FROM HIERARCHIES TO MARKETS: FEDEX DRIVERS AND THE WORK CONTRACT AS INSTITUTIONAL MARKER

by
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Judges are often called upon today to determine whether certain workers are "employees" or "independent contractors." The distinction is important, because only employees have rights under most statutes regulating work, including wage-and-hour and anti-discrimination laws. Too often judges exclude from statutory protection workers who resemble what scholars have described as "typical" employees—long-term, full-time workers with set wages and routinized responsibilities within a large firm. To explain how courts reach these counterintuitive results, this Article examines recent decisions finding that FedEx delivery drivers are independent contractors rather than employees. This Article finds that instability in the legal distinction between employees and independent contractors is embedded within the employment contract itself, in the law's attempt to construe the legal relations of master and servant as a "contract." By merging contractual formation and performance, this attempt creates two doctrinal ambiguities. By manipulating these ambiguities, the courts transformed some of the same vulnerabilities that place the drivers within the policy concerns of collective-bargaining and wage-and-hour law into evidence of their autonomy. The courts also attempted to reconcile the awkward fit of master–servant authority and contract by constructing the written contract that drivers sign as an institutional marker of non-employment.

The attempt to encase master–servant authority in contract also destabilizes distinctions between firms and markets. The FedEx decisions marshal this instability to redefine a firm, as conceptualized by major economic theories of the firm, as a market. They conflate the de-personality of bureaucracy with the impersonality of the market. The drivers' fungibility as low-skilled workers performing standardized routines becomes evidence of their entrepreneurial opportunity, and the

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decisions submerged the FedEx bureaucracy beneath a nexus of contracts. The decisions reject theories of the firm that ground the legitimacy of the corporation in the production of goods and services. While we ultimately require a more radical transformation in work relations to prevent decision makers from redefining servitude as equality, this Article recommends two provisional suggestions to improve decision-making in disputes over employment status.

INTRODUCTION

Most times when we receive a package delivery, whether it's from UPS, FedEx, or the Postal Service, it looks like the drivers are pretty much doing the same work. We track the package online or receive email updates regarding the delivery date. The doorbell rings. Outside is a deliveryman, neatly groomed, in uniform, and sporting an ID badge and the company logo. He is courteous as he hands you the package and perhaps requests your signature. As he turns to return to a recognizable truck, he says, "Have a nice day."

You might find it difficult to believe that, according to FedEx, its drivers are not employees, but independent contractors—even entrepreneurs. You might also find it difficult to believe that the employment status of FedEx drivers is a contested legal issue, and has been for decades.

The distinction between employees and independent contractors is important, because only employees have rights under most statutes regulating work, including wage-and-hour, anti-discrimination, and collective-bargaining law. Only employers have obligations under these laws, such as paying unemployment-insurance premiums or payroll taxes.[1]

FedEx classifies about 16,000 package and delivery drivers nationwide as independent contractors.[2] Other drivers it classifies as employees of its independent contractors and not of FedEx.[3] By relying on these classifications, FedEx has frustrated drivers' attempts to unionize under the National Labor Relations Act (NLRA) and to obtain relief under other law, including workers' compensation and wage-and-hour legislation.[4] While the work of UPS and FedEx drivers is nearly

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[1] KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 6 (2004); Noah D. 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, 34 (Annette Bernhardt et al. eds., 2008).

[2] FedEx Home Delivery v. NLRB (*FHD*), 563 F.3d 492, 495 (D.C. Cir. 2009) (4,000 FedEx Home division drivers); *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., No. 3:05-MD-527 RM, 2007 WL 3036891, at *2 (N.D. Ind. Oct. 12, 2007) (12,000 FedEx Ground division drivers).

[3] *FHD*, 563 F.3d at 495; *In re FedEx*, 2007 WL 3036891, at *2.

[4] *See FHD*, 563 F.3d at 495.

identical,[5] the positions differ. UPS drivers are unionized.[6] They earn over $82,000 per year and have health insurance and other benefits.[7] FedEx drivers earn a net income of about $38,500 per year and have sparse benefits apart from annual vacation.[8]

Today, countless employers are reorganizing work to avoid the legal duties of an employment relationship. Many are recategorizing employees as independent contractors. Many are renouncing their legal identity as the "employer" of workers they control through subcontractors, subsidiaries, or other intermediaries.[9] Disputes over employment status affect millions of workers and arise across a wide spectrum of work—from manufacturing to services, low skill to

[5] UPS appears to monitor drivers more closely. UPS trucks have sensors that collect data all day long, such as how often and the speed at which drivers back up. The drivers' union contract prevents UPS from using the data to discipline drivers, however. Jacob Goldstein, *To Increase Productivity, UPS Monitors Drivers' Every Move*, NPR: PLANET MONEY (April 30, 2014), http://www.npr.org/sections/money/2014/04/17/303770907/to-increase-productivity-ups-monitors-drivers-every-move.

[6] United Parcel Serv., Inc., v. Macon, 743 F.3d 708, 711 (10th Cir. 2014).

[7] *UPS Driver Salaries*, GLASSDOOR (May 26, 2015), http://www.glassdoor.com/Salary/UPS-Driver-Salaries-E3012_D_KO4,10.htm.

[8] STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 123 (2008); Lydia DePillis, *How FedEx Is Trying to Save the Business Model that Saved It Millions*, WASH. POST (Oct. 23, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/10/23/how-fedex-is-trying-to-save-the-business-model-that-saved-it-millions/. New York FedEx drivers earn about $750 per week, for sixty-hour weeks and sparse benefits. UPS drivers earn about $1,400 per week and receive benefits. Josh Kosman, *Trucking Crazy! FedEx Guts Bill that Would Have Aided Drivers*, N.Y. POST (Aug. 10, 2013), http://nypost.com/2013/08/10/trucking-crazy-fedex-guts-bill-that-would-have-aided-drivers; *FedEx Ground Delivery Driver Salaries*, GLASSDOOR (Nov. 3, 2015), http://www.glassdoor.com/Salary/FedEx-Ground-Delivery-Driver-Salaries-E16846_D_KO13,28.htm.

[9] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 3–4 (2014); CATHERINE RUCKELSHAUS ET AL., NAT'L EMP'T LAW PROJECT, WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 7–8 (2014); U.S. DEP'T OF LABOR, OFFICE OF WORKFORCE SEC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS iii (2000) (one of few studies with robust national data on extent of contingent employment); *see also Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification: Hearing on S. 3254 Before the S. Comm. on Health, Educ., Labor, & Pensions*, 111th Cong. 45 (2010) (statement of Catherine K. Ruckelshaus, Legal Co-Director, Nat'l Emp't Law Project) (employers can save over 30% on payroll costs by avoiding taxes through worker misclassification). For some purposes, firms prefer to classify workers as employees. Under the Copyright Act, only independent contractors by default have intellectual property rights in their creative works. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989). Also, workers' compensation insurance does not cover injuries to independent contractors, putting firms at risk of tort liability. *See, e.g.*, Carr v. FedEx Ground Package Sys., Inc., 733 S.E.2d 1, 2 (Ga. Ct. App. 2012).

professional work, and the public to private sector.[10] The reorganization of work costs state and federal treasuries billions in tax revenue.[11] It costs workers billions in wage theft and is a means by which firms drive down industry wages.[12] The questions "who is an employee?" and "who is an employer?" have assumed global significance, particularly in places that tie social insurance and civil rights to employment.[13]

FedEx has litigated its drivers' employment status since the late 1980s.[14] Several dozen lawsuits are pending today, including class actions from over 30 states.[15] FedEx expends substantial resources litigating drivers' employment status, because the viability of its business model depends on avoiding the work-law obligations faced by its main competitor, the unionized UPS.[16] Most courts, as well as the National Labor Relations Board (NLRB), the agency that enforces the NLRA, are

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[10] *See, e.g.*, WEIL, *supra* note 9, at 7–9.

[11] SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2012).

[12] RUCKELSHAUS ET AL., *supra* note 9, at 1, 28; U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-76, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE 33 (June 2000).

[13] *See generally* RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT (Katherine V.W. Stone & Harry Arthurs eds., 2013); THE IDEA OF LABOUR LAW 162–63 (Guy Davidov & Brian Langille eds., 2011).

[14] *See, e.g.*, Roadway Package Sys., Inc., 292 N.L.R.B. 376 (1989). In 1988, Roadway was purchased by FedEx, becoming FedEx Ground Package System, Inc. *See* Jamison F. Grella, Comment, *From* Corporate Express *to* FedEx Home Delivery*: A New Hurdle for Employees Seeking the Protections of the National Labor Relations Act in the D.C. Circuit*, 18 AM. U. J. GENDER SOC. POL'Y & L. 877, 890 (2010); Micah Prieb Stoltzfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH & LEE L. REV. 311, 323–24 (2011); Todd D. Saveland, Note, *FedEx's New "Employees": Their Disgruntled Independent Contractors*, 36 TRANSP. L.J. 95, 96–97 (2009).

[15] Anna Kwidzinski, *Ninth Cir. Says FedEx Drivers in Two States Are Employees, Not Independent Contractors*, 167 DAILY LAB. REP. AA-1 (BNA) (Aug. 28, 2014); GREENHOUSE, *supra* note 8, at 123.

[16] Anya Litvak, *FedEx Ground Makes Change to Independent Contractor Model*, PITTSBURGH BUS. TIMES (June 14, 2010), http://www.bizjournals.com/pittsburgh/stories/2010/06/14/story4.html. FedEx's air-freight division classifies its workers as employees; however, in 1996, the company successfully lobbied Congress (including by giving many representatives rides in its jets) to put its drivers under the jurisdiction of the Railway Labor Act (RLA) rather than the NLRA, which would require all 15,000 drivers dispersed across the country to organize in one national unit, making it very difficult to organize a union. GREENHOUSE, *supra* note 8, at 122; Neil A. Lewis, *Federal Express Knows Its Way Around Capital*, N.Y. TIMES (Oct. 12, 1996), http://www.nytimes.com/1996/10/12/business/federal-express-knows-its-way-around-capital.html. By one estimate, FedEx has saved up to $400 million per year by classifying its drivers as independent contractors. GREENHOUSE, *supra* note 8, at 122.

finding the drivers to be employees.[17] However, important decisions deeming the drivers to be independent contractors still stand.[18]

Most statutes and administrative guidelines fail to define employee or employer in any helpful matter.[19] This has left the issue of employment status largely in the hands of adjudicators[20] sitting on the courts and the NLRB. Judges apply common-law standards and make decisions on a case-by-case basis. The resulting case law is notoriously inconsistent as to who is and who is not in an employment relationship.[21] Further, judges have excluded many workers from statutory protection who fit squarely within the policy concerns of the law.[22]

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[17] *See, e.g.*, *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., 792 F.3d 818, 821 (7th Cir. 2015); Alexander v. FedEx Ground Package Sys., Inc.,765 F.3d 981, 997 (9th Cir. 2014); Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1049 (9th Cir. 2014); Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1024 (E.D. Mo. 2013), *rev'd and remanded sub nom.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015); Schwann v. FedEx Ground Package Sys., Inc., No. 11-11094-RGS, 2013 WL 3353776, at *6 (D. Mass. July 3, 2013), *withdrawn*, 2015 WL 501512 (D. Mass Feb. 5, 2015); Estrada v. Fed Ex Ground, No. BC 210130, 2004 WL 5631425, slip op. at 23 (Cal. Super. Ct. July 26, 2004), *aff'd*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007); Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 92 (Kan. 2014); FedEx Home Delivery, 361 N.L.R.B. No. 55, at 1 (2014).

[18] *See FHD*, 563 F.3d 492 (D.C. Cir. 2009); *In re* FedEx Ground Package Sys. (*Multi-State Decision*), 758 F. Supp. 2d 638, 733 (N.D. Ind. 2010), *rev'd in part*, *Alexander*, 765 F.3d 981, *Slayman*, 765 F.3d 1033, *and* Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313 (11th Cir. 2015); s*ee infra* note 26. *Cf.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995, 997 (8th Cir. 2015) (reversing holding that drivers are employees but not finding drivers to be independent contractors as a matter of law); Johnson v. FedEx Home Delivery, No. 04-CV-4935 JG VVP, 2011 WL 6153425, at *16 (E.D.N.Y. Dec. 12, 2011) (holding FedEx drivers to be independent contractors based on limited record due to abandoned prosecution); Lemmings v. FedEx Ground Package Sys., Inc., 492 F. Supp. 2d 880, 887–88 (W.D. Tenn. 2007) (holding that FedEx driver employed by FedEx contractor driver did not establish employment relationship with FedEx).

[19] *See, e.g.*, 29 U.S.C. § 1002(6) (2012) (defining "employee" for purposes of employee benefit plans as "any individual employed by an employer"); *see also* 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, 296 & n.5 (2001).

[20] Hereafter, "judges" refers to adjudicators on administrative agencies and courts.

[21] *See* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 260, 280–81 (2006); *see also* Carlson, *supra* note 19, at 297–300.

[22] *See, e.g.*, AM. RIGHTS AT WORK, THE HAVES AND THE HAVE-NOTS: HOW AMERICAN LABOR LAW DENIES A QUARTER OF THE WORKFORCE COLLECTIVE BARGAINING RIGHTS 2, 9, 15 (2008); EMP'T DEV. DEP'T, STATE OF CAL., ANNUAL REPORT: FRAUD DETERRENCE AND DETECTION ACTIVITIES 18–19 (2009), http://www.edd.ca.gov/pdf_pub_ctr/report2008.pdf; JOINT ENF'T TASK FORCE ON THE UNDERGROUND ECON. AND EMP. MISCLASSIFICATION, COMMONWEALTH OF MASS., 2010 ANNUAL REPORT 1–2 (2010); LEBERSTEIN, *supra* note 11, at 1–2 (summarizing over twenty state-level studies of scope and costs of independent contractor

Two federal courts recently upheld FedEx's labeling of its delivery drivers as independent contractors.[23] The first was the D.C. Circuit, the circuit court with arguably the most influence over federal labor law in the United States.[24] In 2009, in the case of *FedEx Home Delivery v. NLRB (FHD)*, it granted summary judgment to FedEx, finding that drivers who had voted to unionize had no right to do so because they were not employees.[25] The other is a district court in Indiana, where class actions by FedEx drivers from nearly thirty states were consolidated in historic, multi-district litigation.[26] The drivers alleged that FedEx violated myriad state and federal laws, primarily wage-and-hour, tax, and workers' compensation statutes. Some also sued for fraud and misrepresentation.[27] The multi-district decisions on the drivers' employment status have been overturned in a few states (by every court that has reviewed them thus far),[28] but *FHD* remains intact.[29]

misclassification); John Petro, *The Road to Nowhere: How the Misclassification of Truck Drivers Hurts Workers, Job Quality, and New York State*, DRUM MAJOR INST. FOR PUB. POL'Y (2012), http://www.teamsters952.org/The_Road_to_Nowhere_How_the_Misclassification_of_Truck_Drivers_Hurts_Worker.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 4–5, 9 (2009).

[23] *FHD*, 563 F.3d at 495; *Multi-State Decision*, 758 F. Supp. 2d at 733.

[24] *See* Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 360–61 (2011) (discussing influence of D.C. Circuit over labor law due to its regarded expertise and the ability of losing parties to file NLRB appeals there).

[25] *FHD*, 563 F.3d at 495.

[26] *See Multi-State Decision*, 758 F. Supp. 2d at 638. Beginning in 2005, the Judicial Panel on Multi-District Litigation (JPML) began consolidating actions by drivers against FedEx for pre-trial purposes in the Northern District of Indiana. *Id.* at 565. Ultimately, the JPML consolidated lawsuits from 27 states, most of which were class actions. *Id.* at 734–37. In 2010, Judge Robert L. Miller, Jr., issued two decisions disposing of the claims. He used the Kansas class action, which alleged violations of the Kansas Wage Payment Act, as a test case for applying the common-law agency standard to the drivers' work relationship. *In re* FedEx Ground Package Sys. (*Kansas Decision*), 734 F. Supp. 2d 557, 559–60 (N.D. Ind. 2010), *rev'd*, *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., 792 F.3d 818 (7th Cir. 2015). Judge Miller granted summary judgment to FedEx, finding that even construing the facts in the light most favorable to the drivers, there could be no reasonable inference that the drivers were employees. *Id.* In December 2010, following the reasoning of the Kansas decision, Judge Miller disposed of the remaining claims, entering summary judgment (in some cases sua sponte) for FedEx on 35 claims from 26 different states, including 29 class actions. *Multi-State Decision*, 758 F. Supp. 2d at 734–37. He found that the drivers were employees in three instances where a state statute rejected the means–ends inquiry and/or defined independent contracting narrowly. *Id.* at 660 & n.6.

[27] *See, e.g.*, *Multi-State Decision*, 758 F. Supp. 2d at 654, 686.

[28] The Seventh, Ninth, and Eleventh Circuits reversed Judge Miller's *Kansas Decision* and *Multi-State Decision* for drivers in certain states. *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., 792 F.3d 818 (7th Cir. 2015) (Kansas); Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313 (11th Cir. 2015) (Florida);

The central question of this Article is: How was it possible for courts finding the drivers to be independent contractors to reach these counterintuitive results? By examining this question, the Article penetrates broader questions about the legal identity of employment: What accounts for the well-known inconsistency in the case law on employment status? How are judges able to find that workers who are clearly within the policy scope of workplace regulation are excluded as independent contractors? How do judges transform what scholars have described as "standard" employment into "independent entrepreneurialism?" The Article does not offer a doctrinal solution to the question of employment status. Rather, it offers a new theory of what allows judges to reach inconsistent and policy-defeating results in the first instance.

The problem is more deep-seated than others have surmised. Other legal scholars tend to attribute inconsistency and statutory exclusion in the case law to a decline in industrial work since the 1970s or to imprecision in the legal tests for employment status.[30] Neither of these accounts can explain the FedEx cases; the drivers resemble what scholars and judges have referred to as "standard" or "industrial" employees—full-time, long-term workers with set wages and pre-defined, routinized duties within a large firm. Further, many of the features that are evidence of employment status under the legal tests are present in the drivers' relationship.[31] What judges disagree on is the legal meaning of these features.

This Article shows that instability in the legal distinction between employment and non-employment is rooted in the employment contract itself, in its attempt to construe the legal relations of master and servant as a "contract." The attempt to fit employment in the framework of contract creates two doctrinal ambiguities that make the dominant standard for distinguishing employment from independent contracting relationships—the means–ends standard—irresolvable.

The means–ends standard looks to the extent of the alleged employer's right to control the work. An employer has a right to control the "means" of the work, not only the "ends" of the work. The major tests for employment status ask judges to consider a long, open-ended list of

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Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014) (California); Slayman v. FedEx Ground Package Sys., Inc.,765 F.3d 1033 (9th Cir. 2014) (Oregon). Prior to the Seventh Circuit's case, the Kansas Supreme Court held that FedEx drivers were employees under the Kansas Wage Payment Act. Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66 (Kan. 2014).

[29] A broad regime of federal preemption in labor law makes *FHD* all the more important. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31 (2002) (discussing federal preemption of labor law).

[30] *See* Carlson, *supra* note 19, at 298.

[31] Grella, *supra* note 14, at 890.

factors to determine whether the alleged employer controls the means of the work, like the extent of supervision and whether the alleged employer has a right to assign daily work.[32]

The fusion of master–servant authority and contract make the means–ends question irresolvable by blurring contractual formation and performance. Parties to an employment relationship do not consummate a contractual bargain through an exchange of promises, or through an exchange of a promise for performance, and later move onto the business of carrying out the agreement. Employment entails a continuing renewal of offer and acceptance through an exchange of performances.

First, the employment contract makes ambiguous the activities of *bargaining* over the work and *carrying out* the work, or producing. Employee and employer bargain as they produce goods or services: the employer bargains over the terms of work by directing the work, and the employee accepts these contractual offers by following the employer's direction each moment the employee works without quitting. The means–ends standard, however, depends on being able to distinguish when the parties are bargaining from when they are producing. It may look like one party is controlling the work, for example, but if the parties are still negotiating, then one party may be getting its way by driving a hard bargain, not because it is an employer. The employment contract in practice merges independence in negotiating the "ends" of the work with obedience in producing the "means" of the work.

The second ambiguity surfaces in attempts to interpret a written work agreement in disputes over employment status, rather than in distinguishing the activities of bargaining from producing. It is the ambiguity between contractual duties and the manner of performing them. The means–ends standard depicts employment as a contract, but a special kind of contract—it gives one party a right to determine how the other party carries out its contractual obligations. In other contracts, the parties commit one another only to the "ends" of the deal; neither has a right to dictate how the other party satisfies these ends. The employment contract, however, gives one this right: the employer has a right to control the "means" of the work. The means–ends standard depends on being able to distinguish between contractual duties and the manner of their performance, in order to evaluate whether one party is controlling the latter or only the former. The problem is, again, that the fusion of master–servant authority with contract makes the distinction illusory. The employer and employee determine "contractual" duties as they produce.

This conundrum puts a written agreement in an ambiguous position in employment status disputes. Courts disagree as to what extent, if at all, the alleged employer controls its workers when it relies on a written

[32] *See infra* Part I.A.

contract to direct the work[33]: Does any term appearing in a written agreement, by virtue of its expression in something labeled an "agreement" or "contract," state a contractual end? If the alleged employer is not telling workers to do anything not in the contract, is it not controlling the work? By contrast, might some provisions of the contract describe how contractual ends are to be performed?

Using several decisions finding FedEx drivers to be independent contractors (the "IC decisions"),[34] this Article shows that the attempt to fuse master–servant authority with contract enables courts to transform employees into entrepreneurs. The IC decisions marshaled the doctrinal ambiguities embedded within the employment contract to redefine nearly all of the factors probative of employment status under the legal tests as evidence consistent with, if not evidence of, independent contracting. They engaged the ambiguities to transform features of the drivers' work that were typical of industrial employment into evidence of entrepreneurial opportunity. In the IC decisions, delivery-route assignments, daily package assignments, supervision, discipline, promotions, shift replacements, training, the unskilled nature of the work, job duration, quasi-at-will authority, schedule controls, and work rules involving driving, appearance, customer interaction, and package handling became either irrelevant to the drivers' employment status or affirmative evidence that the drivers were independent businesspersons.

The FedEx disputes not only reveal the law's role in destabilizing the conventional boundaries of work relations, but also in reconstituting them. As part of the employment contract itself, the ambiguities between bargaining and producing, and between contractual duties and their performance, permit no doctrinal resolution. Stability in the legal identity of contemporary work relations depends on how we institutionalize them.

To institutionalize something is to construct it as a pattern of organizations, activities, norms, roles, and media.[35] This pattern is historically specific, but tends to be durable and taken for granted. The

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[33] *See infra* Part V. *Compare* Rainbow Dev., LLC v. Com., Dep't of Indus. Accidents, No. SUCV2005-00435, 2005 WL 3543770, at *2 (Mass. Super. Nov. 17, 2005) (determining that "while the agreement attempts to establish an independent contractor relationship, it also asserts control over the performance of the worker via the contract"), *with* EEOC v. N. Knox Sch. Corp., 154 F.3d 744, 748 (7th Cir. 1998) ("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."). *See generally* Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315 (2014).

[34] *See Kansas Decision*, 734 F. Supp. 2d 557 (N.D. Ind. 2010); *FHD*, 563 F.3d 492 (D.C. Cir. 2009); *Multi-State Decision*, 758 F. Supp. 2d 638 (N.D. Ind. 2010).

[35] *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 33–34 (2005).

elements of this pattern are institutional markers, features that signal a relationship is of one particular type and not another. [36]

The law plays a special role in institutionalization. Judges look to what are ostensibly extra-legal data points to impart meaning to legal categories, and organizations adjust their practices to mimic legal categories. Organizational practice provides the doctrinal categories with content that makes them recognizable, and meaningful, as social relations. At the same time, the law confers legitimacy on organizational practices when it recognizes them as valid legal categories.[37]

While the tension within employment between master–servant authority and contract has always been there, it surfaces in times of institutional disruption. The dominant institutional résumé of employment in the 20th century, in terms of political and cultural salience, was industrial employment.[38] Employment was a long-term, full-time, direct relationship between a large firm and a worker with set wages and pre-defined duties. The institution of industrial employment submerged, for a time and in certain places, the contradictory complex of servitude and equality that defines employment. It did not resolve it. Today, the growing service sector, revolutions in logistics and communications technology, financialization, and other developments are disrupting the institutional order of industrial work.[39] As courts contend with the doctrinal manifestations of this disruption, they also work to reinstitutionalize employment.

The IC decisions seek to reinstitutionalize what looks much like industrial employment—a direct, full-time, long-term relationship between a worker and a large firm—as one of independent entrepreneurialism. The Article explores two ways in which the decisions construct the drivers' written work agreement with FedEx as an institutional marker of non-employment.

As they reinstitutionalize contemporary work relations, judges also redefine the institutional contours of firms and markets. The Article draws on economic theory regarding the institutional structures for directing and coordinating resources in production. Firm theorists, like Ronald Coase and Oliver Williamson,[40] have attempted to explain why

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[36] *See also* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008).

[37] Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 890–91 (2011).

[38] STONE, *supra* note 1, at 4–5.

[39] *See id.* at 5–6.

[40] *E.g.*, R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 393 (1937); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 255–56 (1979) [hereinafter Williamson, *Governance*]; Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 553 (1981) [hereinafter Williamson, *Economics*].

firms exist as an alternative to markets for organizing production, and to account for their bordering. The familiar iteration of the question is: What determines whether a firm "makes" an input to production or instead "buys" an input to production? Economic theories of the firm tend to associate firms and markets with different legal relations: market transactions with contract and firm transactions with property rights or employment.[41] Theories of the firm have even suggested that employment and independent contracting are homologous with firms and markets.[42]

Due to the close relationship between employment and socio-legal conceptions of the business form, the law's attempt to construe employment as a contract tends to destabilize boundaries between firms and markets just as it destabilizes boundaries between employment and non-employment. In the IC decisions, the ambiguity between bargaining and producing in employment reappears as a tension within the firm: employment as a contract is a direct and bilateral relationship between putatively equal parties; however, employment is also a legal rationale for a firm's centralized control over indirect, hierarchical, and multilateral relations in production. The contradiction between master–servant authority and contract enabled FedEx and the courts to submerge the consummate firm—the Weberian bureaucracy—beneath a nexus of contracts.

Despite the indeterminacy of the legal tests for employment status, the IC decisions are troubling for reasons of doctrine, policy, and political legitimacy. First, they ignore—and thus answer incorrectly—what is arguably the underlying query in a dispute over whether a work relationship is employment or independent contracting: Is the relationship more like a contract or more like a master–servant relationship? Second, in ignoring this question, the IC decisions thwart the policy concerns of the law in protecting persons who sell their ability to work to make a living. The decisions transform some of the same vulnerabilities that place the drivers within the policy concerns of minimum-wage and collective-bargaining law into evidence of their autonomy! The more the workers appear as interchangeable cogs in a machine, the more they look like independent entrepreneurs in the courts' reasoning. The decisions conflate the *depersonality* of bureaucracy with the *impersonality* of the market. Third, the IC decisions redefine the normative relationship between the corporate form and the productive enterprise.

The Article proceeds as follows: Part I summarizes the legal tests for employment status and examines the primary explanations for instability in the legal identity of employment in the case law. Part II is the

[41] *See infra* Part IV.B.
[42] *See infra* Part IV.B.

theoretical core of the argument. It shows that the law's attempt to render employment a contract produces two doctrinal ambiguities in employment status disputes. Part III illustrates the first doctrinal ambiguity at work. It shows how the IC decisions drew on the ambiguity between bargaining and producing to reinterpret traditional institutional markers of employment and construct the written document drivers sign as an institutional marker of non-employment. It also shows that their interpretation formed an axis of disagreement among courts considering the employment status of FedEx drivers. Part III also critiques how the IC decisions resolved the ambiguity on doctrinal and policy grounds. Part IV discusses the relationship between employment and economic theories of the firm. It shows that the law's attempt to fit employment in the legal framework of contract destabilizes classic conceptions of firms and markets. It also shows that, in transforming the FedEx drivers into independent contractors, the IC decisions transform a firm, as conceptualized by major theories of the firm, into a market. They likewise conceal a highly rational bureaucracy under a nexus of contracts. Part IV critiques the IC decisions for thwarting the policy objectives of work law and hollowing out the normative basis of the business form. Part V illustrates the second ambiguity created by the fusion of master–servant authority and contract in the IC decisions. It analyzes and critiques the courts' institutional work to construct the written document signed by drivers as a marker of non-employment.

The conclusion suggests two provisional strategies to improve decision-making in disputes over employment status. The first is in the judicial repertoire: use contract law to evaluate whether the disputed work arrangement is more like a contract or more like a master–servant relationship. The second proposal is to use classic theories of the firm to distinguish between entrepreneurial opportunity—opportunity conferred by the market—and an employee's opportunity within a firm.

Nonetheless, because legal ambiguity in contemporary work relations is based on a contradiction at the heart of the employment contract—contractual equality and servitude—the Article concludes that doctrinal adjustments will not resolve the problem. Only a radical transformation in work relations will stabilize the legal identity of work relations and prevent decision-makers from redefining relations of subordination as relations of equality.

I. EMPLOYMENT STATUS

A. The Legal Tests

The definition of the employment contract is working for another, under the other's right of control.[43] The dominant expression of this

[43] *E.g.*, Kelley v. S. Pac. Co., 419 U.S. 318, 323–24 (1974).

definition as a legal standard is the means–ends standard. Courts ask: Does the alleged employer control only the *ends* of the work or does it also control the *means* of the work?[44]

Most statutes do not include a workable definition of employment, so courts and agencies are largely responsible for constructing the employment relationship using the means–ends standard.[45] Almost all of the tests for employment status under state, federal, and local law[46] are variations of two overlapping tests: the common-law master–servant agency test[47] and the economic-realities test.[48]

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[44] Local 777, Dem. Union Org. Comm. v. NLRB, 603 F.2d 862, 897 (D.C. Cir. 1979) (quoting Party Cab Co. v. United States, 172 F.2d 87, 92 (7th Cir. 1949)).

[45] *See, e.g.*, 29 U.S.C. § 1002(6) (2012); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (noting that the statute's definition of an employee is "completely circular and explains nothing").

[46] Some state statutes include more precise definitions of independent contracting than do the common law agency and economic realities tests. *See, e.g.*, *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., No. 3:05-MD-527RM, 2010 WL 2243246, at *1 (N.D. Ind. May 28, 2010) (noting that putative employer must prove three prongs of statutory exemption in order to establish independent contracting relationship, including that the "work is performed either outside the employer's usual course of business or outside the employer's places of business"); Hays Home Delivery, Inc. v. Employers Ins. Co. of Nev., 31 P.3d 367, 369–70 (Nev. 2001) (noting that independent contractors are statutory "employees" under Nevada statute unless putative employer demonstrates that contractor is both an "independent enterprise" and not in the "same trade, business, profession or occupation"). Some of these statutes may be in jeopardy due to federal preemption challenges. *See, e.g.*, Schwann v. FedEx Ground Package Sys., Inc., No. 11-11094-RGS, 2015 WL 501512, at *2 (D. Mass. Feb. 5, 2015) (holding that the Federal Aviation Administration Authorization Act preempts the Massachusetts Independent Contractor Statute).

[47] The federal agency test governs claims under ERISA, the NLRA, Title VII, ADA, ADEA, the Copyright Act, and whenever a statute does not provide a constructive definition of employment. Clackamas Gastroent. Assocs. v. Wells, 538 U.S. 440, 444 n.3, 448 (2003); *Nationwide*, 503 U.S. at 323–25; Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–41 (1989); Loomis Cabinet Co. v. OSHA, 20 F.3d 938, 941 (9th Cir. 1994).

[48] The economic-realities test governs cases under the Fair Labor Standards Act (FLSA), Migrant and Seasonal Agricultural Worker Protection Act (AWPA), Family Medical Leave Act (FMLA), and many state wage-and-hour laws. *See* Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1008–09 (1998); *see also* Haybarger v. Lawrence Cty. Adult Probation & Parole, 667 F.3d 408, 417 (3d Cir. 2012). The economic-realities test includes many agency-test factors. The central differences are that the former asks whether the worker is "economically dependent" on the alleged employer and allows courts to consider statutory purpose. Carlson, *supra* note 19, at 353–54; *cf.* NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 94 (1995) (finding it unnecessary to consider statutory purpose); *Nationwide*, 503 U.S. at 324–25 (refusing to consider statutory purpose). The Supreme Court intended the economic-realities test to be broader than the agency test. *Nationwide*, 503 U.S. at 326; Rutherford Food Corp. v. McComb, 331 U.S. 722, 728–29 (1947); NLRB v. Hearst

Under the federal tests, and under most state versions, judges consider an open-ended list of indicia as evidence bearing on control, or as secondary evidence of, employment status.[49] The *Restatement (Second) of Agency* lists several factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.[50]

Additional factors that judges tend to consider include whether the worker works exclusively for the alleged employer or also services other clients; whether the worker 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 alleged employer can terminate the worker; whether the worker can turn down assignments and whether the alleged

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Publ'ns, Inc., 322 U.S. 111, 127–28 (1944); Zheng v. Liberty Apparel Co., 355 F.3d 61, 70 (2d Cir. 2003); *see also* Goldstein et al., *supra*, at 1008–09; Marc Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555, 556–57 (1989). Whether in practice courts interpret employment more broadly under the economic-realities test is subject to dispute. Benjamin F. Burry, Comment, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 2009 U. CHI. LEGAL F. 561, 564–72; Jonathan Fox Harris, Note, *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, 108–09 (2009).

[49] *Cmty. for Creative Non-Violence*, 490 U.S. at 751–52.

[50] RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

employer can assign additional assignments; and whether the alleged employer assigns daily work.[51] Courts also consider whether the alleged employer provides benefits or withholds payroll taxes.[52]

B. Other Explanations

There are two primary explanations for why "the law can't tell an employee when it sees one"[53]: a decline in industrial employment and imprecision in the legal tests for employment.

1. Decline of Standard, Industrial Employment

One explanation for the widespread disagreement among judges regarding the identity of employment is the disappearance of industrial work models around which the legal standards for employment status were conceived. The industrial model of work, or Fordism, involved a long-term, direct relationship between a worker with routinized responsibilities and a hierarchical, vertically integrated firm.[54] The firm produced and traded in its own name and paid a family wage.[55] Scholars suggest that, because the law was modeled on this "standard" employment relationship, it has difficulty apprehending post-industrial work.[56] Many post-industrial relationships, like temporary-agency work, part-time work, subcontracting, and networked production, are not characterized by the long-term, direct attachment of an employee to a single firm.[57] The argument is that work is changing, but the law is not.

2. Legal Imprecision

Another explanation for the inability of judges to agree on employment status is imprecision in the legal tests.[58] For purposes of most statutes regulating employment, judges must consider a long, non-exclusive list of factors to determine employment status.[59] Courts disagree

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[51] *E.g.*, Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 988–97 (9th Cir. 2014).

[52] *E.g.*, *Nationwide*, 503 U.S. at 323–24.

[53] Carlson, *supra* note 19, at 298–99.

[54] STONE, *supra* note 1, at 45–46.

[55] *See* ANTONIO GRAMSCI, *Americanism and Fordism*, *in* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 279, 285 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); STONE, *supra* note 1, at 46–47. Fordism also refers to a post-World War II regime of accumulation, or the particular relationship between production and consumption that was possible because many large industrial firms paid a family or living wage. The eponym of "Fordism" is Henry Ford, who famously introduced the $5 wage so that every Ford Motor worker could afford to purchase a Ford automobile. *Company Timeline: 1914*, FORD (2015), http://www.corporate.ford.com/company/history.html.

[56] *See* STONE, *supra* note 1, at 6.

[57] *Id.* at 68.

[58] *See* Carlson, *supra* note 19, at 298–99.

[59] *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

on how many are necessary and which ones in what combinations are the most important.[60] Standards that define employment by open-ended enumeration necessarily lead to inconsistent results.[61] Further, the means–ends standard is amenable to nearly infinite manipulation. Courts can always find some residual discretion left to the putative contractor, and they can describe the "ends" at the level of detail necessary for the employer to maintain complete control.[62]

3. A Challenge

The FedEx disputes challenge these explanations. The drivers' work relationship fits what scholars have referred to as standard, industrial employment—a long-term, full-time, direct relationship between a worker and large firm that trades and produces under a coherent business identity.[63] The drivers have routinized responsibilities in an integrated production process, and they work under hierarchical, centralized management. Drivers must work nine to eleven hours of work per day, five days a week.[64] Drivers must wear uniforms and punch in and out of work.[65] They are subject to a system of supervision, performance evaluation, and discipline, all of which managers document in personnel files.[66] They receive annual vacation, and performance bonuses.[67] Most drivers work for FedEx for many years.[68]

Almost all of the other features that are evidence of employment status under the legal tests are also present in the drivers' relationship; FedEx provides all of the tools of work, with the exception of the trucks, which drivers must purchase.[69] FedEx decides which trucks are acceptable and their specifications, down to the shelving dimensions and acceptable brands of white paint.[70] FedEx restricts drivers' ability to use the trucks for non-work purposes.[71] The work is unskilled, and FedEx trains drivers

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[60] Carlson, *supra* note 19, at 298–99.

[61] *See FHD*, 563 F.3d 492, 496 (D.C. Cir. 2009).

[62] One judge parodied the means–ends inquiry as follows: "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." Powell v. Appeal Bd. of Mich. Emp't Sec. Comm'n, 75 N.W.2d 874, 883 (Mich. 1956) (Smith, J., dissenting).

[63] STONE, *supra* note 1, at 5.

[64] *Kansas Decision*, 734 F. Supp. 2d 557, 569–70 (N.D. Ind. 2010).

[65] *Id.* at 591–93.

[66] *Id.*

[67] *Id.* at 568.

[68] Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 333 (Ct. App. 2007).

[69] *Kansas Decision*, 734 F.3d at 565.

[70] *Id.*

[71] *FHD*, 563 F.3d 492, 514 (D.C. Cir. 2009) (Garland, J., dissenting).

in its service procedures.[72] The work is part of FedEx's regular and core business.[73] Drivers' pay is based primarily on the hours they work.[74] FedEx assigns mandatory tasks on a daily basis.[75] Drivers must follow extensive rules on driving, personal appearance, vehicle appearance, handling packages, and interacting with FedEx customers.[76] Drivers generally have one customer—they sell their delivery services only to FedEx.[77] Drivers who perform exactly the same work (FedEx drivers employed by a temp agency) or very similar work are employees.[78] The latter include drivers for FedEx's main competitors, UPS and DHL, and drivers for the company division FedEx Express.[79]

Based on the main accounts for instability in the legal identity of employment, FedEx drivers should not be a hard case. However, the different case outcomes are not a product of disagreement regarding how to count, weigh, and balance a bevy of pros and cons under the legal tests.[80] The D.C. Circuit and Judge Miller acknowledged that many factors probative of employment under the governing tests were present.[81] They reinterpreted this as evidence consistent with, or evidence of, non-employment.

II. CONSTRUING MASTER–SERVANT AUTHORITY AS "CONTRACT"

A. History of the Employment Contract

The employment contract—working for another under the right of control of the other—is a product of the 19th century combination of the legal relationship between master and servant with the legal relationship of contract.[82] Judges and treatise writers reconfigured the master's property-like right to the servant's labor services as a right based in

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[72] *Id.* at 510.

[73] *Kansas Decision*, 734 F. Supp. 2d at 597–98.

[74] *Id.* at 567.

[75] *Id.* at 569.

[76] *Id.* at 564.

[77] *FHD*, 563 F.3d 492, 514 (D.C. Cir. 2009) (Garland, J., dissenting).

[78] In some of the FedEx cases, drivers could choose to become FedEx drivers as the formal employees of a temp agency that contracted with FedEx rather than as a FedEx contractor. Drivers underwent the same training and performed the same work whether hired as contractors or as temporary employees. FedEx Home Delivery (*FHD NLRB Decision*), Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *10–11 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[79] Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 337 (Ct. App. 2007).

[80] *See infra* Parts III & IV.

[81] *FHD*, 563 F.3d at 504 (majority opinion); *Kansas Decision*, 734 F. Supp. 2d at 600.

[82] Robert J. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870, at 10 (1991).

contract, a doctrine enabling parties to reach enforceable agreements in commodity exchanges.[83] As they transferred the legal rationale for subordination to contract, courts expanded master–servant authority to cover a wide range of work relationships in which workers were not previously subject to this authority.[84] With the development of larger-scale production, judges expanded master–servant agency authority to cover not just the right to direct a single worker or group of workers in a shop, but to justify managerial coordination and direction of the enterprise.[85]

Karl Marx suggested that, in the remarkable creation of value that occurred through the capitalist's purchase of labor power and the process of converting labor power into labor, the "laws that regulate the exchange of commodities have been in no way violated."[86] He was, perhaps, too cavalier. Employment is not a contract, and the attempt to fit employment in the legal framework of contract produces intractable problems of interpretation.

B. Fitting Employment into Contract[87]

1. The Problem of Consideration

To see why it is so difficult to construe employment as a contract, first, take the issue of at-will employment, and the contractual requirements of consideration and mutual assent. Recall that the definition of employment is an agreement to work for another, under the other's right of control. By default, employment is at-will.[88] Subject to limited exceptions, either party may terminate the relationship at any time, for a good reason, bad reason, or no reason.[89] Enforceable

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[83] *Id.* at 126–38.

[84] *Id.* at 186–87.

[85] *See* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 268, 284–85 (1993).

[86] KARL MARX, *Capital*, *in* SELECTED WRITINGS 452, 505 (David McLellan ed., Oxford Univ. Press 2d ed. 2000) (1867).

[87] Much of the theory in this Section was developed, in additional detail, in Tomassetti, *supra* note 33, at 349–57.

[88] As contractual defaults go, the at-will default is particularly stubborn. Even when evidence discloses clear party intent to contract out of the at-will default, courts tend to be resistant to enforcing the term or permanent employment contracts. *See, e.g.*, Asmus v. Pac. Bell, 999 P.2d 71, 88–90 (Cal. 2000).

[89] The limits on an employer's authority to terminate an at-will employee are the carve-outs provided by statute, a handful of judicially created public policy exceptions, a covenant of good faith and fair dealing in a small number of states, and an implied-in-fact contract exception of shrinking applicability. Statutory exceptions include, for instance, the prohibition in Title VII against terminating employees on the basis of race, color, national origin, religion, or gender. *See* 42 U.S.C. § 2000e-2(a)(1) (2012). Public policy exceptions often restrict employers for terminating employees who refuse to commit perjury, or who miss work for jury duty. *See* Katherine V.W. Stone, *Dismissal Law in the United States: The Past and Present of At-Will*

contracts generally require consideration—a bargained for promise or performance in return for a promise. The option of the return promise is unavailable in at-will employment: the employee agrees to follow the employer's commands so long as she feels like it. The employer agrees to provide work in exchange for pay so long as she feels like it. This is a quintessential case of illusory consideration. Neither party commits with a promise.[90]

Therefore, the employee provides consideration through performance. The employee "assents" to the employer's "offer" of work by following the employer's directions in the course of the work. 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.[91] The employee bargains over the terms and conditions of work by satisfactorily following the employer's instructions. The employer bargains as it directs the work, for instance, telling the employee to work faster, to perform additional work, to stay late. Thus, in employment, the parties bargain and perform their deal at the same time. Employment is not a unilateral contract, however, in which one provides consideration for the promise through performance. Both employee and employer exchange performances, not a promise for a performance. They bargain and they produce at the same time.[92]

To further understand, consider that, by definition, the employee does not provide *labor* for pay through employment: Employment is an agreement to work for another, to provide *labor effort*. An agreement to exchange consummated work, labor, is an independent contracting agreement. Based on the very nature of labor effort and the contractual requirement of assent, the parties cannot use contract to exchange labor

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Employment 7–9 (UCLA Law Sch. Law & Econ. Research Paper Series, No. 09-03, 2006), http://papers.ssrn.com/abstract=1342667.

[90] *Cf.* Petrol. Refractionating Corp. v. Kendrick Oil Co., 65 F.2d 997, 999 (10th Cir. 1933) (finding consideration in return promise to discontinue production entirely of certain grade of oil).

[91] *See also* JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 285 (Univ. of Wisc. Press 1959) (1924) ("The labor contract is therefore not a contract, it is a continuing implied *renewal* of contracts at every minute and every hour, based on the continuance of what is deemed, on the employer's side, to be satisfactory service, and, on the laborer's side, what is deemed to be satisfactory conditions and compensation."); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972).

[92] The Thirteenth Amendment prohibition on involuntary servitude is likely an obstacle to exchanging labor effort as a contractual commodity. In the nineteenth century, judges began to find that indentured servitude could be "involuntary," even if the servant initially agreed to the arrangement voluntarily. STEINFELD, *supra* note 82, at 144–45.

effort: An employer cannot direct the employee's labor effort without the latter's ongoing assent.[93] This is why a lease theory of employment does not ease the fit of employment in the Procrustean bed of contract. Hiring an employee in some ways looks like renting an asset capable of producing value—the employer leases the worker's ability to labor. A lessee has a property right in the leased goods to use and control them, to extract as much value out of them as possible. However, the employer cannot squeeze anything out of the employee—it cannot put in motion the capacity to produce value that it has leased—without the latter's simultaneous engagement of his or her will. The use and control of this value-producing asset requires that the employee continuously renew his or her contractual assent. John Commons, the father of institutional economics, remarked, "[the worker's] bargaining is his act of producing something for the employer and his producing something acceptable is his method of bargaining."[94] 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."[95]

The problem is, we cannot distinguish the employment relationship from the independent contracting relationship unless we can distinguish when the parties are bargaining from when they are producing. The means–ends standard depends on the ability to recognize when the parties are on the "market" and when they are in the abode of production: The right to contract over the terms and conditions of the labor services is a feature of both employment and independent contracting. What distinguishes employment is whether there is control over production. The employer controls the "means and manner" of the work, not just the "ends" of the work, over which all parties have a right to drive hard bargains. Since contracting and producing are simultaneous in employment, however, employer and employee never conclude a contractual negotiation and proceed to a discrete activity of producing. In employment, contractual formation regarding the "ends" of the work is simultaneous to producing—the "means" of the work or contractual performance. Independence in contracting is simultaneously subordination in production.

2. The Problem of Indefiniteness

Regardless of whether the employment is at-will, the promise-as-consideration option is generally unavailable in employment because it would tend to create contracts too indefinite to enforce. Further, to save some contracts from indefiniteness and to police the conduct of the

[93] If we could alienate the capacity to will, we would not have the capacity to contract.

[94] COMMONS, *supra* note 91, at 286.

[95] *Id.*

parties, courts will imply contractual terms or use other gap-fillers.[96] They interpret employment agreements differently.[97]

Again, by definition, the employee agrees to obey the employer's instructions; however, these instructions will often determine essential parts of the bargain.[98] In particular, employment lacks a quantity term—the employee agrees to place his or her energies under the employer's right of control, and the employer promises a certain payment.[99] The exchange is for an indefinite amount of labor for a definite amount of payment. How much labor the employee provides is determined in the course of production. The employer seeks to convert the employee's capacities into as much completed work as possible; the employee seeks to regulate this intensity. Critical terms of the conversion tend to go unspecified: How hard should the employee work? How fast? With what rights to object?[100] Employment resembles the unenforceable "agreement to agree."[101]

Employees and employers can bargain about many features of the relationship, and they may seek to limit the employer's otherwise nearly unlimited right to dispose of the employee's capacities. With limited exceptions, provided mainly by statute, the terms are difficult to enforce, particularly in at-will employment. Rather than rights to damages or equitable relief, the parties have the right to exit the relationship.

While all contracts are incomplete, employment is incomplete by design. Outside bodies, like courts or arbitrators, have authority to interpret non-employment contracts. Contract law has a repertoire of interpretive principles and standardized terms to fill contractual gaps

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[96] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95–96 (1989).

[97] Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1554 (2014).

[98] Promises to obey one party's reasonable instructions, when these promises would *not* give one party the right to determine something as important as the quantity term, tend to be acceptable. For instance, a bailor may agree to follow the bailee's reasonable instructions about how to handle its property, or a seller might promise to follow a buyer's reasonable directions regarding delivery.

[99] *See, e.g.*, U.C.C. § 2-201 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2014) (requiring quantity term in contracts); U.C.C. § 2-306 cmts. 1–2 (requiring good faith when conforming to quantity estimates); Ayres & Gertner, *supra* note 96, at 95–96 (discussing the U.C.C.'s refusal to enforce agreements when a quantity is not specified).

[100] JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 11, 13 (1983); ALAN FOX, BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS 183 (1974); PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 134–35 (1969); *see also* U.C.C. § 2-201 cmt. 1; U.C.C. § 2-306 cmts. 1–3; Ayres & Gertner, *supra* note 96, at 97.

[101] *Cf.* Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co., 139 N.E. 470, 471 (N.Y. 1923).

and ambiguities.[102] Their content may be based on, for example, industry standards, a course of dealing or performance between the parties, or a relevant statute.[103] Further, the courts imply a covenant of good faith in other contracts.[104] In a non-employment contract, the parties may agree that one party will have discretion to interpret contractual terms and fill certain gaps; however, courts or arbitrators determine whether the interpretation is consistent with the parties' intent and not an abuse of discretion.[105]

By contrast, when courts and treatise writers incorporated master–servant status into contracts for labor services, they gave the employer an implied authority to determine unspecified or ambiguous elements of the agreement.[106] Employers (especially in at-will relationships) are generally not subject to the scrutiny of contract law as to whether the employer's interpretation of the agreement comports with the parties' intent, or whether the employer is performing the agreement in good faith.[107] For instance, in the absence of a statute or public policy

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[102] In commercial requirements and outputs contracts, for example, which also lack a specified quantity for exchange, courts require exclusive dealings to support a contract, impute "reasonable" maximum and minimum quantities, and impose a duty of good faith. *See, e.g.*, Mid-S. Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1121–22 (5th Cir. 1985); U.C.C. § 2-306 cmts. 1–3, 5.

[103] *See, e.g.*, U.C.C. § 1-303.

[104] U.C.C. § 1-304 cmt. 1; *see, e.g.*, Sanders v. FedEx Ground Package Sys., Inc., 188 P.3d 1200, 1203 (N.M. 2008).

[105] *See, e.g.*, Centronics Corp. v. Genicom Corp., 562 A.2d 187, 193 (N.H. 1989).

[106] Christopher L. Tomlins, *Law and Power in the Employment Relationship*, *in* LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 71, 73–74 (Christopher L. Tomlins & Andrew J. King eds., 1992).

[107] Most states do not recognize a covenant of good faith in at-will employment relationships. Susan Dana, *The Covenant of Good Faith and Fair Dealing: A Concentrated Effort to Clarify the Imprecision of Its Applicability in Employment Law*, 5 TRANSACTIONS: TENN. J. BUS. L. 291, 291 (2004); Stead v. Unified Sch. Dist. No. 259, 92 F. Supp. 3d 1088, 1110 (D. Kan. 2015), *appeal dismissed,* No. 15-3085 (10th Cir. Aug. 3, 2015) (noting that "Kansas law recognizes an implied duty of good faith and fair dealing in all contracts, except at-will employment contracts"). Some states do not recognize the covenant in any employment relationships. *See, e.g.*, Magee v. Trustees of the Hamline Univ., 957 F. Supp. 2d 1047, 1073 (D. Minn. 2013), *aff'd*, 747 F.3d 532 (8th Cir. 2014). In states that apply the covenant of good faith to at-will employment contracts, the doctrine tends to be of narrower scope than when applied to commercial contracts. *E.g.*, O'Tool v. Genmar Holdings, Inc., 387 F.3d 1188, 1202 (10th Cir. 2004) (noting that "fraud, deceit or misrepresentation" was required to show breach of faith claim in an at-will employment contract, but holding that a "broader definition of 'bad faith'" applied to commercial contracts). In the at-will employment context, the covenant ordinarily will not limit the employer's right to discharge an employee without cause. Sporer v. UAL Corp., No. C 08-02835 JSW, 2009 WL 2761329, at *4 (N.D. Cal. Aug. 27, 2009). *But cf.* Becker v. Fred Meyer Stores, Inc., 335 P.3d 1110, 1116 (Alaska 2014) (holding that covenant of good faith in at-will employment "requires employers to act in a manner that a reasonable person would regard as fair").

exception, most courts would not imply a term that would limit an employee's duty to obey the employer to the latter's "reasonable" commands.[108] This implied right includes circumstances where the employer seeks unilaterally to change agreed-upon terms.[109] The basic remedy is exit. The essence of the employment contract is extra-contractual discretion.[110]

C. Employment and Power

What does it mean then to say the employer has a "right" to control the work of an employee? It means, simply, that we can recognize something as an employment relationship when one party to an agreement for labor services has such greater bargaining power that it can impose its will on the other: The right to control the work means the employer will likely get its way in the course of the parties' negotiations. The legal definition of the employment contract registers the inequality of bargaining power between employer and employee.

D. Interpretative Ambiguities

The tension between master–servant authority and contract limned above creates two interpretative ambiguities in disputes over employment status. The first, explained above, is to make ambiguous the activities of *bargaining* over the work and *carrying out* the work.

The second ambiguity surfaces in attempts to interpret a written work agreement, rather than in distinguishing the activities of bargaining and producing. The means–ends standard depicts employment as a contract, but a peculiar kind of contract. In ordinary contracts, parties commit one another to the "ends" of the deal, but neither has a right to dictate how the other party satisfies these ends. The employment contract, however, gives one party an implied right to determine how the other party satisfies its contractual duties: the employer has a right to control not only the "ends" of the work, but also the "means" of the work. The means–ends standard therefore depends on being able to distinguish between contractual duties and the manner of their performance, in order to evaluate whether one party is controlling the

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[108] *See, e.g.*, Plantier v. Cordiant plc, No. 97 CIV. 8696 (JSM), 1998 WL 661474, at *2 (S.D.N.Y. Sept. 24, 1998) (holding that employer did not breach covenant of good faith in terminating at-will employee for refusing to perform illegal business activities). *But see* U.C.C. §§ 1-304, 2-103 (requiring merchants to observe "reasonable commercial standards of fair dealing in the trade" in contracts for the sale of goods).

[109] FOX, *supra* note 100, at 183–84; *see also* ATLESON, *supra* note 100, at 14–15. *See, e.g.*, Asmus v. Pac. Bell, 999 P.2d 71, 81 (Cal. 2000) (allowing employer unilaterally to modify job-security provision in contract with *non*-at-will employees in absence of usual requirements for contractual modification).

[110] Tomlins, *supra* note 106, at 73–74.

latter but not the former. The problem, again, is that the fusion of master–servant authority with contract makes illusory any distinction between contractual duties and how they are performed. Employer and employee exchange performance for performance and determine their contractual duties as they produce. In employment, we cannot identify the contractual duties.

Part V illustrates how this ambiguity turns the interpretation of a written work agreement into a puzzle in disputes over employment status. The IC decisions take the position that everything in the written document signed by the drivers states a contractual end, which by definition prohibits FedEx from controlling how drivers perform these ends.[111] Other courts recognized that the contract by its terms gave FedEx a right to control the contracted-for ends or collapsed the distinction altogether, revealing an employment relationship.[112]

In sum, the attempt to fit employment in the framework of contract creates an ambiguity between the activities of bargaining and producing, and an ambiguity between contractual duties and how they are performed. Both make the dominant standard for distinguishing employment from independent contracting relationships—the means–ends standard—irresolvable. Applying the means–ends standard requires distinguishing the activities of bargaining and producing, and when interpreting a written agreement, distinguishing between contractual duties and the way in which they are performed.

E. Employment as Institution

Marx referred to the market, "within whose boundaries the sale and purchase of labour power goes on," as a "very Eden of the innate rights of man," where "alone rule Freedom, Equality, Property, and Bentham."[113] Employer and employee then "desert[]" this "noisy sphere, where everything takes place on the surface and in view of all men" and enter the "hidden abode of production."[114]

However, since employer and employee negotiate and produce at the same time, since the means–ends standard cannot distinguish between contractual duties and their performance, how do judges distinguish the "noisy sphere" from the "hidden abode of production?" How do they distinguish where parties meet as equals—in contract—from where they meet as superior and subordinate—in production? The apparent coordinates of contracting and production in time and space

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[111] *See supra* note 34.

[112] *See* Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1044 (9th Cir. 2014); Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 81 (Kan. 2014).

[113] MARX, *supra* note 86, at 492.

[114] *Id.*

are artifacts of practice. The intelligibility of employment is dependent on its institutionalization.

In an industrial manufacturing firm, human-resources personnel might hire the worker and explain salary and benefits. Later, distinct personnel in a manufacturing division might supervise the worker on the factory floor. These organizational markers of industrial employment separate the productive process from the sorting of workers in the labor market and the contracting process. Judges interpreting nonstandard work must find a way to make sense of the disorganized temporal, spatial, and bureaucratic markers of industrial employment.

NLRB v. Labor Ready[115] illustrates the task. This NLRA case concerned a non-solicitation policy that a temporary employment agency imposed in its waiting area.[116] The legality of the policy depended on whether persons registered with the agency were employees of the agency while they were waiting for assignments.[117] The company argued that, although it was mandatory for registrants to be in the waiting room in order to receive job placements, their employment relationship with the agency ended between each assignment or after each day of work.[118] The court rejected this argument.[119] It reasoned that requiring registrants' physical presence at the agency to receive assignments was a form of control over their work; the employment relationship continued between assignments.[120]

The work arrangement in *Labor Ready* lacked the temporal, spatial, and bureaucratic markers of the prototypical industrial firm that separate the hiring process from supervisory direction. The company interpreted registrants looking for jobs in the waiting room as an aspect of labor market sorting, or *contracting*. The court, in contrast, interpreted the waiting room requirement as a part of the company's process of *producing* its saleable service, which was to make workers available on-demand to client firms.[121]

The FedEx disputes, and the IC decisions in particular, suggest that the law's attempt to construe employment as a contract renders even those work relations approaching the prototype of industrial employment susceptible to redefinition.

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[115] NLRB v. Labor Ready, Inc., 253 F.3d 195 (4th Cir. 2001).
[116] *Id.* at 196–97.
[117] *Id.* at 199.
[118] *Id.* at 196–97, 199.
[119] *Id.* at 200.
[120] *Id.* at 201.
[121] *Id.* at 196–97.

III. FROM BARGAINING TO PRODUCING

The way that FedEx organized the drivers' work manipulated the ambiguities in the employment contract between bargaining and producing. This enabled the courts to find that features of the work that under the legal tests would be probative of an employment relationship were here consistent with, or even evidence of, an independent contracting relationship. The IC decisions marshaled the ambiguity between producing and contracting to negate or invert the legal meaning of nearly every factor under the legal tests indicative of employment and to transform several features typical of industrial work into evidence of entrepreneurial opportunity: delivery route assignments, supervision, discipline, promotions, shift replacements, training, skill, tenure, at-will authority, scheduling, and other work rules.

A. Route Assignments, Training, and Execution of the Contract as Institutional Marker

1. Control or Entrepreneurial Opportunity?

In what we think of as the formation of a "typical" employment arrangement, a worker applies for a job. If accepted, the worker meets with human-resources personnel, perhaps signs an agreement, and then receives a desk, a phone—whatever the required equipment for the job. And, often the worker receives training from the company or participates in an orientation.

For FedEx drivers, the sequence differs. A potential driver completes a computerized application and undergoes a physical examination and drug screening.[122] Next, those approved by FedEx who do not have satisfactory commercial driving experience must take a training course.[123] Some approved drivers also receive training from FedEx and begin working as FedEx drivers through a temporary agency.[124] To become permanent, the applicant must buy or lease a truck. Until 2008, FedEx furnished or financed trucks for sale or lease to drivers.[125] The truck must fit FedEx's detailed specifications (down to the brand and shade of white paint) for FedEx trucks generally and must be approved for a particular

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[122] *FHD NLRB Decision*, Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *12 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[123] *Id.* at *26; *see also Kansas Decision*, 734 F. Supp. 2d 557, 563–64 (N.D. Ind. 2010).

[124] Drivers performed the same work whether hired as contractors or temporary employees. *See* FedEx Home Delivery, 361 N.L.R.B. No. 55, at 3 (2014); FedEx Ground Package Sys., Inc., No. 22-RC-12508, slip op. at 26, 93 (N.L.R.B. Reg. Dir. Decision Nov. 2, 2004), http://apps.nlrb.gov/link/document.aspx/09031d45800c9763.

[125] Up until 2008, FedEx purchased custom-made trucks and sold or leased them to potential drivers. *Kansas Decision*, 734 F. Supp. 2d at 566.

delivery route.[126] Only after all this does a FedEx terminal manager present the driver with a written agreement.[127] Only in signing the agreement does the driver officially receive the delivery route and become a FedEx driver.[128]

Ordinarily, assigning a worker to a particular service area or a driver to a particular delivery route,[129] and training a worker,[130] are evidence of employer control over production—evidence of employment.

FedEx, however, suggested that drivers' meetings with terminal managers were part of the bargaining process.[131] Thus, the work relationship did not really begin until *after* the drivers signed the contract. For instance, according to the former CEO of FedEx, when a driver checked with a manager to see if a certain truck would be permissible for the route to be assigned, it presented FedEx with a "business plan."[132] FedEx manipulated the ambiguity within the employment contract by relocating the conventional threshold between bargaining and production in industrial, or "typical," employment (Figure 1). Everything that fell on the pre-contract signing side of the relationship appeared as part of the market sorting or bargaining process.

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[126] Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 986 (9th Cir. 2014); Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1039 (9th Cir. 2014); *Kansas Decision*, 734 F. Supp. 2d at 565–66; *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *17–18.

[127] *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *13.

[128] *Id.*; *FedEx*, 361 N.L.R.B No. 55, at 3; *see also* Deposition of Penny Massa at 14, *Multi-State Decision*, 758 F. Supp. 2d 638 (N.D. Ind. 2010) (No. 3-05-MD-527-RM), 2005 WL 5865334.

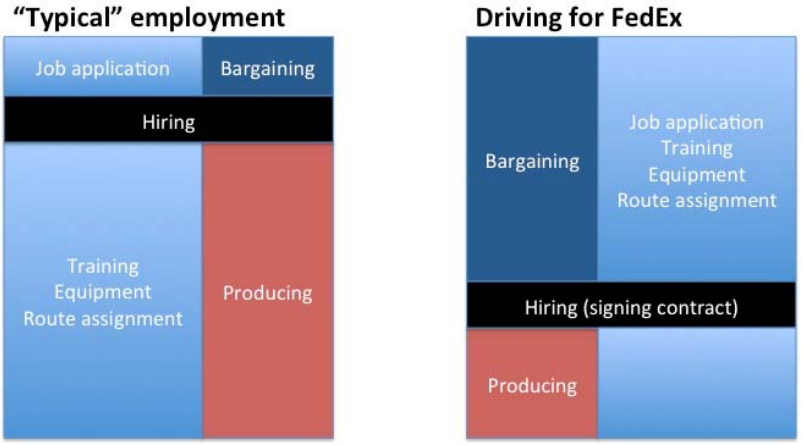
[129] *See, e.g.*, Solis v. Velocity Express, Inc., No. CV 09-864-MO, 2010 WL 3259917, at *6–7 (D. Or. Aug. 12, 2010).

[130] *See, e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258–59 (1968); Crawford v. State Dep't of Human Res., 845 P.2d 703, 706–07 (Kan. Ct. App. 1989).

[131] *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *13–14; *see also* Brief of Petitioner/Cross-Respondent at 6–7, *FHD*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436), 2008 WL 4425826 (suggesting that signing the agreement and receiving a service area was part of the "contracting" process).

[132] *Kansas Decision*, 734 F. Supp. 2d 557, 565–66 (N.D. Ind. 2010).

Figure 1



In reality, drivers had little leeway to make rational investment decisions to exploit what FedEx claims was their "proprietary interest"[133] in their delivery routes. FedEx maintained strict control over the volume of package deliveries in each service area. Using advanced logistics technology and supervisory ride-alongs, it structured drivers' routes so that each driver would have nine to eleven hours of deliveries per day.[134] Regardless of the desirability of a driver's initial route assignment, FedEx had the right to alter the routes unilaterally and regularly did so to distribute work somewhat evenly among drivers.[135] The document the drivers signed expressly stated that a driver's "proprietary" interest was limited to their service area "as that area is configured from time to time"

[133] Brief of Petitioner/Cross-Respondent at 6, *FHD*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436), 2008 WL 4425826; *cf.* Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1024 (E.D. Mo. 2013) (finding that "none of the [FedEx drivers] actually 'owned' their routes"), *rev'd and remanded sub nom.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015).

[134] *Kansas Decision*, 734 F. Supp. 2d at 589–91; *see also* FedEx Ground Package Sys., Inc., No. 22-RC-12508, slip op. at 75 (N.L.R.B. Reg. Dir. Decision Nov. 2, 2004), http://apps.nlrb.gov/link/document.aspx/09031d45800c9763 (describing FedEx supervisor considering driver break-time in determining route structure). *See generally* Richard Mason et al., *Absolutely, Positively Operations Research: The Federal Express Story*, INTERFACES, Mar.–Apr. 1997, at 17.

[135] *Kansas Decision*, 734 F. Supp. 2d at 573–74; *FedEx Ground Package Sys.*, 22-RC-12508, slip op. at 54.

unilaterally by FedEx.[136] Drivers were required to deliver every package FedEx assigned to them each day.[137] Further, although a property right usually includes the right to exclude, FedEx adjusted packages among drivers daily. Drivers were required to deliver packages outside of delivery areas and to allow other drivers to make deliveries in their own service areas.[138] And, if delivery volume increased on a particular route, under the driver's compensation formula, FedEx offset the increase in piece rate earnings for packages by decreasing the driver's daily wage, which was inversely correlated to delivery volume and geographic density.[139] In effect, FedEx largely predetermined drivers' pay based on hours of work.[140] By design, bargaining over delivery areas was not a meaningful source of entrepreneurial opportunity for most drivers.

However, the courts finding the drivers to be independent contractors largely followed FedEx's cues with respect to the company's manipulation of the institutional markers of industrial employment. They did not find the route assignments to be evidence of FedEx's right to control the means of the work.[141] The D.C. Circuit suggested that route assignments were evidence of entrepreneurial opportunity because a driver might acquire a delivery route with expanding package volume.[142] Judge Miller suggested that the route assignments went to FedEx's control only over "results" of the work; he characterized them not as an assignment of work by FedEx, but as a driver's contractual agreement to service a particular area.[143] Both courts emphasized drivers' contracted-

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[136] *See* Pick-up and Delivery Contractor Operating Agreement para 5.3, *exhibit to* [FedEx's] Memorandum of Law and Supplemental Statement in Opposition to Leighter (Oregon) Motion for Class Certification, *In re* FedEx Ground Package Sys., Inc., Emp't Practices Litig., 662 F. Supp. 2d 1069 (N.D. Ind. 2009) (No. 3:05MD00527), 2007 WL 6930366 [hereinafter *Operating Agreement*].

[137] *FHD*, 563 F.3d 492, 510–11 (D.C. Cir. 2009).

[138] *Kansas Decision*, 734 F. Supp. 2d at 570; *Operating Agreement*, *supra* note 136, para. 9.

[139] *See* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 985 (9th Cir. 2014); *Kansas decision*, 734 F. Supp. 2d at 567, 589.

[140] *See, e.g.*, *Kansas Decision*, 734 F. Supp. 2d at 567 (discussing compensation factors including daily rates); Deposition of Michael Callahan at 61, *Kansas Decision*, 734 F. Supp. 2d 557 (No. 3:05-MD-527-RM), 2005 WL 5865335 ("They say the busier you are, the less you get as [other compensation]"); *FedEx Ground Package Sys.*, 22-RC-12508, slip op. at 44–45 (describing changes in pay structure that tend to equalize pay regardless of volume).

[141] *FHD*, 563 F.3d at 502; *Kansas Decision*, 734 F. Supp. 2d at 589.

[142] *FHD*, 563 F.3d at 500 ("[R]outes are geographically defined, and they likely have value dependent on those geographic specifics which some contractors can better exploit than others. For example, as people move into an area, the ability to profit from that migration varies . . . .").

[143] *Kansas Decision*, 734 F. Supp. 2d at 589 ("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

for "proprietary" rights as key to their finding that drivers were independent contractors, on the basis that it revealed their entrepreneurial opportunity.[144] The IC decisions thus reinterpreted delivery area assignments as evidence of independence in bargaining rather than dependence in producing.

The courts also reinterpreted or lessened the import of the drivers' training and FedEx's control over the delivery vehicles. Judge Miller asserted that the training drivers underwent before signing the contract "isn't training, but a precondition, to becoming a contractor."[145] The D.C. Circuit suggested that the training requirement was insubstantial evidence of employment status in the FedEx situation, merely reflecting the results the drivers contracted to provide, or the "type of service the contractors are providing rather than differences in the employment relationship."[146] Agreeing with FedEx,[147] the court suggested that drivers invested in an independent business by purchasing or leasing FedEx trucks.[148]

FedEx's manipulation of the bargaining/producing ambiguity formed a basis for disagreement among the courts. Several other courts found the route assignments to be evidence that the drivers were employees.[149] For example, in two decisions, the Ninth Circuit argued that the route assignments were evidence of FedEx's control over the means of the work, not merely the results.[150] The Kansas Supreme Court remarked, "[T]he procedure by which a driver becomes qualified to deliver packages for FedEx more closely resembles the process by which

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results-oriented approach to management when viewed with the totality of circumstances.").

[144] *FHD*, 563 F.3d at 503; *Kansas Decision*, 734 F. Supp. 2d at 596–97, 601.

[145] *Kansas Decision*, 734 F. Supp. 2d at 563. Based in part on the additional training FedEx provided after drivers signed the agreement, Judge Miller found that the training factor weighed somewhat in favor of employee status. *Id.* at 600.

[146] *FHD*, 563 F.3d at 501.

[147] Reply Brief of Petitioner/Cross-Respondent at 23–24, *FHD*, 563 F.3d 492 (Nos. 07-1391, 07-1436), 2008 WL 4425828 [hereinafter *Reply Brief*].

[148] The D.C. Circuit characterized the requirement that drivers purchase or lease FedEx trucks as drivers "suppl[ying] [their] own equipment" and argued that this indicated entrepreneurial opportunity. *FHD*, 563 F.3d at 503. The Ninth Circuit, though it ultimately found the drivers to be employees as a matter of law, also found the tools factor, when considered alone, to weigh slightly in favor of independent-contractor status. Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 995 (9th Cir. 2014); Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1046 (9th Cir. 2014).

[149] Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 91 (Kan. 2014); *see* Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1019 (E.D. Mo. 2013) (noting that service areas were "assigned" by FedEx, consistent with employment), *rev'd and remanded sub nom.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015).

[150] *Alexander*, 765 F.3d at 990; *Slayman*, 765 F.3d at 1044.

employees are hired than the process by which independent contractor agreements are negotiated."[151]

The extent that drivers "invested" in their own businesses was also a point of disagreement. The NLRB and a federal district court suggested that the FedEx-specific nature of the vehicles, and their use for a regular and integral service of the alleged employer's business, augured an employment relationship.[152] The Kansas Supreme Court reasoned that requiring drivers to purchase some of the tools of work did not so much show that drivers invested in their own businesses, but rather that they invested in their FedEx jobs.[153]

2. Contract Execution as Temporal, Institutional Marker

Since the legal standard cannot distinguish where employer and employee meet as equals—in contract—from where they meet as superior and subordinate, we create institutional markers to do so. Like a Human Resources department or other bureaucratic marker, the written contract appears as an institutional index tab: It purports to divide the work relationship into distinct and legally cognizable segments—the ends of the work and the means of the work, or contractual negotiation and performance.

FedEx and the IC decisions construct the contract signing as an institutional marker of non-employment: everything that happens before the contract signing is bargaining over the work; only what happens afterwards is production. A driver's execution of a written agreement signals that the relationship is one of independent contracting by marking a clear break between the negotiation process and the endowment of enforceable rights.[154]

3. A Critique

Despite the inherent ambiguity within the employment contract between bargaining and producing, the construction of the execution of

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[151] *Craig*, 335 P.3d at 81.

[152] *Wells*, 979 F. Supp. 2d at 1014, 1024; FedEx Home Delivery, 361 N.L.R.B. No. 55, at 13–14 (2014) (noting that investment in FedEx trucks and equipment suggests long-term relationship).

[153] *Craig*, 335 P.3d at 89–90. Given that in several cases drivers were suing under statutes that prohibited employers from charging employees for business expenses, it seems rather circular to argue that requiring drivers to buy or lease their work trucks was evidence of the law's inapplicability, rather than evidence of FedEx's violation of the law (in spirit). *See Multi-State Decision*, 758 F. Supp. 2d 638, 654 (N.D. Ind. 2010).

[154] *See, e.g.*, Solis v. Velocity Express, Inc., No. CV 09-864-MO, 2010 WL 3259917, at *6 (D. Or. Aug. 12, 2010). *Solis* was an overtime case involving a shipping company that converted its delivery drivers from employees to independent contractors. *Id.* at *1. The court queried whether the company's route assignments were evidence of the company's "control over its workers or simply an unprofitable contractual bargain." *Id.* at *6. It found that the "critical evidence" was that drivers "received their route assignments *after* they contracted with Velocity Express." *Id.*

the written agreement as an institutional marker of non-employment is problematic for both doctrinal and policy reasons. The written document the drivers sign is not performing the work of a contract: it is not separating the market sorting and bargaining process from the carrying out of an enforceable contract.

As a doctrinal matter, drivers begin submitting to FedEx's authority as employees before they sign the agreement. They receive training and begin following FedEx's directions in acquiring and outfitting a truck for an assigned route. The relationship is closer to that of a master–servant relationship than a contract. Secondly, as noted above, the agreement did not provide the drivers post-signing with meaningful business property in their routes that they could exploit as entrepreneurs.

As a policy matter, recall that the drivers in the IC decisions were trying to unionize and exercise rights to statutory wages. At a minimum, these laws are intended to protect vulnerable workers.[155] FedEx and the IC decisions' resolution of the ambiguity between bargaining and producing disrupts these policy objectives. FedEx hired drivers without any requirements as to skill, experience, or capital.[156] The unskilled nature of the work was evidence that the drivers should be classified as employees under the legal tests.[157] FedEx also dictated all of the instrumentalities of work and restricted drivers' property rights in the vehicles.[158] These characteristics of the relationship also suggested it fit well within the policy scope of collective-bargaining and wage-and-hour law. Shifting the temporal site of contract signing does not correspond to a transmutation of bargaining power.

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[155] RETHINKING WORKPLACE REGULATION, *supra* note 13, at 67.

[156] *See, e.g.*, *Kansas Decision*, 734 F. Supp. 2d at 562, 599 (describing "minimal eligibility requirements" to become a FedEx driver and ability to learn the required skills through FedEx's training or supervision on the job); *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *10–11 (Sept. 20, 2006) (describing process of becoming a FedEx driver), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[157] *See, e.g.*, *FHD*, 563 F.3d 492, 510–11 (D.C. Cir. 2009) (Garland, J., dissenting); *Kansas Decision*, 734 F. Supp. 2d at 599.

[158] *See, e.g.*, *FHD*, 563 F.3d at 514; Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1014–15 (E.D. Mo. 2013), *rev'd and remanded sub nom.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015); *Craig*, 335 P.3d at 89–90. Drivers' most valuable property rights in their vehicle ownership or leases appeared to be the ability to sell them, particularly to other FedEx drivers. Evidence suggests that, rather than give drivers autonomy over their market destinies, requiring drivers to purchase the vehicles tended to limit their ability to quit. It saddled drivers with debt payments for a truck that had limited commercial use apart from servicing FedEx. *See* GREENHOUSE, *supra* note 8, at 122; Deposition of Michael Callahan, *supra* note 140, at 27. Furthermore, FedEx limited drivers' use of their vehicles for non-FedEx purposes. *Wells*, 979 F. Supp. 2d at 1014. FedEx could also remove a truck from service. *Id.; see also* Rocha v. FedEx Corp., 15 F. Supp. 3d 796, 802 (N.D. Ill. 2014) (recounting claim that FedEx locked a driver's truck in the terminal and prevented the driver from accessing it).

By manipulating the sequencing of the contract signing, rather than bargaining with an unskilled and propertyless worker, it appears that the company is bargaining with an independent business—one that happens to possess the requisite equipment, skill, and knowledge. The D.C. Circuit, for example, did not address the skill factor at all, and it commented, "Servicing a route is not cheap; one needs a truck (which the contractor pays for) and a driver (which the contractor also pays for, either directly or in kind)."[159] Rather than meeting as subordinate and superior on the factory floor, drivers seem to meet FedEx as equals at the bargaining table. [160]

B. Negotiation or Unilateral Changes to Work Duties?

The IC decisions also reinterpreted FedEx's right to alter routes unilaterally as evidence consistent with independent entrepreneurialism. FedEx regularly monitored delivery volumes on each route and reconfigured routes to even out workloads among drivers as deliveries expanded or contracted.[161] This reflects the continuing and simultaneous bargaining and directing of the work that characterizes an employment relationship, where FedEx, as the stronger party, always prevails. The IC decisions exploited the ambiguity between contracting and producing to interpret FedEx's adjustments to drivers' delivery routes as frequent re-openings of the negotiation process.

The D.C. Circuit, for example, accepted FedEx's characterization of the company's right to unilaterally alter routes (in return for some compensation) as a "Mutual Intention to Reduce the Geographic Size of Primary Service Area."[162] To keep its route in the case of expanding business, FedEx might require a driver to acquire additional trucks and supervise other FedEx drivers.[163] If a driver found this infeasible or undesirable, FedEx could change the driver's route.[164] FedEx characterized a driver's submission to a mandatory route change as a driver "decid[ing] to forgo the business growth opportunity."[165] Note the language of equality in bargaining rather than subordination in

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[159] *FHD*, 563 F.3d at 500 (majority opinion).

[160] The courts' emphasis on entrepreneurial opportunity also tended to suppress the legal weight of the unskilled nature of the work. FedEx and Judge Miller suggested that entrepreneurialism was a skill. *Kansas Decision*, 734 F. Supp. 2d at 599 (suggesting that the agreement required drivers to have business management skills); *cf.* Johnson v. FedEx Home Delivery, No. 04-CV-4935 JG VVP, 2011 WL 6153425, at *11 (E.D.N.Y. Dec. 12, 2011) (disagreeing with FedEx that the drivers' work required managerial skills as opposed to simply the ability to "drive a van and carry packages").

[161] *Kansas Decision*, 734 F. Supp. 2d at 573–74.

[162] *FHD*, 563 F.3d at 501; *Reply Brief*, *supra* note 147, at 20–22 (quoting *Operating Agreement*, *supra* note 136, para. 5.2).

[163] *Reply Brief*, *supra* note 147, at 21–22.

[164] *Id.*

[165] *Id.* at 21.

production. While it might appear that FedEx was controlling the work in determining delivery areas, the parties were really just reopening negotiations. If FedEx always managed to prevail, it was by driving a hard bargain, not being an employer.

Once a court concludes that most features of the relationship that might suggest subordination or inequality were incidents of bargaining rather than production, they became irrelevant to the court's decision, and even taboo, as an issue of bargaining power. The D.C. Circuit thus remarked, "[W]e will 'draw no inference of employment status from merely the economic controls which many corporations are able to exercise over independent contractors with whom they contract.'"[166] The dissent in a recent NLRB decision that found FedEx delivery drivers to be employees also interpreted FedEx's right to control the delivery routes as a potential use of "contractual power" to negotiate changes to the drivers' agreements.[167] Having located FedEx's right in the realm of the market rather than production, the dissent concluded that this right did not defeat the drivers' entrepreneurial opportunity, and that the majority's focus on FedEx's control over routes betrayed an impermissible concern with bargaining power.[168] The majority, by contrast, found the right to control the routes evidence of FedEx's right to control the means of the work and evidence that the drivers were not performing services as independent businesses.[169]

A California appellate court rejected FedEx's characterization of route assignments as evidence of independence in bargaining, noting that the terminal managers who assigned routes were "drivers' immediate supervisors and can unilaterally reconfigure the drivers' routes without regard to the drivers' resulting loss of income."[170]

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[166] *FHD*, 563 F.3d at 502 n.8 (quoting N. Am. Van Lines, Inc. v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989)).

[167] FedEx Home Delivery, 361 N.L.R.B. No. 55, at 26 n.34 (2014) (Johnson, dissenting).

[168] *Id.* at 26–27.

[169] *Id.* at 12, 15 (majority opinion). The crux of the disagreement between the majority and dissent regarding whether drivers had "theoretical," *id.* at 15, 17, as opposed to "actual" entrepreneurial opportunity, *id.* at 20, 23 (Johnson, dissenting), appears to turn on the distinction between contracting and producing. Thus, a driver can assign a FedEx position to another FedEx driver for money, *if* FedEx grants permission and approves the assignee. *Id.* at 15 (majority opinion). The majority found that FedEx's right to control route sales indicated that drivers were not rendering services as independent businesses. *Id.* The dissent characterized the route assignments as bilateral market transactions, or "businesses of independent value being evaluated and sold by business owners . . . as opposed to being mere episodes of work force reshuffling controlled by FedEx." *Id.* at 32 (Johnson, dissenting).

[170] Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 336 (Ct. App. 2007). At some point, FedEx modified the document signed by the *Estrada* drivers. The new document reserved FedEx's right to unilaterally change the routes

C. Termination or Aborted Negotiation?

The authority to terminate a worker at-will is generally evidence of employment rather than independent contracting under the legal standards for employment status.[171] By default, employment in the United States is an at-will relationship, meaning either party may terminate it at any time for a good reason, a bad reason, or no reason at all.[172] Performing continuous services for a long, indefinite period of time is also evidence of employment.[173] Usually, independent contractors are hired to "achieve a specific result that is attainable within a finite period of time."[174]

The FedEx drivers signed an initial contract of one, two, or three years that renewed automatically.[175] FedEx had a right to cancel the renewal without cause.[176] The company claimed that its fixed-term contracts were evidence that the drivers were independent contractors.[177] In practice, FedEx hired drivers for long periods of time,[178] and their work—delivering packages to FedEx customers—continued indefinitely. FedEx also awarded vacation time based on driver seniority.[179]

Recall that, in contractual terms, the employer and employee bargain over their relationship and perform it at the same time. To the extent employment is a contract, it is continuously renewed at each moment the relationship endures.[180] To say that employment is "at-will" simply means that at some moment the employer and/or employee decide not to renew the contract.[181] Maybe the employee decides not to accept the employer's terms and conditions conveyed through the employer's

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but provided a formula to compensate drivers who lost pay due to a reconfiguration. *FHD*, 563 F.3d at 501; *Kansas Decision*, 734 F. Supp. 2d 557, 574 (N.D. Ind. 2010).

[171] *See, e.g.*, *Kansas Decision*, 734 F. Supp. 2d at 598; S.G. Borello & Sons v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989).

[172] *See, e.g.*, Lake Land Emp't. Grp. of Akron, LLC v. Columber, 804 N.E.2d 27, 32 (Ohio 2004).

[173] *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)).

[174] Antelope Valley Press v. Poizner, 75 Cal. Rptr. 3d 887, 900 (Ct. App. 2008).

[175] Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 986 (9th Cir. 2014).

[176] *Kansas Decision*, 734 F. Supp. 2d at 574, 596; FedEx Home Delivery (*FHD NLRB Decision*), Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *16 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[177] Craig v. FedEx Ground Package Sys., 335 P.3d 66, 87; Memorandum of Law of Defendant FedEx Ground Package Sys., Inc. in Support of its *Tofaute* (New Jersey) Motion for Summary Judgment at 25, *Kansas Decision*, 734 F. Supp. 2d 557 (N.D. Ind. 2010) (No. 3:05-MD-527-RM), 2008 WL 2497409.

[178] In a California case, the average driver worked for FedEx for 8 years. Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 332 (Ct. App. 2007).

[179] *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *38.

[180] *See supra* Part II.B.1.

[181] *Id.*

direction of the work. Or, perhaps the employer feels the employee has not agreed to its terms by performing deficient work. Regardless of the reason, the parties stop bargaining.

The ambiguity between the activities of contracting and producing enabled the IC decisions to interpret FedEx's partial at-will authority as evidence of independent contracting. Judge Miller suggested that, rather than evincing a right to terminate a driver, this simply showed that FedEx had a right not to engage in "repeat business."[182] He argued that the right to cancel a driver's contract renewal without cause "isn't atypical of an independent contractor relationship where a hiring party can simply decide not to re-hire a worker."[183] The court exploited the ambiguity between bargaining over the work and carrying it out to interpret FedEx's partial at-will authority as evidence of the drivers' contractual independence rather than subordination in production.[184]

This construction of FedEx's authority to cancel a driver's contract renewal also dimmed the importance of the duration of the relationship and the continuous nature of the service provided. Judge Miller characterized this practice as one bearing on contracting rather than production, noting a company "might wish to *deal with* reliable suppliers, middlemen, or subcontractors."[185] Noting the drivers' agreement was for a definite term, he found that the length of the relationship did not weigh in favor of either party.[186]

The ambiguity between bargaining and producing in employment was behind some of the disagreement among courts trying to interpret the three factors discussed above with respect to FedEx drivers—whether the relationship was at-will, the length of the work relationship, and whether the services were discrete or continuous.[187] One court stated,

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[182] *Kansas Decision*, 734 F. Supp. 2d at 595 (quoting Home Design, Inc. v. Kan. Dep't of Human Res., 2 P.3d 789, 793 (Kan. Ct. App. 2000)); *see also* State Comp. Ins. Fund v. Brown, 38 Cal. Rptr. 2d. 98, 105 (Ct. App. 1995) (stating that the right to terminate a contract with 14 days of notice was "consistent either with an employment-at-will relationship or parties in a continuing contractual relationship"); *cf.* Taylor v. Shippers Transp. Express, Inc., No. CV 13-02092 BRO, 2014 WL 7499046, at *12–13 (C.D. Cal. Sept. 30, 2014) (finding that drayage company's right to terminate port drivers' 90-day, automatically renewable contracts on 30 days' notice for any reason, or immediately with cause, was equivalent to at-will authority).

[183] *Kansas Decision*, 734 F. Supp. 2d at 595.

[184] The D.C. Circuit cited the length of service as a relevant legal factor but ignored it entirely in its analysis of the drivers' status. *See FHD*, 563 F.3d 492, 496 n.1 (D.C. Cir. 2009). In practice, FedEx had at-will authority over the drivers. *See infra* Part V.

[185] *Kansas Decision*, 734 F. Supp. 2d at 595 (emphasis added).

[186] *Id.* at 596.

[187] *See* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 996 (9th Cir. 2014) (finding that length of time for performance of the drivers' contracts was evidence of employment); Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1019–20 (E.D. Mo. 2013) (duration of drivers' relationship was evidence of

"Plaintiffs could effectively be terminated at will given that the [agreement] provides for nonrenewal without cause."[188] Another court also found that FedEx could terminate drivers by retaining the right not to renew a driver's contract without any cause, and that FedEx did so in practice.[189]

D. Performance Evaluation or Bargaining?

Interpreting FedEx's right to cancel a driver's contract renewal as a cessation of negotiations, rather than as quasi-at-will authority, enabled courts to reinterpret other factors usually indicative of employment as consistent with independent contracting: the right to supervise and discipline the worker.

FedEx supervised drivers and evaluated every detail of their work.[190] Managers inspected drivers' vehicles and their personal grooming each morning and could prevent them from working or suspend them if they did not pass inspection.[191] The company monitored drivers during the day through scanning devices that recorded the location and time of each package delivery.[192] Drivers were also subject to occasional management ride-alongs, in which a manager would sit with a drivers for the day and take detailed notes on the work, including, for example, whether a driver conveyed a "'sense of urgency,' and '[p]laces [his or

employee status), *rev'd and remanded sub nom.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015); Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 337 (Ct. App. 2007) (citing length of relationship as evidence of employment and noting drivers had long-term relationship with FedEx); Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 87 (Kan. 2014) (disagreeing with FedEx that fixed-term contracts were evidence that the drivers were independent contractors and finding that the length of the relationship favored employment status); FedEx Home Delivery, 361 N.L.R.B No. 55, at 14 (2014) (arguing that length of relationship favored employment status, despite short-term nature of contracts); *see also* Estrada v. Fed Ex Ground, No. BC 210130, 2004 WL 5631425, slip op. at 16 (Cal. Super. Ct. July 26, 2004), *aff'd*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007) (noting that drivers' positions are "long-term in years of service.").

[188] *Wells*, 979 F. Supp. 2d at 1025.

[189] *Estrada*, 64 Cal. Rptr. 3d at 336. Some courts found that FedEx did *not* have a complete right to terminate drivers without cause due to arbitration provisions in the agreement. *See* Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1046 (9th Cir. 2014); *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *59 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009). At least two courts have struck down the provisions as unconscionable. Lucey v. FedEx Ground Package Sys., Inc., 305 F. App'x 875, 878 (3d Cir. 2009); Openshaw v. FedEx Ground Package Sys., Inc., 731 F. Supp. 2d 987, 990 (C.D. Cal. 2010).

[190] *Alexander*, 765 F.3d at 989–90.

[191] *Id.* at 990; FedEx Home Delivery, 361 N.L.R.B No. 55, at 13 (2014).

[192] *FedEx*, 361 N.L.R.B. No. 55, at 13.

her] keys on [the] pinky finger of [his or her] non-writing hand' after locking the delivery vehicle."[193]

Drivers were subject to regular performance evaluations, and these formed the basis for FedEx's decisions regarding bonuses, suspensions, promotions, repeated training, termination, and contract renewal.[194] FedEx referred to the meetings as "Business Discussions"—part of the contracting process, not production.[195] FedEx also referred to the division that reviewed drivers and made recommendations on contract termination and nonrenewal as a "Contractor Relations" division.[196]

The IC decisions evidently accepted FedEx's characterization of what look to be employee-performance evaluations with human-resource personnel as a "Business Discussion" between an independent contractor and a client.[197] The decisions depict the performance evaluations as forward-looking bargaining between independent businesses, not control over production. For example, Judge Miller acknowledged that FedEx closely supervised the drivers' work and that drivers were subject to corrective measures.[198] However, since he decided that FedEx did not have at-will authority over the drivers, rather than control the means of the work he found that FedEx merely gave drivers "suggestions of best practices" to follow in producing the contracted-for service, or the *ends* of their work.[199]

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[193] *Alexander*, 765 F.3d at 985 (alterations in original). FedEx instructed managers to gather detailed information, including "the time the driver arrives and departs from each stop, the number of minutes at each stop, the number of minutes between stops, the last three digits of the driver's odometer reading at each stop, and the approximate distance the driver must walk to pick up or deliver a package." *Kansas Decision*, 734 F. Supp. 2d 557, 573 (N.D. Ind. 2010). FedEx also used customer audits to review driver performance. *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *23–24.

[194] *See FHD*, 563 F.3d at 513 (Garland, J., dissenting); *Kansas Decision*, 734 F. Supp. 2d at 573; *FedEx*, 361 N.L.R.B No. 55, at 5, 13.

[195] *Kansas Decision*, 734 F. Supp. 2d at 570.

[196] *See id.* at 599; *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *45. A business discussion might involve a customer complaint, for which a manager required the driver to undergo a training course and threatened a pay penalty. *In re* FedEx Ground Package Sys., Inc., Emp't Practices Litig., 273 F.R.D. 499, 505–06 (N.D. Ind. 2010).

[197] *See e.g.*, *Kansas Decision*, 734 F. Supp. 2d at 594*; see also* Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1017 (E.D. Mo. 2013) (noting that the "Business Discussions" involves review of complaints, operations, and other aspects of the job), *rev'd and remanded sub nom.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015).

[198] *Kansas Decision*, 734 F. Supp. 2d at 573. Judge Miller provided substantial detail regarding the information managers were supposed to collect when supervising drivers, including a 17-point list that instructed managers to record the "number of steps to reach point of delivery" and whether the driver "[a]ttracts immediate attention and walks at a direct steady pace." *Id.* at 572.

[199] *Id.* at 594–95.

Another court rejected FedEx's attempt to refashion some of the institutional markers of traditional employment as markers of independent contracting.[200] It also refused to interpret FedEx's disciplinary authority as an incident of contracting rather than producing:

> According to [FedEx personnel], Contractor Relations is a liaison between [FedEx] and [drivers] in order to guarantee the independent contractor model. The purpose of Contractor Relations is to review recommendations for contract termination or non-renewal and to make certain that terminal managers do not overstep their bounds. . . . However, a closer look shows that Contractor Relations is nothing more than a mere branch of management. . . . *Contractor Relations must be seen in a role akin to Human Relations over employees*, wherein the highest levels of management have the final say.[201]

This court viewed the role of Contractor Relations as consistent with an employer's open-ended authority over production, not with the discrete obligations undertaken by parties to a contract.[202]

E. Promotion or Business Expansion?

The interpretation of what very much resembles the internal promotion of a driver to a supervisory position offers another example of how the courts' ruling in FedEx's favor drew on the tension between master–servant authority and contract to reinterpret a feature of typical employment.

A driver could ask FedEx to oversee multiple routes.[203] FedEx had unilateral discretion over whether to grant such requests, which it exercised in part based on existing route coverage and business volume.[204] If FedEx granted permission, the driver became responsible for "hiring" and supervising other FedEx drivers, and for acquiring

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[200] Estrada v. Fed Ex Ground, No. BC 210130, 2004 WL 5631425, slip op. at 3.

[201] *Id.* at 11–12 (emphasis added).

[202] *Id.* at 5. The *FHD* dissent also suggested that FedEx's supervision resembled employee-performance evaluations, noting that it could lead to discipline. *FHD*, 563 F.3d 492, 513 (D.C. Cir. 2009) (Garland, J., dissenting). While agreeing that FedEx did not have a traditional system of "reprimand" or "discipline," the NLRB Regional Director in *FHD* likewise suggested that FedEx had disciplinary authority consistent with employer status. *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *16–17 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[203] *Kansas Decision*, 734 F. Supp. 2d at 674.

[204] Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1039 (9th Cir. 2014); *Kansas Decision*, 734 F. Supp. 2d at 574; *see also* Sanders v. FedEx Ground Package Sys., Inc., 188 P.3d 1200, 1202 (N.M. 2008) (noting that FedEx argued the drivers had no real contractual rights to acquire additional routes).

additional FedEx vehicles.[205] FedEx limited the number of routes one driver could manage, and it retained unilateral authority to re-configure the routes and adjust packages among routes, as it did with the single-route drivers.[206] Any driver who worked under the supervision of a multiple-route operator had to first become a FedEx driver[207]: they had to agree to abide by all of the rules in written agreement with FedEx;[208] and they also had to undergo training and orientation and submit to drug testing and background checks.[209] FedEx could disapprove of anyone a multiple-route operator sought to hire.[210] In essence, drivers could only "hire" their coworkers with FedEx's permission.

The *FHD* majority and Judge Miller contended that driver requests to serve multiple routes were evidence of the entrepreneurial potential for business expansion—activity in the moment of contracting rather than evidence of internal job ladders in production.[211] The IC decisions transformed what looks like an internal promotion of a driver into a driver successfully bargaining with FedEx to expand its own business. A feature of the work that ordinarily suggested employer control over productive activities—organizing a supervisory hierarchy—became an incident of bargaining over the work.[212]

Another court disagreed. It interpreted the company's discretionary grants of multiple routes to drivers as an activity of production—akin to an internal promotion—rather than an activity of contractual negotiation by which driver/entrepreneurs expanded their businesses:

> [N]o [single-route driver] can become [a multiple-route driver] without the consent of [FedEx] (unless without the knowledge of

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[205] *Slayman*, 765 F.3d at 1039; *FHD*, 563 F.3d at 499; *Kansas Decision*, 734 F. Supp. 2d at 596; FedEx Home Delivery, 361 N.L.R.B No. 55, at 7 (2014).

[206] *FHD*, 563 F.3d at 501; *Kansas Decision*, 734 F. Supp. 2d at 573–74, 596.

[207] *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *40.

[208] *Slayman*, 765 F.3d at 1039.

[209] *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *40.

[210] *Id.*; *see Alexander*, 765 F.3d at 984; *Slayman*, 765 F.3d at 1039; Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 337 (Ct. App. 2004); *FedEx*, 361 N.L.R.B. No. 55, at 7.

[211] *FHD*, 563 F.3d at 499; *Kansas Decision*, 734 F. Supp. 2d at 596.

[212] *See Kansas Decision*, 734 F. Supp. 2d at 596 (describing the drivers' obligation to supervise additional drivers). Similarly, FedEx might allow—or require—a driver to obtain an additional truck and driver. Deposition of Michael Callahan, *supra* note 140, at 19, 24. Again, all extra drivers had to first form a work relationship with FedEx and be pre-approved by FedEx. *See, e.g.*, *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *40. FedEx referred to a driver's acquisition of additional vehicles and its agreement to oversee other FedEx drivers as a "business growth opportunity." *Reply Brief*, *supra* note 147, at 21. The IC decisions agreed with FedEx that allowing or forcing a driver to hire another FedEx driver was not evidence that FedEx controlled the means of the work, but only evidence that FedEx contracted for certain "results," and even evidence of drivers' entrepreneurial opportunity. *See FHD*, 563 F.3d at 499; *Kansas Decision*, 734 F. Supp. 2d at 588.

> [FedEx], a person purchases another [single-route driver's] corporation that has additional routes). A new route cannot be created without the approval of [FedEx]. The chance of a [single-route driver] to become a [multiple-route driver] is similar to that of an associate of a law firm, who has the opportunity some day to become a partner. The mere potential of that associate to become a partner does not transform his or her employee status to that of an independent contractor.[213]

The courts exploit the ambiguities resulting from the awkward fit of master–servant authority and contract to negate or even invert the legal meaning of many features of the work. Many of these features indicate that the delivery drivers' relationship with FedEx is not passable as a contractual relationship, and are relevant to the policy concerns of the law.

IV. FROM HIERARCHY TO MARKET

A. Markets and Hierarchies

Theories of the firm have attempted to explain why firms exist as an alternative to markets for organizing production and to account for their bordering.[214] The question is often termed: What determines whether a firm will "make" an input to production or instead "buy" an input to production?[215] Two classic firm theorists, Ronald Coase and Oliver Williamson, defined the market in contradistinction to the firm: in markets, production was organized through decentralized, voluntary exchanges, mediated through the price mechanism,[216] and in firms, production was organized through the command relation, a "hierarchy."[217]

Firms existed because market transactions were not costless. Participants to a market transaction might avoid certain costs, like that of monitoring their transacting partners. However, they often incurred other costs. It might take time and resources to locate suitable partners,

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[213] Estrada v. Fed Ex Ground, No. BC 210130, 2004 WL 5631425, slip op. at 15 (Cal. Super. Ct. July 26, 2004), *aff'd*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007); *see also FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *3 (classifying multiple-route drivers as FedEx supervisors and their "employees" as FedEx employees).

[214] *Why do Firms Exist?: Ronald Coase, the Author of "The Nature of the Firm" (1937), Turns 100 on December 29th*, ECONOMIST (Dec. 16, 2010), http://www.economist.com/node/17730360.

[215] Coase, *supra* note 40, at 390–95.

[216] *Id.* at 387.

[217] *Id.* at 388; Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV., 112, 114 (May 1971). *See generally* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975).

determine prices, and negotiate an agreement.[218] One might be at risk of opportunistic behavior by a partner and face difficulty predicting and adapting to relevant contingencies.[219] Firms would exist when the costs of organizing production through the market exceeded the costs of organizing production through fiat.[220]

Williamson argued that contracting costs corresponded to dimensions of the "transaction," a step in the production process.[221] These dimensions were recurrence, market uncertainty, and asset specificity.[222] Regarding recurrence, a firm might find it cheaper to make an input to production rather than repeatedly go to the market to buy it.[223] Uncertainty about the costs of input might also motivate firm production.[224] Asset specificity referred to the extent the parties were interdependent on one another because they incurred durable, transaction-specific investments.[225]

B. The Firm as Employment Relationship

Firm theories tend to associate firms and markets with different legal relations: market transactions were done through contract, while the legal authority for fiat within the firm came from property rights and the employment relationship.[226] Sometimes major theorists of the firm spoke

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[218] Coase, *supra* note 40, at 390–91.

[219] Williamson, *supra* note 217, at 113; Williamson, *Economics*, *supra* note 40, at 553; Williamson, *Governance*, *supra* note 40, at 246 n.46.

[220] *See* Williamson, *Economics*, *supra* note 40, at 552–53. *See generally* Williamson, *supra* note 217; Coase, *supra* note 40.

[221] Williamson defined the "transaction" as the transfer of a good or service "across a technologically separable interface." *Economics*, *supra* note 40, at 552.

[222] *Id.* at 555.

[223] *Id.* at 550.

[224] *Id.* at 559.

[225] Williamson, *Governance*, *supra* note 40, at 239–40.

[226] *See, e.g.*, WILLIAMSON, *supra* note 217, at 114; Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1765–73 (1989) (discussing the property-rights theory); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 302–03 (1978); Williamson, *Economics*, *supra* note 40, at 559; Williamson, *Governance*, *supra* note 40, at 241–42 (suggesting that unenforceability of contract clauses prohibiting opportunistic behavior could make the firm a more efficient governance structure for long-term commercial relationships). Scholars often use the term "contractual" to refer to any kind of (usually presupposed) exchange/market relationship. *See* D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 12 & n.63 (2009) (noting that when scholars refer to "relational contracts," they are often referring to non-legal dimensions of exchange relations); *see also* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978). Many theorists of the institutional structures for coordinating

of firms and markets almost interchangeably with employment and contracting.[227] Coase suggested, for example, that when an entrepreneur wanted a long-term but flexible agreement, and did not want to work out important details ahead of time, the legal template of contract—which requires that parties specify their rights and obligations with some certainty upfront—was unsuitable.[228] In this case, the entrepreneur must use the employment relationship, or firm, which afforded the entrepreneur more open-ended authority.[229] Coase's account thus restates the very reason judges and treatise writers in the 19th century incorporated master–servant relations into contracts for labor services—to grant more discretionary control to the employer than that afforded by contract.[230]

Also evocative of the intimate relationship between conceptions of the firm and employment, firm theorists have conceptualized the firm as a superior governance structure for coordinating a complex division of labor, or multilateral relations in production. Alchian and Demsetz, for example, suggest that firm production might be desired when production involved a complex division of labor, making it difficult to coordinate through a contract, which contemplated a bilateral relationship.[231] Make-or-buy decisions would depend on how best to realize the advantages of cooperative production—production based on the joint use of inputs.[232] They reject Coase's notion that the command relation defines the firm; however, their analysis of how to reduce shirking and meter individual productivity suggests that the firm is more

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resources in production have complicated the binary firm–market taxonomy, proposing new governance forms like a "network," focusing more on informal dimensions of commercial relationships, and/or defining organizational forms in terms other than the legal relations that structure them. *See, e.g.*, OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 16–18 (1985); Reinier Kraakman, *The Durability of the Corporate Form*, *in* THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 147 (Paul DiMaggio ed., 2001) (emphasizing the centrality of the corporate form even in networks); Smith & King, *supra*.

[227] *See, e.g.*, Williamson, *supra* note 217, at 113–14. In discussing the putative trade-off between flexibility and calculability associated with firms and markets, respectively, Williamson argues that the firm offered the advantage of control (and thus greater calculability) through the employment relationship. *See* WILLIAMSON, *supra* note 217, at 78; Alchian & Demsetz, *supra* note 91, at 783 (equating the capitalist "firm" with the "employer"). *See generally* Matthew T. Bodie, *Participating as a Theory of Employment*, 89 NOTRE DAME L. REV. 661 (2013).

[228] Coase, *supra* note 40, at 391–92.

[229] *Id.*

[230] TOMLINS, *supra* note 85, at 283–84.

[231] *See* Alchian & Demsetz, *supra* note 91, at 794.

[232] *Id.* at 779; *see also* Bodie, *supra* note 227, at 696–97.

efficient when most input owners contribute primarily the ability to work and not other assets.[233]

Robert Gibbons has focused on property ownership to illustrate the firm–employment connection: "Making" an input to production entails purchasing labor effort and the other supplies needed to make the input from separate suppliers—the supplier of labor effort (the employee) does not possess the other supplies.[234] A "buy" decision means purchasing labor effort and complementary supplies from a supplier who possesses both, and who has already combined them into a completed input for sale.[235] In major economic theories of the firm, employment largely distinguishes the firm from the market.[236]

C. The Firm and the Legal Tests

The industrial firm was the empirical model for Coase's theory of the firm and the legal tests for employment status.[237] As both bear its imprint, it should be unsurprising that the firm–employment connection is immanent in the legal tests for employment status. For example, under the legal tests, unskilled workers are more likely to be employees than independent contractors.[238] Hiring unskilled workers, particularly in an economy where labor supply exceeds demand, suggests the entrepreneur is "making" a production input. The entrepreneur expends few resources to search the market for no-frill labor effort. Unskilled work and the entrepreneur's ownership of the tools of production also suggest a "make" decision under Gibbons's theory: the "upstream party"—the employee—contributes effort, not effort plus assets.[239] Under a transaction-cost theory of the firm, supplying the tools of production and requiring workers to undergo in-house training augur firm production as well. These elements suggest asset specificity and high uncertainty regarding whether the entrepreneur will find labor possessing the desired knowledge on the market. Whether the supplier sells its services to others, or "whether or not the one employed is engaged in a distinct occupation or business,"[240] is also a measure of asset specificity and uncertainty. Similarly, under Gibbons's theory, an upstream party in a market with one buyer is an employee.[241] Likewise, under Coase's and Williamson's theories, firms would be expected to incur costs in ex post

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[233] *See* Alchian & Demsetz, *supra* note 91, at 784.

[234] *See* Robert Gibbons, *Firms (and Other Relationships), in* THE TWENTY-FIRST-CENTURY FIRM, *supra* note 226, at 186, 188–89.

[235] *Id.*

[236] *See* Bodie, *supra* note 227, at 664–65.

[237] Coase, *supra* note 40, at 398.

[238] *See, e.g.*, *Kansas Decision*, 734 F. Supp. 2d 557, 599 (N.D. Ind. 2010).

[239] Gibbons, *supra* note 234, at 188–89.

[240] RESTATEMENT (SECOND) OF AGENCY § 220(2)(b) (AM. LAW. INST. 1958).

[241] Gibbons, *supra* note 234, at 189.

monitoring and sanctions in organizing production, but expect the entrepreneur who is contracting with independent suppliers to incur more of its costs in ex ante negotiations. Consistent with this expectation, supervision of the work and a right to discipline the worker are evidence of employment under the legal tests. The extent to which the work is part of the alleged employer's "regular business" more explicitly asks whether the worker is part of a firm, and therefore more likely an employee.[242]

D. Destabilizing the Firm: The FedEx Enterprise as "Market"

Due to the close relationship between socio-legal conceptions of the firm and employment, the tension between master–servant authority and contract within employment tends to destabilize the conventional boundary between firms and markets. As conceived by major theories of the firm, contractual relations in the market tend to be direct, bilateral, discrete, and putatively equal. Likewise, relations of production within a firm tend to be hierarchical, multilateral, and indefinite. The tension between bargaining and producing in employment reappears as a tension within the firm: employment as a contract is direct and bilateral, but employment is also the legal rationale for the firm's centralized control over multilateral and often indirect relations in production.[243]

1. Transforming FedEx into a Market

Within the terms of major firm theories, like those of Coase, Williamson, Gibbons, and Alchian and Demsetz, FedEx is clearly making delivery services, not going to the market to buy them.

FedEx does not incur costs in searching the market for contractors with certain skills, experience, and equipment.[244] It hires unskilled workers, who furnish no specialized assets, through a standardized application.[245] Likewise, FedEx does not incur costs in negotiating or drafting a contract, given that drivers sign a standardized, non-negotiable agreement.[246] The required training and FedEx's provision of the tools of work also reflect asset specificity. By hiring unskilled workers and training them, FedEx minimized the risk that the experience and skill required for the job might be unavailable on the market, particularly given that

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[242] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(h).

[243] *See* Alchian & Demsetz, *supra* note 91, at 794 (stating that in firm production, "a central common party to a set of bilateral contracts facilitates efficient organization of the joint [inputs]").

[244] *See* Coase, *supra* note 40, at 391–92.

[245] FedEx Home Delivery, 361 N.L.R.B. No. 55, at 3 (2014). Under Gibbons's theory, FedEx is purchasing labor alone from the drivers, not labor plus assets. FedEx is the only buyer on the market for these services, and the drivers sell only to FedEx. They have little ownership and control over assets useful in the production of other goods or services. *See* Gibbons, *supra* note 234, at 189.

[246] *FedEx*, 361 N.L.R.B. No. 55, at 3.

FedEx was the only buyer. Instead, FedEx incurred costs in training, monitoring, and disciplining workers.[247]

FedEx's control over delivery routes and daily workloads—its control over the initial route assignment, its monitoring of business volume, its frequent adjustment of route and package assignments—reveals a firm directing resources through fiat as it determines an efficient division of labor.[248] The price mechanism is not determining each driver's business volume. The route assignment also suggests firm production due to its high asset specificity from the driver's perspective. To receive a route, the driver must first make costly, "durable, transaction-specific investments,"[249] or invest in resources, like a FedEx vehicle and training, that are difficult to redeploy to other uses.[250]

Nor did FedEx expose itself to uncertainty as to the price it supposedly pays for its delivery services; FedEx could largely predetermine its labor costs.[251] Similarly, the company absorbed most of the risk of cost increases in non-labor inputs to production. While it externalized some production costs onto drivers, like fuel and vehicle maintenance, FedEx also assisted drivers with these costs.[252] Further, FedEx realized economies of scale, for instance, in purchasing insurance for drivers.[253] In sum, FedEx did not go to the market, repeatedly, to acquire the same service—a service for which it is the only buyer—from thousands of different independent suppliers. Regarding the proposed trade-off the firm offered between flexibility and calculability, FedEx left nothing to chance.

However, the contradiction between master–servant authority and contract enabled FedEx and the courts to transform a firm, as conceived by major economic theories of the firm, into a market. The IC decisions masked "make" decisions—FedEx's purchase of *labor effort*—as "buy" decisions—FedEx's purchase of *labor*, labor effort absorbed and transmuted into a completed service.[254] Thus, the IC decisions reinterpret performance evaluations and disciplinary action against the drivers as contractual negotiations between the drivers and FedEx. Supervision and ex post correction, characteristic of a firm transaction, become the activities of ex ante information gathering and negotiation, indicative of

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[247] *See Kansas Decision*, 734 F. Supp. 2d 557, 592 (N.D. Ind. 2010).

[248] *See* Alchian & Demsetz, *supra* note 91, at 794; Coase, *supra* note 40, at 392.

[249] *See* Williamson, *Economics*, *supra* note 40, at 555.

[250] Drivers were not allowed to use their trucks for other commercial purposes during the 45–55 hours they were dedicated to FedEx. Outside of these hours, drivers could use the trucks for other purposes so long as they removed or covered all FedEx markings. *FHD*, 563 F.3d 492, 498 (D.C. Cir. 2009).

[251] *See Kansas Decision*, 734 F. Supp. 2d at 567.

[252] *FHD NLRB Decision*, Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *29, *55–56 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[253] *Id.* at *55.

[254] *See supra* Part II.B.1.

a market transaction.[255] Judge Miller, following FedEx's cues, suggested training drivers was a cost to FedEx of transacting on the market—a "buy" decision. It was a "precondition" to contracting, an asset drivers brought with them to the bargaining table.[256] In interpreting FedEx's cancellation of a driver's otherwise automatic contract renewal as an aborted negotiation rather than an employee termination, the IC decisions also depicted what resembled a firm under economic theory as a market. A decision to cancel a driver's automatic contract renewal became an ex ante decision not to contract in the market, a decision not to engage in "repeat business."[257] When drivers come to oversee more than one route, FedEx, not the price mechanism, is directing resources in production. The drivers' so-called "business expansion" looks very much like a firm's promotion of a driver up the internal job ladder. FedEx is coordinating hierarchical relations in production. FedEx and the IC decisions, however, suggested that the decentralized market conferred the opportunity, rather than FedEx.

2. Shift Replacements or Entrepreneurialism?

FedEx and the IC decisions engaged the ambiguity between contracting and producing not only to redefine relations between FedEx and each driver, but also to redefine relations among drivers. In doing so, it dissolved the FedEx bureaucracy into a nexus of contracts. Multilateral cooperation among coworkers in production merged into bilateral relations between contracting parties in the market.

FedEx and the courts ruling in its favor argued that the drivers were entrepreneurs, because they could "hire" others to perform their work for them. Drivers could take advantage of expanding business volume on their routes by hiring multiple drivers, or could decide not to work at all.[258] The courts and FedEx contended the latter was "not involved" in any of these transactions between one driver and another.[259] However, any replacement and extra drivers must already have formed a work relationship with FedEx: they must undergo the required orientation, drug screening, and road test, and agree to follow all the rules in the written agreement.[260] Moreover, FedEx could still disapprove of anyone a

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[255] The drivers' pay formula also suggested they produced delivery services in a firm, not a market. The formula was based primarily on the time drivers committed to FedEx, not by project. It included seniority bonuses. FedEx also paid bonuses based on the collective performance of workers at a terminal. *Kansas Decision*, 734 F. Supp. 2d at 567–68.

[256] *Id.*

[257] *Kansas Decision*, 734 F. Supp. 2d at 595 (quoting Home Design, Inc. v. Kansas Dep't of Human Res., 2 P.3d 789, 793 (2000)).

[258] *FHD*, 563 F.3d at 499.

[259] *Id.*

[260] FedEx Home Delivery, 361 N.L.R.B. No. 55, at 7 (2014).

driver wanted to hire.[261] In other words, drivers could only "hire" their coworkers.

Unsurprisingly, drivers usually used replacements when they needed a day off for illness or another reason.[262] Or they rented an extra truck and used one of FedEx's temporary drivers during the holiday season, when they needed the help to complete their assigned deliveries.[263] This looks very much like having a coworker cover a shift for you, or getting a coworker to help you with your assigned work. However, the courts' rulings for FedEx reinterpreted the company's centralized control over a complex division of labor in production as the drivers bargaining with one another in the market. Multilateral cooperation among drivers, as they worked under FedEx's supervision and control, became bilateral contracts between drivers in a decentralized market. Producing became contracting, and the fiat of the entrepreneur became the price mechanism.[264]

Through the interpretation of shift replacements as incidents of contracting rather than producing, the multi-district-litigation court also negated another factor probative of employment under the applicable legal test: the extent of the putative employer's control over the worker's schedule. Judge Miller acknowledged that FedEx tightly controlled drivers' schedules.[265] Drivers had to arrive within a certain window in the morning—after the packages became available but early enough to complete the nine to eleven hours of work FedEx assigned per day.[266] They had to complete deliveries by a certain time in the evening and meet windows negotiated by FedEx for certain customers.[267] Judge Miller found, however: "Contractors' ability to hire assistants and replacement drivers, though, even under FedEx's approval requirements, allows them to have *complete freedom* in their schedules."[268]

3. From Firm to Market, From Bureaucracy to Nexus of Contracts

In fact, Judge Miller took the interpretation of shift replacements as an incidence of bargaining in the market rather than producing within a firm to a nonsensical extreme. The judge recognized that FedEx indeed controlled and monitored "almost every aspect"[269] of the drivers' work, from their schedules to their appearance to how they drove, kept

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[261] *FHD NLRB Decision*, Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *40 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[262] *Id.* at *42.

[263] *Id.* at *10.

[264] *See* Coase, *supra* note 40, at 388.

[265] *Kansas Decision*, 734 F. Supp. 2d 557, 591 (N.D. Ind. 2010).

[266] *Id.*

[267] *Id.*

[268] *Id.* (emphasis added).

[269] *Id.* at 593.

records, handled packages, and interacted with customers.[270] He noted that all of this normally would be evidence of employment under the governing legal test.[271] But, he argued that here it was not because the drivers were not "personally" subject to any of these controls: FedEx controlled the *positions* but not the *drivers*.[272]

This is the very definition of bureaucracy. The FedEx enterprise resembled not just any firm as might be faintly adumbrated by economic theory; it resembled the consummate firm—a bureaucracy as conceptualized by Max Weber.[273] The more the allocation, pacing, and direction of the work, as well as the skill and knowledge of the work, is embedded in the machine[274]—here the FedEx logistics system—and the more closely it is monitored, the more indifferent the firm becomes to whether it's Mary or Lee sitting in the delivery truck. The drivers are interchangeable. But this separation of the person from the position reveals a bureaucracy—the consummate expression of a firm.[275]

Another dimension of the tension between master–servant status relations and contract comes to the fore here: As a master–servant relationship, employment is personal. As a contract, it is impersonal and presumably assignable. Here, the court construes the fungibility of drivers as evidence that the relationship is impersonal—the kind of arms'-length relationship found in the market.[276] The drivers' interchangeability among standardized routines in a tightly integrated operation becomes evidence of FedEx's lack of control over their work.

This exploitation of the tension between master–servant authority and contract not only redefines a firm as a market, but thwarts the policy purposes of collective bargaining and minimum-wage law: The impersonality of bureaucracy—its indifference to the personal characteristics of those filling its slots—was possible precisely because the drivers were interchangeable, low-skilled workers. The very evidence that suggested their status as workers with little bargaining power—workers within the contemplated scope of the NLRA and minimum wage and hour law—became evidence of independent contracting.[277] The drivers' fungibility, their *disposability*, became evidence of their autonomy. The more that drivers were "small cog[s] in a ceaselessly moving mechanism

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[270] *Id.* at 573, 589, 593.

[271] *Id.* at 589–90.

[272] *Id.* at 596.

[273] MAX WEBER, 1 ECONOMY AND SOCIETY 956, 988 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922).

[274] *Id.* at 1394–95.

[275] *See id.* at 218–19.

[276] *See Kansas Decision*, 734 F. Supp. 2d 557, 596, 601 (N.D. Ind. 2010).

[277] *See supra* note 34.

which prescribes . . . an essentially fixed route of march,"[278] the more they looked like entrepreneurs.[279]

Judge Miller's association of driver autonomy with FedEx's purported indifference to who drove its trucks is belied also by FedEx's bodily inspection of drivers. Drivers had to submit to physical invasions not associated with civilian independent contracting—periodic drug screenings and physical examinations, and for some drivers, strength tests.[280] These criteria for the job, as well as the driving record and criminal background check, could not be assigned from one body to another.

The IC decisions evoke Weber's comment about capitalist work:

> The private enterprise system transforms into objects of "labor market transactions" even those personal and authoritarian–hierarchical relations which actually exist in the capitalistic enterprise. While the authoritarian relationships are thus drained of all normal sentimental content, authoritarian constraint not only continues but, at least under certain circumstances, even increases.[281]

The courts conflate the *de*personalization of bureaucratic domination with the purported *im*personality and autonomy of the market.

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[278] WEBER, *supra* note 273, at 988.

[279] The case records reveal few scant instances where drivers availed themselves of the fabled entrepreneurial opportunity. In *FHD*, only one driver—a multiple-route driver—used his truck for a commercial purpose apart from serving FedEx. *FHD NLRB Decision*, Nos. 1-RC-22034, 1-RC-22035, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *52 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009). Three out of thirty-three drivers held multiple routes, and two of these drivers relied on spouses to help with delivery volume. Not a single driver hired a full-time substitute. *Id.* at 41. Drivers used substitute drivers only for illness or vacation. Further they usually selected substitute and extra drivers from a pool of replacement drivers FedEx made available for that purpose. *Id.* at *38. The multi-district-litigation record indicated that drivers rarely hired full-time substitutes or supplemental drivers. Shift replacements appeared to cost drivers money rather than increase their earnings. *See* Grella, *supra* note 14, at 899–900. It is unclear the extent to which drivers at other terminals created independent businesses, but evidence is sparse. *See id.*; *see also* GREENHOUSE, *supra* note 8, at 123. Regardless, the IC decisions are unable to explain why these opportunities are "entrepreneurial," and not those available to a resourceful and smart employee.

[280] Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1016, 1023 (E.D. Mo. 2013), *rev'd and remanded sub nom.* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015); Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 331 (Ct. App. 2007).

[281] WEBER, *supra* note 273, at 731.

4. The Legitimacy of the Firm

Classic theories of the firm have not explained firm boundaries very well.[282] Furthermore, financialization, globalization, technological advances, and other economic changes often uncouple governance types from their theorized costs and advantages. The theories have not provided a refutable explanation for today's buyer-driven supply chains, for example.[283] These tend to centralize decision-making across firms.[284] Other forms of production decentralize decision-making within firms.[285] Classic theories of the firm tend to share the major flaw of assuming that the boundaries of the business form will coincide with the boundaries of

[282] For instance, Williamson's theory that differences between contracting and agency costs could explain make-or-buy decisions did not explain mergers and acquisitions in the 1980s. Charles Perrow, *Economic Theories of Organization*, 15 THEORY & SOC'Y 11, 24–25 (1986). Efficiency hypotheses, like those of Williamson, tend to assume that competition and technology, as exogenous and socially transcendent forces, select institutional forms and thereby produce efficient outcomes. To the extent that efficiency hypotheses have been amenable to testing, their explanatory success has been limited. *See* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 493–94, 499 & 503–04 (1985) (explaining Williamson's theory of economic organization and discussing some of its explanatory limits); Perrow, *supra*, at 19 n.19 (critiquing Williamson); *see also, e.g.*, WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 26–29 (1997) (refuting efficiency as an explanation for the adoption of the corporate form by large industrial firms in the United States); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE ix–x (1994) (arguing that an efficiency theory is inadequate to explain why a small group of large financial intermediaries holding large equity blocks did not arise in the United States in lieu of dispersed shareholders).

[283] Non-property relations do not necessarily impose greater information costs than firms today. Communications and logistics technology have improved information flow across proprietary firm boundaries. Advanced technology also helps to reduce the metering of individual productivity across property lines in buyer-driven supply chains. *See* WEIL, *supra* note 9, at 60–63. Further, market position enables powerful buyer–firms to avoid the trade-off between control and the risk of decreases in product demand. In addition to advanced technology, for example, Wal-Mart controls suppliers via its near monopsony position. The company wants a flexible relationship with supplier firms akin to at-will employment. It uses market power rather than property ownership and employment to achieve this control. By de-integrating or refusing to integrate, large firms can insulate themselves from liability, and public scrutiny, and they do not have to buy or maintain plants and equipment. *See* Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2276–77 (2014) (highlighting Wal-Mart as a modern example of a monopsony); WEIL, *supra* note 9, at 159–160, 167 (discussing benefits of formally de-integrated supply chains to large retailers); *see also* Granovetter, *supra* note 282, at 496–97.

[284] Kraakman, *supra* note 226, at 148.

[285] *Id.*

the productive enterprise.[286] The FedEx cases present another counterexample.

Nonetheless, in trying to explain the existence of firms, theories of the firm implicitly provide a legitimating account of the firm as a business form. Classic theories of the firm, like those expostulated by Coase and Williamson, ground the social legitimacy of the corporation in the efficient production of goods and services: The warrant for the corporation is its ongoing coordination of a productive enterprise.[287] In this regard, classic theories of the firm stand in counterpoise to theories that promote the corporation as a "nexus of contracts," a "bundle of assets," or a tool for financial speculation, accounting manipulation, and regulatory evasion.[288]

In redefining the FedEx work relationship as market production rather than firm production, the IC decisions reject the classic conception of the firm. They redefine the normative relationship between the corporate form and the productive enterprise.

5. Technology and Service Work

Advances in technology and distinctions between service work and industrial manufacturing are two sources of institutional disruption in contemporary work relations. This Section hypothesizes that these contributed to making salient the ambiguity between bargaining and producing in the FedEx disputes.

The FedEx bureaucracy is relatively invisible compared to the bureaucracy of an industrial manufacturing enterprise. The advanced logistics and communications technology that FedEx uses replaces the heavy integrated machinery and constant eye of the foreman typical of industrial manufacturing. FedEx organizes, directs, and paces the work

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[286] *See, e.g.*, Oliver E. Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1202 (1984) (discussing corporate and firm governance interchangeably and defining the firm as a governance structure for facilitating transactions of goods and services); *see also* GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA 3 (2009) (describing the transformation of the corporation from a servant of industrial enterprise into a legal device for increasing market valuation); Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, 53 MOD. L. REV. 731, 732 & 736–37 (1990) (describing the often attenuated relationship between the boundary of the formal business entity and boundary of the integrated production entity).

[287] *See* Collins, *supra* note 286, at 732 & 736–37; *supra* Part IV.A.

[288] *See* DAVIS, *supra* note 286, at 60; DiMaggio, *supra* note 226, at 4; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310–11 (1976). Scholars generally use "nexus of contracts" as a theory of firm ownership and control, a hypothesis about relationships among owners, financiers, and management, rather than relationships among workers and management. This Article suggests, however, that the IC decisions offer a nexus-of-contracts theory of the firm based on relationships between workers and management.

largely through use of these technologies. For instance, barcode technology enables FedEx to monitor drivers' locations and delivery times.[289] The control is relatively invisible.

Distinctions between industrial manufacturing and service work may also have played a role. The production of FedEx delivery services takes place not in a factory, and not only in FedEx terminals, but along thousands of miles of roads, and in the doorways of millions of residences and businesses. Production and consumption occur simultaneously in service work (i.e., the delivery driver produces the service as the costumer consumes it).

FedEx did not accomplish its direction of resources through gears and conveyer belts in a factory. It accomplished its fiat, its centralized control over a multilateral division of labor in production, through logistics and communications technology, and over an enormous geographic space not dedicated to FedEx production alone. To the IC courts, the FedEx bureaucracy appeared as a nexus of bilateral contracts among drivers in a sprawling market.

It is unlikely that any court would find that pre-specifying and embedding the work process in machinery is evidence of independent contracting—evidence that the alleged employer is not controlling the means of the work. However, the IC decisions, particularly Judge Miller, fail to appreciate the logistics machine of FedEx. FedEx's control over drivers through sophisticated technology appeared as freedom.

6. Institutional Work: Contract as Bilateral, Direct, and Exclusive

To flatten the FedEx bureaucracy into a "nexus of contracts,"[290] the IC decisions perform institutional work. In particular, the decisions invoked institutional features associated with contract relations: the contract as a bilateral, direct, and exclusive relationship. For instance, the *FHD* majority claimed that FedEx was "not involved" in the relationship between drivers and substitutes, extra drivers, and helpers: "[C]ontractors have the ability to hire others without FedEx's participation," and "substitutes and helpers have been hired without FedEx's involvement."[291] The majority also characterized the promoted driver's supervision of other FedEx drivers as a distinct employment relationship in which FedEx was uninvolved.[292]

By emphasizing the contract as direct, bilateral, and exclusive, the courts transformed multilateral relations among coworkers in the productive process into bilateral contracts in the market. The work of

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[289] *FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *32 (Sept. 20, 2006), *vacated*, 563 F.3d 492 (D.C. Cir. 2009).

[290] DAVIS, *supra* note 286, at 60; Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 302 (1983).

[291] *FHD*, 563 F.3d at 502–03; *see also Kansas Decision*, 734 F. Supp. 2d 557, 596 (N.D. Ind. 2010).

[292] *FHD*, 563 F.3d at 499.

FedEx drivers is deeply embedded in a logistics system and managerial hierarchy as imperious as the assembly line of an industrial firm. However, by constructing the relationships among drivers as contractual relations that *excluded* FedEx, the decisions seem to make the FedEx logistics machine and bureaucracy disappear.[293] In rendering the integrated enterprise of FedEx largely invisible, this institutional work created the illusion of independent business activity among drivers.[294]

V. CONTRACTUAL ENDS OR THE MANNER OF PERFORMANCE?

This Part examines how the IC decisions dealt with the second interpretative ambiguity in the employment contract identified in Part II—the ambiguity between contractual duties and the way they are performed. It shows that this ambiguity, like the ambiguity between the activities of bargaining and producing, created discord among courts considering the employment status of FedEx drivers. It also shows another way in which the IC decisions constructed the written contract as a marker of non-employment,[295] apart from positioning it as a temporal barrier between bargaining and producing.

As explained in Part II, the law's attempt to assimilate master–servant relations to contract produced a peculiar kind of contract in employment. Unlike other contracts, the employment contract gave one party a right to determine *how* the other party performed its contractual duties. The means–ends standard for employment status thus asks whether one party has a right to determine not only the contracted-for ends of the deal, but also the "means" of performing them. Parties may flex their muscles to insist that their contract include certain obligations, yet neither has a right to control how the other performs those obligations. Distinguishing employment from independent contracting therefore depends on being able to distinguish between contractual duties and the manner of their performance in order to evaluate whether

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[293] *Id.* at 499–500.

[294] A driver's permission to sell a route to another FedEx driver provided opportunity to profit, albeit in a one-time sell, for a few drivers. In the *FedEx Home Delivery* dispute, most new drivers received routes for free from FedEx, limiting the emergence of a viable secondary market in FedEx jobs. *See FHD NLRB Decision*, 2006 NLRB Reg. Dir. Dec. LEXIS 264, at *46–48 ("[T]he ability of contractors to transfer their rights should make their routes marketable, but . . . route value might decline if FedEx Home added new routes or existing routes were routinely available."). Most who quit their positions at FedEx did not sell their routes, and terminated drivers were not allowed to sell them. *Id.* There is no evidence in any of the case records that any FedEx driver created a business model out of trading FedEx jobs. *See, e.g.*, FedEx Home Delivery, 361 N.L.R.B. No. 55, at 17 n.82 (2014). It is also unclear why permission to sell one's job is evidence that the position affords entrepreneurial opportunity.

[295] For a more detailed discussion of how this ambiguity engenders inconsistency in legal disputes over employment status, see Tomassetti, *supra* note 33, at 315.

one party is controlling the latter, or just the former. As explained in Part II, the problem is that the fusion of master–servant authority with contract erases the distinction between contractual duties and how they are performed. The employment contract collapses contractual formation and performance. The employer and employee do not consummate a contractual bargain and then proceed to perform it.

This conundrum puts the written agreement in an ambiguous position in employment status disputes. It permits two possible interpretations: First, does anything stated in a written agreement necessarily refer to a contractual obligation and not the manner of satisfying it? Therefore, if the alleged employer is not telling workers to do anything that is not in the contract, is it not controlling the work? Likewise, if the alleged employer is closely supervising the work, but only to ensure workers conform to contractual specifications, is it not controlling the work?

Or, by contrast, are some things stated in the contract not really contractual duties—do they actually give one party a right to determine how the other performs contractual duties or do they collapse the distinction?

The IC decisions take the first approach with respect to the Operating Agreement (OA) drivers signed with FedEx. Judge Miller and the D.C. Circuit found that anything stated in the written contract was a contractual duty by virtue of its expression there.[296] The written contract could not give one party a right to control how the other performs a contractual duty.[297] Therefore, because FedEx was not supervising and directing the work in any way that was inconsistent with or extraneous to the written contract, it was not their employer: It was not telling the drivers *how* to perform their contractual obligations, because these *were* the contractual obligations.[298] The long, detailed OA (over sixty pages)[299] purportedly exhausted FedEx's authority over drivers and described their relationship ex ante with reasonable certainty.[300] The document drivers signed became an institutional marker of non-employment: it formed a firewall between producing and contracting, protecting the latter from contaminating the former, as it does in employment.

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[296] *See FHD*, 563 F.3d at 500–01; *Kansas Decision*, 734 F. Supp. 2d at 589.

[297] *Kansas Decision*, 734 F. Supp. 2d at 595.

[298] *Id.* (referring to work rules in the written contract as "result-oriented" and arguing, "FedEx doesn't have the right to dictate . . . specifics as to how contractors must complete their contractual obligations").

[299] *Operating Agreement*, *supra* note 136; 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).

[300] *Kansas Decision*, 734 F. Supp. 2d at 595 ("FedEx is bound by the terms and limitations set forth in the Operating Agreement.").

For example, Judge Miller repeatedly implied that the extensive elaboration of work in the OA established the precise bounds of FedEx's authority, and its lack of interest in controlling the work during production.[301] He acknowledged that "[v]arious 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 . . . ."[302] He continued, however, by stating that these requirements "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."[303] He presumed that everything in the OA, by purporting to state a contractual obligation, must necessarily refer to the "results" of the work and not the manner and means of the work: "FedEx's requirement that drivers comply with certain standards of conduct and obligations set forth in the Operating Agreement, however, illustrates FedEx's concern with the results of the drivers' work, not their method in performing the work."[304]

Both Judge Miller and the D.C. Circuit suggested that any supervision of the drivers to ensure that they were complying with specifications in the OA could not be evidence of employment: the company was not exercising extra-contractual discretion.[305]

The IC decisions also appealed to the written contract to reinterpret hallmarks of industrial employment. *FHD* interpreted the five-day workweek of industrial employment as more consistent with independent contracting than employment.[306] It reasoned that FedEx did not control the means of the work, since "it is undisputed the contractors are *only obligated* to provide service five days a week."[307] Judge Miller suggested that training was not weighty evidence of employment status, because the written agreement required drivers to be trained.[308] He also characterized features of the work typical of industrial employment as contractual undertakings by FedEx. With respect to assigning drivers nine to eleven hours of work per day, five days a week, the court stated, "FedEx is

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[301] *See, e.g.*, *id.*

[302] *Id.* at 589.

[303] *Id.*

[304] *Id.* at 592; *see also id.* at 594 ("Under the Operating Agreement, FedEx doesn't have the right to determine the drivers' means and methods of work, but retains the right to exercise control over the results of the drivers' work.").

[305] *FHD*, 563 F.3d at 501 (quoting N. Am. Van Lines, Inc. v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989); *Kansas Decision*, 734 F. Supp. 2d at 592.

[306] *FHD*, 563 F.3d at 499.

[307] *Id.* at 499 n.5 (emphasis added).

[308] *Kansas Decision*, 734 F. Supp. 2d at 593.

required to fulfill this obligation pursuant to the parties' agreement, so [the schedule] isn't necessarily indicative of employee status."[309]

Likewise, the D.C. Circuit suggested that many work rules pre-specified in the OA were not in this instance evidence of employment, because they were contractual obligations that described the service the drivers agreed to provide.[310] The court acknowledged that in other delivery-driver cases, including prior cases involving FedEx drivers, judges found certain features of work relevant to the question of employment status—rules regarding training, insurance, uniforms, grooming standards, vehicles, performance bonuses, the inability to turn down assignments, and the five-day workweek.[311] The majority reasoned that in this case, "those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship."[312]

The most extreme example of using the ambiguity between contractual duties and their performance to negate evidence of employment under the legal tests involved Judge Miller's interpretation of the drivers' right to quit in the written contract. The judge noted that FedEx assigned each driver nine to eleven hours of package deliveries per day, and that drivers had to deliver every package assigned to them that day.[313] He acknowledged, "Requiring workers to accept assigned work weighs in favor of employee status."[314] However, he claimed, "[C]ontractors can terminate their contracts upon thirty days' notice, in which case, they would be relieved of any future work assignments."[315] The right to quit is evidence that the drivers are employees under the governing legal tests.[316] By default, an employee can quit without incurring contractual liability.[317] Because the OA states the driver's at-will right, however (modified only with a notice requirement), the court interpreted it to negate not only evidence of employment status, but also to negate evidence that FedEx had the right to assign daily workloads.[318]

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[309] *See id.* at 589–90. *See also* [FedEx's] Response to Plaintiffs' Renewed Statement of Undisputed Facts at paras. 18, 21, Schwann v. FedEx Ground Package Sys., Inc., No. 11-11094-RGS, 2013 WL 3353776 (D. Mass. July 3, 2013), *withdrawn*, 2015 WL 501512 (D. Mass Feb. 5, 2015) (disputing that it "retained any rights" to monitor drivers or determine what packages they delivered, because the drivers and FedEx "mutually agreed to grant rights to one another" in the Operating Agreement).

[310] *FHD*, 563 F.3d at 498.

[311] *Id.* at 498–501.

[312] *Id.* at 501.

[313] *Kansas Decision*, 734 F. Supp. 2d at 589.

[314] *Id.* at 589–90.

[315] *Id.* at 590.

[316] *See* Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 92 (Kan. 2014).

[317] *Id.*

[318] *Kansas Decision*, 734 F. Supp. 2d at 590.

Other courts considering the employment status of FedEx drivers differed in resolving the ambiguity between contractual duties and their manner of performance. The Ninth Circuit, for example, found that the OA was *not* limited to stating only the results of the work, but that the agreement gave FedEx the (non-contract-like) right to control the drivers' work.[319] And, contrary to the D.C. Circuit, it argued that "no reasonable jury could find that the 'results' sought by FedEx includes detailed specifications as to the delivery driver's fashion choices and grooming."[320]

From a doctrinal perspective grounded in the distinction between a contract and a master–servant relationship, the IC decisions are incorrect in their interpretation of the written document drivers signed. The OA does not specify the essential details of the bargain or limit the discretion of FedEx production. Despite its recitations to the contrary,[321] it reads much like a master–servant relationship.[322] Some of its provisions nearly recite the legal definition of employment. For example, drivers agree to follow supervisory instructions ("[c]ooperate with" FedEx employees).[323] Some expressly give FedEx a right to determine the terms and conditions of work during the course of the work. For instance, drivers agree to follow whatever appearance and grooming standards FedEx might promulgate from "time to time,"[324] to deliver packages not only on their own route, but "in such other areas as Contractor may from time-to-time be asked to service,"[325] and to service a route as changed by FedEx at its discretion.[326] Some provisions contemplate that FedEx will exercise

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[319] Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989 (9th Cir. 2014) ("What matters is what the contract, in actual effect, allows or *requires*." (emphasis added)); *see also* Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1042 (9th Cir. 2014).

[320] *Alexander*, 765 F.3d at 990. *Compare* Huggins v. Fed. Express Corp., No. 4:06-CV-01283 SNL, 2008 WL 2037416, at *2–3 (E.D. Mo. May 9, 2008) (interpreting contractual work rules regarding conduct, appearance, customer service, and safety as "objectives" of the work and not evidence of FedEx's control over the means of the work), *rev'd sub nom.* Huggins v. FedEx Ground Package Sys., Inc., 592 F.3d 853 (8th Cir. 2010), *with Huggins*, 592 F.3d at 858–59 (holding that the contractual specifications the District Court interpreted as "objectives" were instead evidence that "FedEx retained the right to control at least some of the 'means and methods'" of the work).

[321] *See Kansas Decision*, 734 F. Supp. 2d at 560 (quoting the Operating Agreement, which states its purpose is to "set forth the mutual business objectives of the two parties intended to be served by th[e] Agreement—which are the results the Contractor agrees to seek to achieve" and that the "manner and means of reaching these results are within the discretion of the Contractor").

[322] *See* STEINFELD, *supra* note 82, at 15–17 (contrasting the employment and master–servant relationships).

[323] *Kansas Decision*, 734 F. Supp. 2d at 561.

[324] *See* Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 81 (Kan. 2014).

[325] *Kansas Decision*, 734 F. Supp. 2d at 570.

[326] *Id.* at 573–73.

ongoing discretion in its direction and supervision of the work. For example, drivers must complete work assigned daily.[327]

Some of the contractual terms the IC decisions cite as evidence of the drivers' entrepreneurial opportunity are actually evidence of employment. Take the example of route assignments and daily assigned work. FedEx and the IC decisions contend that route assignments are evidence of entrepreneurial opportunity because drivers could negotiate for a good route and had contracted-for property rights in their routes. Yet, FedEx did not commit contractually to a route assignment. It reserved the right to change a driver's service area unilaterally, upon a few days of notice.[328] Further, drivers agree to deliver packages outside their service areas and to relinquish deliveries in their service areas to other drivers "as requested" by management.[329] Drivers agreed to perform whatever work FedEx required each day.[330] Judge Miller admitted as much, noting, "FedEx drivers typically are required to flex packages. Flexing is the daily expansion or contraction of a driver's work area . . . ."[331] He likewise acknowledged that payment was based, in practice, on "expected daily work hours,"[332] and that FedEx had authority to determine the days drivers must work.[333]

All of these contractual "ends" leave it up to FedEx to determine the quantity of work the drivers will actually provide and what they will earn for it. The terms reveal that the negotiation process regarding the drivers' services do not end upon signing the agreement. The drivers and FedEx never arrive at an agreement regarding the essential terms of a contractual bargain. However, the IC decisions deemed every exercise of discretion resembling the traditional prerogatives of an employer as consistent with the contract and an exercise of contractual rights.

Many of the work rules the drivers contracted to follow required interpretation and implementation by supervisors. The "Standard of Service" the drivers agree to provide—the supposed "ends" of the work—is stated in broad terms that managers must fill out during the course of the work.[334] To do so, managers used thick manuals full of detailed

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[327] *Id.* at 570.

[328] *Cf.* Coase, *supra* note 40, at 391–92 (discussing the formation of a firm through an entrepreneur's preference for avoiding ex ante specification of significant details of the relationship).

[329] *Kansas Decision*, 734 F. Supp. 2d at 561.

[330] *Id.* at 589.

[331] *Id.* at 569.

[332] *Id.* at 567.

[333] *Id.* at 589 ("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.").

[334] *See id.* at 576*; see also In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., 273 F.R.D. 499, 505 (N.D. Ind. 2010).

policies that were generally unavailable to drivers.[335] Managers also had discretion regarding what alleged breaches of the OA to document in drivers' files.[336] Drivers had recourse to arbitration only after termination.[337]

Another court ruling on the drivers' employment status recognized the quantum dimension of the drivers' supposed contractual duties, arguing that the "right to interpret the OA and the other matters is in the sole hands of [FedEx]. By leaving such subjective interpretation to the discretion of management, the relationship between the [drivers] and [FedEx] ceases to be a partnership, metamorphasizing [sic] into a tightly controlled hierarchical employment model."[338] In sum, the "OA is a brilliantly drafted contract creating the constraints of an employment relationship with [single-route drivers] in the guise of an independent contractor model."[339] Where the IC decisions saw a congeries of equal parties in the market, this court saw a model of rational bureaucracy:

> The lack of objective, precisely defined guidelines either reflects a totally disorganized business, which [FedEx] is certainly not, or a highly motivated, well organized entity, which it is, that utilizes control and order in order to meet its successful economic goals.[340]

We think of contracts as delineating discrete obligations between two parties.[341] The FedEx contract, however, appears to describe the enterprise organization. The contract pre-specifies the work a little like an engineering blueprint. Its work directives deposit the drivers into a highly rationalized, tightly integrated productive process controlled from the top.[342]

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[335] *Kansas Decision*, 734 F. Supp. 2d at 576.

[336] *See In re FedEx*, 273 F.R.D. at 516.

[337] *Operating Agreement*, *supra* note 136, at para. 12.3.

[338] Estrada v. Fed Ex Ground, No. BC 210130, 2004 WL 5631425, slip op. at 9 (Cal. Super. Ct. July 26, 2004), *aff'd*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007).

[339] *Id.* at 5.

[340] *Id.* at 11. The Kansas Supreme Court and Ninth Circuit also interpret the significance of these contractual provisions in the opposite manner of the IC decisions. They suggest that an employer cannot transform the means of work into the ends of work merely by stating so in its contract. *See* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989–90 (9th Cir. 2014); Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 81 (Kan. 2014).

[341] *See* Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609, 623 (2006); *see also* MARK FREEDLAND, THE PERSONAL EMPLOYMENT CONTRACT 36–52 (2003); Judy Fudge, *The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 295 (Guy Davidov & Brian Langille eds., 2006).

[342] Even if many rules in the contract provide meaningful guidance, some courts still resist interpreting everything in the contract as a description of the ends of the work. Courts have been unwilling to construe rules involving uniforms, grooming,

The following thought experiment seeks to illustrate how the interpretative ambiguities in employment make it possible for judges to reinterpret even traditional employment as independent contracting.[343] It is also meant to illustrate the potential role of technology and service work in shaping the IC decisions—they make it easier to disguise the FedEx bureaucracy as a nexus of contracts in the market. Finally, the thought experiment is meant to reveal how distant the image of the firm constructed in the IC decisions is, from the firm as conceptualized by classic theories:

> You contract with the firm for a "proprietary right" to your assembly line workstation. You are responsible for rotating and inserting pins inside each widget that comes down the conveyor belt in a day. You have no set schedule, but the firm turns the machine on at 7:30 a.m. so you cannot begin before that. You can take breaks when you want, but the engineers control the speed of the machinery, and they have estimated how long it takes you to grab the widget, turn your wrist, pick up a pin, and insert it, and thus you will have nine to eleven hours of work per day. You must work so as not to hold up the next station. The machine turns off at 5:30 p.m.
>
> You have entrepreneurial opportunity: You receive payment per each widget and pin, and depending on customer demand, the machine will speed up and send more pins down per day. If it looks like you are falling behind, some of your work will go to a coworker or an automated widget rotator will be installed, decreasing your pay. But, you have five days to present a plan to us showing how you can take advantage of this increased "business volume" by finding a coworker to help hand you the pins or purchasing an expensive widget rotator.
>
> You also "invest" in your business/workstation, because you are responsible for paying for the oil to keep that part of the conveyor belt moving. As long as all these implements meet particular specifications set by the firm, you can buy them anywhere. Thus, you have the entrepreneurial opportunity to earn "profit" by finding cheap suppliers.[344]
>
> You can "hire" others to run your station, so long as they are coworkers or workers who the firm has already approved. You can expand your business if the firm allows you to manage a group of stations and hire coworkers to run them.

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demeanor, and work schedules as consistent with independent contracting. *See, e.g.*, *Alexander*, 765 F.3d at 990.

[343] I thank Larry Solum and Noah Zatz for suggesting this thought experiment.

[344] FedEx had argued that drivers had entrepreneurial opportunity because they could save money by locating cheap mechanics. Brief of Petitioner/Cross-Respondent at 31, *FHD*, 563 F.3d 492 (D.C. Cir. 2009) (Nos. 07-1391, 07-1436), 2008 WL 4425826.

> A few times a year, a supervisor will stand next to you all day. Otherwise, the firm does not supervise. It does monitor "customer service," however, through sensors that measure your speed and accuracy.

CONCLUSION

This Article posed the following question: How are courts able to interpret what very much looks like a "typical" relationship between an employer and employee as a relationship between two independent firms? The answer is that the employment contract itself is contradictory. The law's attempt to render master–servant authority as a contract collapses the distinctions between contractual formation and performance, and, as a result, between the activities of bargaining and producing, and between the "ends" and "means" of the work. It enables courts to negate the importance, or even reverse the meaning, of many of the factors probative of an employment relationship under legal tests. It enables courts to redefine features of industrial employment, like the opportunity for a promotion or permission to have a coworker cover a shift for you, into evidence of entrepreneurial opportunity. It also destabilizes the distinction between firms and markets.

In the past, many social actors participated in institutionalizing employment as a somewhat intelligible relationship. They developed patterns of activity, media, norms, and organizations to represent employment in the industrial age. The institutional markers of industrial employment bore no necessary relation to the "means" or "ends" of the work, however. They were settlements. For a time, they submerged, but did not ultimately resolve, the contradiction between servitude and equality embedded within the employment contract.

Today, the contradictory nature of capitalist work is reemerging. Several changes appear to be causing the institutional disruption: a movement among firms to shift risks to workers, a reorientation of the economy around financial markets putting ever more pressure on profits, the growth of the service sector, and technological revolutions in logistics and communications. Institutional disruption forces judges to confront the contradictory complex of servitude and equality that defines employment. It prompts efforts to reconcile the tension between servitude and equality by constructing new institutional features to mark an employment relationship.

FedEx reorganized many of the conventional, institutional markers of industrial employment in the drivers' work. These were markers that had purported to separate contractual formation from performance in employment. In an industrial manufacturing firm, for example, human-resources personnel might hire the worker and explain salary and benefits. Later, distinct personnel in a manufacturing division will probably supervise the worker on the factory floor. These organizational

markers separated the productive process from the sorting of workers in the labor market and the contracting process. Courts differed on how to make sense of FedEx's reorganization of employment and thus how to understand the drivers' work relationship with FedEx. In disorganizing these markers, FedEx enabled the contradiction within employment between master–servant authority and contract to resurface. As courts contend with the doctrinal manifestations of this contradiction, they work to re-institutionalize employment as an intelligible relationship. The IC decisions worked to re-institutionalize what looks much like what scholars have referred to as standard employment—a direct, full-time, long-term relationship between a worker and a large firm—as one of independent entrepreneurialism. By drawing upon the ambiguities embedded within the legal definition of employment, the IC decisions transform employment into independent contracting, a firm into a market, and a bureaucracy into a nexus of contracts.

This Article elaborated on one aspect of the institutional work that the IC decisions perform to reconstruct employment as a meaningful relationship: the decisions construe the written agreement the drivers sign with FedEx as a marker of independent contracting. First, they deposited the written agreement as a temporal barrier between bargaining and producing. FedEx shifts the temporal site of the contract signing from its location in an industrial employment arrangement to transform features of the relationship that would ordinarily be evidence of employer control over the "means" of the work into control over the "ends." Secondly, the IC decisions draw on the ambiguity in employment between the articulation of contractual duties and how they are performed to construct the drivers' written agreement as an institutional marker of independent contracting. The IC courts maintain that the document stated only the contractual ends of the drivers' work, not its means. They suggest that such a lengthy contract must exhaust FedEx's authority over drivers. It signals that FedEx has not reserved the open-ended discretion in production that defines employment and that FedEx will not continue to bargain over the terms of work during production. The ostensibly detailed, upfront elaboration of the work appears to establish and protect a sphere of independent production.

The contract has a double structure as an institutional marker. On the one hand, it is an "extra-legal data" point. Judges are generally most comfortable with understanding their role as classificatory rather than constitutive. They would like employment to be a social relationship that is already "out there," which they then fit within a legal category, not a relationship they create by legal fiat.[345] Thus, the contract has an extra-legal existence that judges recognize. For instance, parties do not need to intend to create legal relations to create an enforceable contract—they

[345] *See* Zatz, *supra* note 36, at 940.

must intend to be in a deal, however.[346] The contract also has a legal existence—it is a template and regulatory structure for private exchanges.[347] Written documents purporting to be "contracts" do not necessarily meet the requirements of a binding legal contract. In the many disputes over employment status, however, by assuming the trappings of a legal template, the written agreement gains doctrinal and normative valence as a marker of non-employment.

If the legal tests are ambiguous, and if the very definition of employment is contradictory, what was the basis for the author's critique of the IC decisions? The Article argued that the decisions and their reasoning are wrong for reasons of doctrine, policy, and the legitimacy of the business form.

First, many of the elements in the governing tests that the courts either negate or even transform into evidence of independent contracting bear on what should be the ultimate doctrinal question: Is the disputed relationship more like a contract or more like a master–servant relationship?

Second, this difference is relevant to the premise of most statutory work laws, including those at issue in the IC decisions—the NLRA and wage-and-hour law. The premise of most statutory employment protections is that a systematic disparity in bargaining power between workers and employers warrants statutory intervention. To say that an employer has a "right" to control the work, from the perspective of contract doctrine, is simply an observation that the employer will tend to get its way in the continuing bargaining over the work, as the employer directs the work and the employee decides whether to quit or to follow the employer's direction. It means the employer has enough power to determine unspecified, but significant, terms of the bargain as the work relationship proceeds. Thus, the right to assign daily work is evidence of employment, because it indicates that one party has enough power to determine the quantity of labor the worker must provide for a given price. Several factors in the legal tests for employment status are relevant to the doctrinal and policy questions, including skill and the right to discipline the worker.[348] They reflect that one party continues to "bargain" over the terms of the work, and get its way, due to superior

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[346] *See* Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954).

[347] Roland Barthes's semiotics is helpful here. Barthes theorized the "sign" as a "symbol" plus the "signified" thing. The written contract in these decisions works like Barthes's double-exposure or revolving-door explanation of a "myth." In the myth, the signifier is a sign with a new signified. Here, the sign is the contract as legal template, and by interposing the contract as an institutional marker, the arbitrariness of the association between the sign-as-signifier (contract-as-legal-template) and new signified (non-employment) is submerged in the association between the signified and signifier in the sign. *See* ROLAND BARTHES, MYTHOLOGIES 221–24 (Richard Howard & Annette Lavers trans., Hill & Wang 2012) (1957).

[348] RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

economic power. *FHD* and Judge Miller exploited the ambiguities in the employment contract to redefine control over production as equality in contracting.

For the same reasons, this Article is critical of the IC decisions' construction of the written agreement the drivers sign as a marker of non-employment. As an institutional marker, the written agreement purports to deconstruct the coincidence of domination in production and independence in contracting that defines employment. This is, of course, what written contracts purport to do—separate the process of contractual formation from performance. Not every piece of paper with "agreement" on the front achieves this purpose, however. The drivers' agreement does not delimit separate moments of contracting and production and protect the latter from the former. Rather than describe fixed obligations between FedEx and each driver, the agreement deposits the drivers into a tightly integrated process of production controlled by FedEx. By its terms, the agreement gives FedEx a right to determine the essential terms of the bargain during the course of the work. The IC decisions allow FedEx to use the written agreement to write around not only the legal test for employment status, but also around the contractual requirements of consideration and definiteness.

Finally, the Article suggests that the decisions rationalize a corporation whose boundaries bear no relation to the efficient production of goods and services, but instead seem calculated to evade statutory work protections.

Two modest changes in judges' approach to employment-status disputes would improve decision-making.[349] The first is already at hand:

(1) Use contract law. In determining whether a relationship is one of employment or independent contracting, the ultimate question courts are trying to get at is whether the relationship is more like an employment relationship or a contract. What distinguishes employment from other contracts involving acute power disparities is not the lopsidedness of specified terms. Employment entails a particular term giving one party open-ended authority. Courts could use principles from contract law involving consideration, definiteness, negotiation and closure, and good faith, to better get at the distinction: Do the ex ante

[349] The bifurcated analysis explained in the RESTATEMENT OF EMPLOYMENT LAW would also much simplify and improve legal reasoning in employment-status disputes. The Restatement recommends first looking at whether the alleged employer closely supervises the physical details of work. This is sufficient, but not necessary, to establish employment status. When the alleged employer does not exercise such control, which could be the case in unskilled work where supervision is unnecessary, or in the case of certain professional employees like doctors, the court would look to whether the alleged employer's control effectively prevents the service provider from providing the services as an independent businessperson. RESTATEMENT OF EMPLOYMENT LAW § 1.01 (AM. LAW INST. 2015). Under the RESTATEMENT, the FedEx drivers are clearly employees.

terms of the agreement include a quantity term? Or is it more like a master–servant relationship, where one party agrees to provide an indefinite amount of labor for a definite payment? Are the essential terms of the bargain being worked out in production? Is it an "agreement to agree"[350] by design? Does the agreement by its terms afford so much discretion to one party that it could deprive the other of the benefit of the bargain? As noted, several factors in the tests for employment status are relevant to distinguishing contracts from master–servant relations.[351]

(2) Use principles from major economic theories of the firm.[352] In order for any test for employment status focusing on a worker's "entrepreneurial opportunity" to be useful, judges need some means of distinguishing entrepreneurial opportunity—or opportunity conferred by the market—from the opportunity an employee has within a firm. A firm-theory approach might curb the tendency of some courts to find workers to be independent contractors so long as the workers retain a smidgen of discretion (which is always). For example, under a transaction-cost approach considering the trade-off between flexibility and control, a court would focus on what calculability the alleged employer *relinquished* by turning to the market, not on what discretion the worker retained.[353] This approach would also direct courts to look at the broader matrix of exchange and productive relations the parties inhabit: for instance, is there any other buyer on the market for the putative contractor's services? If not, it is evidence of an employment relationship. Several factors in the legal tests for employment status already bear on whether the relationship more resembles firm production or market production.[354]

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[350] Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co., 139 N.E. 470, 471 (N.Y. 1923).

[351] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2).

[352] *See generally* Bodie, *supra* note 227.

[353] California in effect incorporates insights from transaction-cost economics. California's agency test looks at whether the alleged employer retained "all necessary control" for its purposes. S.G. Borello & Sons v. Dep't of Indus. Relations, 769 P.2d 399, 400–01 (Cal. 1989). Thus, the test looks to see if the alleged employer accepted some lost calculability if it was indeed in a market relationship, and not a firm relationship, with the alleged independent contractor. The test shifts the focus of the means–ends standard away from what discretion a worker retains and away from the intensity of work monitoring. It centers the inquiry on whether the alleged employer supervises *enough* to meet its goals. Under this test, workers engaged in simple manual tasks are generally employees despite low levels of supervision.

[354] Statutory reforms that include less open-ended definitions of employment and require courts to consider statutory purpose would also help. *See supra* note 46. Some jurisdictions recognize a category of "dependent contractors." *See* Guy Davidov, *Who Is a Worker?* 34 INDUS. L.J. 57, 60–61 (2005). Two other reforms would not depend on judges' aptitude in recognizing an employment relationship—increasing penalties and improving enforcement of existing laws.

Both of these solutions are limited. The first is dependent on the clarity of contract law. The second depends on our ability to distinguish firms from markets. It is not likely to work well when dealing with disputes over work arrangements less clear than the FedEx relationship. Much innovative research on contemporary arrangements for production rejects the firm–market binary. Firm theory cannot be of much help then if employment law continues to insist on an employment–independent-contractor binary.

The provisional solutions also would not solve the problem of ensuring that workers without employers could access rights and benefits. Unlike the FedEx drivers, many workers do not have clear employers that are capable of complying with the law. These include day laborers, migrant farmworkers, and some home health aides.[355] We need new governance solutions for these workers.[356]

The provisional solutions elide another issue. Even if enforced in full, the panoply of rights the law affords to workers are insufficient to curb growing inequality, durable poverty, and other macroeconomic harms, or to ensure the individual has the opportunity to flourish as befits a human being and a citizen. A minimum wage, for instance, is not a living wage.[357]

Finally, the problem is not simply that some courts draw the line between employment and other relationships in the "wrong" place. The law's attempt to render master–servant authority as a contract creates challenges for all legal decision-makers, not just those inclined to rule in the employer's favor. The prescription to draw from this Article is not that we need a better method to draw a dividing line. The institutions that generate the categories requiring this bordering are flawed, and we need bigger fixes. Two goals should be to improve worker bargaining power or the supply elasticity of labor[358] and to de-commodify labor effort.[359] Only a radical transformation in work relations will ultimately

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[355] *See generally* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010).

[356] *See id.* at 33; *see also* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1210 (2011).

[357] *See* Tanvi Misra, *Mapping the Difference Between Minimum Wage and Cost of Living*, ATLANTIC: CITYLAB (Sept. 10, 2015), http://www.citylab.com/work/2015/09/mapping-the-difference-between-minimum-wage-and-cost-of-living/404644/.

[358] The first might entail providing opportunities for individuals to withdraw their labor from the market when the price goes down, as do owners of other commodities. Several policies and proposals tend to increase the elasticity of the supply of labor effort: living wages; expanded opportunities for education, re-skilling, child rearing, and self-sustenance; social-drawing rights; and a minimum income. *See* ALAIN SUPIOT WITH MARIÁ EMILIA CASAS ET AL., BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 222 (2001).

[359] An example would be to abolish employment and require that labor services be sold through contracts. See Sachs, *supra* note 356, at 1216, for other proposals that would help restrict the exchange of human effort as a commodity.

stabilize the legal identity of contemporary work. The interpretative ambiguities that result from trying to encase master–servant relations in contract are a manifestation of a deeper conflict: our aspirations to be capitalist yet democratic, to commodify human will but eschew human servitude, to reconcile liberty of contract with liberty of person.