

# REVISING THE ROLES OF MASTER AND SERVANT: A THEORY OF WORK LAW

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In this article, I critically examine the claim that work law is best conceived as a subspecies of contract law, arguing that this characterization is neither descriptively accurate nor normatively instructive. Rather than understanding work law as a set of restraints on freedom of contract, we should see it as creating and defining special relationships, much like the codified definitions of marriages and business partnerships. I trace the development of work relationships through the common law of “master and servant” and their more recent statutory modification. I argue that the history and present form of work law are not consistent with the contract-centered view of work law as “interfering” with an otherwise free labor market. In addition, I set the stage for a future research project in which I will argue that since work relationships permit employers to exercise authority over workers, a just work law would narrowly circumscribe employers’ authority in order to achieve work law’s justifiable aims while minimizing overreaching by employers.

I.WORK LAW AS I SEE IT .....	1224
A. Brief Introduction .....	1224
B. What I Mean By “Work Law” .....	1225
II.INITIAL SKIRMISH WITH THE FREEDOM-OF-CONTRACT VIEW .....	1227
III.MOTIVATIONS FOR THE FREEDOM-OF-CONTRACT VIEW .....	1233
A. Maine’s “From Status to Contract” .....	1233
B. Where Maine Went Wrong .....	1235
IV.WHY THE FREEDOM-OF-CONTRACT VIEW IS MISTAKEN .....	1238
A. Master and Servant .....	1238

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1224 U. OF PENNSYLVANIA JOURNAL OF BUSINESS LAW [Vol. 17:4

B. Blackstone .....	1240
C. Modern Law .....	1246
CONCLUSION .....	1252

## I. WORK LAW AS I SEE IT

### A. *Brief Introduction*

In this paper, I will explore and analyze the philosophical foundations of laws regulating labor and employment (hereafter, “work law”). I will say more below about what I intend to include within the body of “work law” that is my subject, but as an initial description, I will focus my analysis on laws that govern the relations between employers and employees in the United States and other common-law jurisdictions. More importantly, I will argue for the adoption of a particular way of viewing and understanding work law and an associated normative framework through which to assess its legitimacy.

I argue herein for the view, which I will call the “relationship view,” that work law defines and regulates the authority relations involved in work relationships, particularly those within firms. This would constitute a departure from the more prevalent alternative view of work law, which I will call the “freedom-of-contract view.” This view holds that work law is best understood as a set of constraints on freedom of contract in labor markets which primarily affect decisions whether to enter a given employment relationship and bargaining over compensation and benefits.

In contrast, the relationship view suggests that we analyze work law as constituting and regulating the nature of work relationships, which are essentially status-based governance relationships. Furthermore, a critical evaluation of a given jurisdiction’s body of work law should focus on whether and to what extent these governance relationships might be justified. Accordingly, my positive project in this dissertation is to argue that the primary purposes of work law are and should be to define and regulate the nature of the work relationship, to provide effective checks against abuses of authority, and to recognize and permit only legitimate exercises of authority in the workplace.

In addition, I will pursue the negative project of arguing that the aforementioned freedom-of-contract view of the nature and purpose of work law is flawed and incomplete. The view mistakenly holds that work law is best understood as a part of contract law, which largely consists of restraints on freedom of contract in labor markets. Moreover, the view errs in placing undue emphasis on the negotiations and transactions through

which parties enter or modify the terms of work relationships, to the exclusion of the “internal” aspects of employment relationships with which work law is primarily concerned.

B. *What I Mean By “Work Law”*

I follow what I take to be a current trend in legal academia by referring to the area of law governing the terms and conditions of work and working relationships as “work law.” I will now expand on my earlier remarks in order to provide a necessarily rough but fuller picture of what I mean to discuss under the term “work law.”

I will first explain why I choose not to refer to the body of law in question as the law of “labor,” “employment,” or both. Although the term “labor law” is often used in a broader sense in other common law legal systems, such as those of England and Canada, Americans tend to use “labor law” to refer more specifically to laws regulating unions. This is understood as largely distinct from “employment law,” which is understood to refer to laws regulating non-union hired workers. Perhaps because of these terms’ ambiguity, some U.S. scholars use the term “work law” to refer to the body of law comprising both labor law and employment law, along with other laws regulating the world of work.

For example, Orly Lobel argues, in an article titled “The Four Pillars of Work Law,” that U.S. work law comprises labor law, employment law, employment discrimination law, and the laws regulating employee benefits.<sup>1</sup> I do not dispute Lobel’s claim that these topics constitute the “four pillars,” but I will occasionally use the term “work law” more broadly. For example, although law schools typically do not offer entire courses devoted to the study of the federal and state Occupational Safety and Health Acts, these statutes’ principle purpose is to promote and ensure health and safety in the workplace by regulating relevant minimum standards, so I consider them part of work law. Similarly, I will also use “work law” to refer to federal, state, and local regulations mandating the provision of various facilities in workplaces, such as bathrooms, break rooms, and first aid equipment.<sup>2</sup> In short, I understand “work law” as the

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1. Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1539 (2006) (“Work law developed in the American legal system as a patchwork of common law doctrine, federal and state statutes, and evolving social norms. Typical law school curricula often include courses related to the four pillars of work law: ‘employment law,’ ‘labor law,’ ‘employment discrimination,’ and some variation of a tax-oriented ‘employee benefits law.’”).

2. See, e.g., OSHA General Industry Regulations, 29 C.F.R. § 1910 (2014); OSHA Construction Industry Regulations, 29 C.F.R. § 1926 (2014) (providing examples of such

body of laws in a given jurisdiction which directly define and regulate the employer-employee relationship, and I will therefore use the term in this expansive sense and use the specialized terms “labor law,” “employment law,” “employment discrimination,” “employee benefits,” and “workplace safety regulations” in their usual, narrower senses.<sup>3</sup>

I should also say something about the areas of law that I want to set aside in my discussion of “work law.” First, it is worth noting that, as Lobel explains, “[t]here are over two hundred statutes that regulate the workplace at the federal level alone,” so it would be impossible to discuss all instances of work regulation even if I considered them all equally germane to my discussion herein.<sup>4</sup> Moreover, I think that many such instances are outside

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regulations). These regulations are typically contained *within* the jurisdiction’s OSHA statute, but for the purposes of my discussion herein, they seem to have a different emphasis from the OSHA regulations focusing on safety, e.g., those limiting exposures to dangerous conditions, requiring the use of safety equipment meeting minimum standards, etc.

3. Please note, however, that this usage is not universal, and many of the authors I cite herein use the terms differently. For example, it is especially common to see “labor law” used in the same broad “catch-all” sense in which I use “work law,” and other common variations include “labor and employment law” and “workplace law.” See, e.g., Horacio Spector, *Philosophical Foundations of Labor Law*, 33 FLA. ST. U. L. REV. 1119, 1120 (2006) (defining labor law as a number of restraints on the freedom to contract in the labor market); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 351-52 (2002) (discussing the history of American labor and employment law); James J. Brudney and Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1231 (2008) (exploring the statutory interpretation of workplace law).

4. Lobel, *supra* note 1, at 1540, n. 4 (2006) (citing Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-197 (2000) (“limiting the scope of collective bargaining: excluding, for example, supervisory workers”); National Labor Relations (Wagner) Act (NLRA), 29 U.S.C. §§ 151-169 (2000) (“setting the regime for collective bargaining and founding the National Labor Relations Board to check disputes”); Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219 (2000 & Supp. II 2002) (“setting minimum-wage, overtime, and child-labor restrictions”); Equal Pay Act of 1963, 29 U.S.C. § 206 (2000 & Supp. II 2002) (“amending the FLSA”); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401-531 (2000) (“amending the NLRA”); Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621-634 (2000); Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651-678 (2000 & Supp. II 2002); Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461 (2000 & Supp. II 2002); Job Training Partnership Act (JTPA) of 1982, 29 U.S.C. §§ 1506-1781 (2000); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (2000) (“limiting use of lie detectors at work”); Workers’ Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109 (2000) (“requiring notice to employees in major layoffs and plant closures”); Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654 (2000 & Supp. II 2002) (“providing unpaid leave of up to twelve weeks for sickness or dependent care”); Workforce Investment Act (WIA) of 1998, 29 U.S.C. §§ 2801-2945 (2000); Mine Safety and Health Act (MSHA) of 1969, 30 U.S.C. §§ 801-962 (2000 & Supp. II 2002); Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-

the scope of the “work law” I have in mind to discuss. For example, state Temporary Assistance for Needy Families (TANF)<sup>5</sup> laws bear on the lives of workers in several ways, most obviously by setting forth the terms under which and the extent to which their communities are willing to support them when they are in need of public assistance. Less obviously, these laws also make up part of the large and varied body of jurisprudence that contributes to the definitions of terms such as “work,” “employment,” and “job” within a given legal system. Despite these connections with the law’s regulation of workers’ lives, I exclude TANF laws from the “work law” I want to discuss because I understand it to comprise all and only those laws that directly regulate the work relationship. In addition, I will exclude most “higher-level” policy that is, arguably, intended to influence employers, employees, or workplaces via indirect incentives or penalties rather than direct regulation of what the parties in work relationships may, must, or must not do.

For example, I exclude the core provisions of job-creation and -training programs such as the Workforce Investment Act of 1998<sup>6</sup>; the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>7</sup> which implemented the aforementioned TANF and “workfare” programs in the United States; and in general, any federal, state, or local taxation, environmental, consumer protection, food and drug safety, or other laws or regulations that offer incentives or impose costs on either employers or employees in ways that arguably aim to influence their conduct in or with respect to work relationships.

## II. INITIAL SKIRMISH WITH THE FREEDOM-OF-CONTRACT VIEW

Despite the centrality of work in most people’s lives, theoretical discussion of work law has been scant in contemporary legal and political scholarship. This scarcity may be largely explained by the freedom-of-

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707 (2000) (“requiring large employers to have substance-abuse programs”); Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, 42 U.S.C. §§ 601-619 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) (“creating the Equal Employment Opportunity Commission (EEOC)”); Americans with Disabilities Act (ADA) of 2000, 42 U.S.C. §§ 12101-12213 (2000) [note that all text in quotation marks in this parenthetical is quoted verbatim, with the permission of the author, from the above-cited passage in Orly Lobel’s *The Four Pillars of Work Law*].

5. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (2006) (codified as amended in various sections of 42 U.S.C. § 601). “TANF” is the current statutory name for the form of social insurance usually known as “welfare.”

6. 29 U.S.C. §§ 2801-2945 (2000).

7. 42 U.S.C. §§ 601-619 (2000).

contract view's assumption that work relationships can be adequately analyzed under the existing and relatively well-developed philosophy of contract law. For example, Horacio Spector notes that the "paucity of contemporary philosophical works on labor law is surprising," but he simultaneously asserts that labor law is no more than "a complex bundle of restraints on freedom of contract in the labor markets."<sup>8</sup> Moreover, Spector proposes, in an article titled "Philosophical Foundations of Labor Law," merely to "focus on philosophical arguments relevant to the *justification* of labor law institutions."<sup>9</sup> Spector's remarks suggest that we can understand work relationships entirely through the lens of contract law and define the "philosophical foundations of labor law" as the project of attempting to justify such laws' intrusions into "freedom of contract in the labor markets."<sup>10</sup>

This approach is bizarre in light of work law's emergence from the laws of master and servant. This is a distinctive form of status-based law. Work law is no more an *intrusion* upon the employment contract than marriage law "intrudes" upon the marriage contract. To the contrary, marriage law *constitutes* the marital relationship, which can then only be modified by contracts such as prenuptial agreements. Similarly, work law *constitutes* the work relationship, which can then only be modified in limited ways by particular employment contracts.<sup>11</sup>

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8. Spector, *supra* note 3, at 1120-21 ("Basically, labor law is a complex bundle of restraints on freedom of contract in the labor markets. According to Henry Farnam's classification, such legislative measures fall into three different types: protective labor legislation, distributive legislation, and permissive legislation. Protective legislation includes compulsory regulation of the labor contract such as child labor laws, maximum hours laws, and health and safety laws. Today, this type of legislation also encompasses the prohibition of sexual and moral harassment at work and nondiscrimination in recruitment and hiring. Distributive legislation seeks to affect the terms of exchange; for example, compulsory payment in legal tender, minimum wage laws, control of wages, and retirement security. Compensation for arbitrary discharge is often regarded as a distributive measure, but it can also be taken as a piece of protective legislation if it seeks to guarantee fair and humane treatment in the workplace. Finally, permissive legislation facilitates the creation of institutions for concerted worker action, collective bargaining, and labor arbitration.").

9. *Id.* at 1120 (emphasis added).

10. *Id.*

11. See, e.g., Marion Crain, *Arm's Length Intimacy: Employment as Relationship*, 35 WASH. U. J. L. & POL'Y 163, 180 (2011) ("Marriage and employment share a common status-based genealogy in master-servant law. The household model in which the master provided for and controlled his family and servants was transported to the pre-industrial workplace, and along with it assumptions about the proper order of things that were based upon custom and ideology. Like marriage, work was seen as 'enabling and redemptive,' 'a source of spiritual or secular enhancement of the self.' Both marriage and employment initially emphasized 'bonds of loyalty, subservience, and one-directional joint endeavor.' Both represented an amalgam of contract and status that defined the 'total legal situation of

Nonetheless, the view that work law might best be understood as a species of contract law has some *prima facie* plausibility. For example, what we refer to as “labor law” constitutes a major component of work law, and it governs the formation and activities of unions, which exist in large part to negotiate *contracts* between unionized workers and management. Similarly, “employment law” is another significant component of work law, and it governs relationships between employers and employees, which are typically entered via *contractual* or quasi-contractual agreements. In short, when people work for a salary or wages, they typically agree to a bargain specifying that they will provide labor in exchange for money and other valuable consideration – the quintessential elements of a contract at common law. So it is understandable that some might believe the most important aspect of work law concerns the contracts through which employers and employees enter work relationships and specify some of their terms.

However, viewing work law as merely ancillary to an overarching body of contract law – which it “restrains” – is deeply mistaken. At best, this is a stifflingly narrow view that ignores the many ways in which work law supersedes or functions alongside the law of contracts. At worst, it is a category mistake. As I will discuss further in the next section, the roles of employer and employee are primarily defined by “status” rather than by “contract.” We have long understood “status” and “contract” as distinct from or even opposed to each other, but this conception can be misleading, as agreements governed by contract law all involve *some* sort of change in status. Accordingly, any purported distinction between status and contract must be viewed on a continuum rather than as stark opposites. Nonetheless, the work relationships formed when parties voluntarily agree to contracts of employment must inevitably skew toward the “status” side of the conceptual spectrum, as such contracts clearly involve accepting and assuming distinct statuses within a state-defined and -regulated institution.

Consider again the comparison with marriage laws, which allow some modifications of the marriage relationship through prenuptial agreements and only recognize as valid those marriages that are entered voluntarily

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the individual.’ Though the parties might contract as to some terms, the background rules for the relationship were prescribed by custom and ultimately embedded in standard form contracts supplied by law (the at-will rule for American workers; the marriage contract for intimate relationships for which the parties sought formal legal recognition); ‘it was never contemplated that the parties would design their own relationship.’”) (citing Mary Ann Glendon, *The New Family and the New Property*, 53 TULANE L. REV. 697, 698-99 (1979); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 13-14 (1983)) (quoting PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 54 (1969); ALAN FOX, BEYOND CONTRACT: WORK, POWER & TRUST RELATIONS 185 (1974)).

through signed agreements by both parties. The foregoing are important elements of marriage law. But they do nothing to change the fact that once one has agreed to enter a marriage, one thereby takes on the status of spouse in a legally defined relationship, most of the features of which cannot be altered by contract. For example, spouses typically cannot sue each other during marriage for anything other than divorce, spouses cannot be forced to testify against each other in court, and spouses have mutual obligations to support each other during marriage that cannot be contractually waived or altered.

Accordingly, courts have long recognized that marriage is primarily a relationship of status, despite its gradual incorporation of contractual elements. For example, in 1888, the U.S. Supreme Court explained that, “at common law, marriage as a status had few elements of contract about it.”<sup>12</sup> Since 1888, of course, we have abolished the laws of coverture and enacted civil rights legislation protecting the rights of women, and the law no longer sees the parties to a marriage relationship as “merged into one.” However, despite the greatly increased “independence” of the parties to modern-day marriage contracts, 21<sup>st</sup>-Century courts continue to reaffirm the essentially status-based nature of the marriage relationship. For example, in its landmark 2003 decision holding that same-sex couples have the right to marry under the Massachusetts Constitution, the Massachusetts Supreme Court’s majority opinion cited to *DeMatteo v. DeMatteo*, 436 Mass. 13, 31, 762 N.E.2d 797 (2002), which stated that “marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise.”<sup>13</sup> Yet, more recently, the federal District Court for the Northern District of California held in *Perry v. Schwarzenegger* that the U.S. Constitution guarantees a right to same-sex marriage.<sup>14</sup>

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12. *Maynard v. Hill*, 125 U.S. 190, 210, 213 (1888) (holding that “marriage is not a contract within the meaning of . . . [the Commerce Clause]”) (“For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement, as of public ordination. In every enlightened government, it is preeminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.”) (emphasis omitted).

13. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 954 (Mass. 2003).

14. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992-93 (N.D. Cal. 2010) (“Marriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. The spouses must consent to support each other and any dependents. The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace. . . . The evidence shows that the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than



As the foregoing legal opinions attest, although the state-sanctioned marriage relationship can only be entered by two parties' consenting to sign a marriage contract, courts and judges have long seen this contractual element of the relationship as a mere formality in comparison with its core nature and function as a state-defined institution conferring a "marital status" on those parties who choose to participate in it.

Similarly, when two parties consent to enter a work relationship via an employment contract, they thereby agree to do so and set some of the terms of the relationship, but work law defines and regulates the relationship so that many of its essential features cannot be altered by contract. For example, if two parties purport to enter an employment contract, but the putative "employee" meets, instead, the legal definition of an "independent contractor," the putative "employer" cannot be held vicariously liable for a variety of torts committed by the "employee" in the course of her work for the "employer," even if the "employer" implicitly or explicitly agrees to assume such liability in the contract. More frequently, a hiring party will purport to agree to a contract for services with an "independent contractor" while nonetheless retaining the sort of control over the worker that is definitive of an employment relationship. In such cases, courts have held that even though the hiring party did not explicitly *agree* to enter an employment relationship and assume the rights and obligations associated therewith, the nature of its relationship with the purported "independent contractor" – no matter how it is described in the contract – unavoidably constitutes an employer-employee relationship in the eyes of the law. Thus, even though contractual attempts to execute an "end run" around the provisions of work law are common – and all too often successful despite their illegality – they are prohibited by law and will be declared void if discovered.

Moreover, most of the laws governing the day-to-day interactions between workers and employers have little to do with contracts. In practice, most employment litigation is prosecuted on behalf of aggrieved employees – interestingly, very few employers sue their employees to enforce their rights *qua* employer, preferring simply to fire any employees who displease them – and employee plaintiffs typically do not sue their employers to enforce their *contractual* rights. Instead, they much more commonly seek to enforce rights guaranteed to them by local, state, and federal statutes. For example, common employee-initiated lawsuits based on work law statutes include causes of action for discrimination based on race, sex, disability, age, or religion; sexual harassment; wage and hour claims, including those based on allegations that workers have been misclassified as "independent

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a change in marriage.”).

contractors” rather than “employees”; and employer retaliation against whistleblowers or employees who have attempted to enforce their statutorily guaranteed rights.

Accordingly, we could plausibly suggest that it is principally through such statutes and other elements of work law – rather than the law of contracts – that the U.S. and other common law jurisdictions regulate work relationships. In response, Horacio Spector and others sympathetic to the freedom-of-contract view might argue that these statutes should nonetheless be viewed as *part of* contract law since they principally function as restraints on freedom of contract. However, in addition to its straightforward inaccuracy, this line of reasoning is problematic in that it implies that we should conceive of a great many distinct bodies of law as somehow ancillary to – or mere “branches” of – contract law. For example, it is a matter of blackletter law that any contractual provision involving illegal subject matter is unenforceable, so all statutes that make any sort of conduct illegal thereby function as restraints on contract by making putative contracts involving the illegal conduct unenforceable. Thus, statutes prohibiting murder indisputably constrain freedom of contract by rendering unenforceable any contractual agreement to commit murder. But to view criminal laws principally as means to limit the enforceable subject matter of contracts is obviously misguided. By analogy, it seems similarly misguided to view work law as no more than a specialized branch of contract law.

The freedom-of-contract view’s focus on external aspects of work relationships distorts the primary purpose of work law by neglecting its function of regulating the ongoing nature of the relationship between employer and employee in the workplace, over the course of performing the contract. This is a mistake because the core of work law concerns this ongoing relationship. The view I will defend in this dissertation more accurately conceives of work law as specifying and regulating the content of the relationship. This relationship is one of governance, in which the employer is understood and permitted to exercise authority over the employee. Indeed, we might plausibly see work law as providing a constitution for a sort of private government that persists within the workplace, much as it has since work law was more commonly called the law of “master and servant.” I will discuss and defend this view of the workplace as a zone of private governance below. In the next section, however, I will explore and critically evaluate the ideology that arguably motivates the freedom-of-contract view.

### III. MOTIVATIONS FOR THE FREEDOM-OF-CONTRACT VIEW

#### A. *Maine's "From Status to Contract"*

It is widely accepted among social scientists and legal theorists that Sir Henry Maine was largely correct when he wrote in 1861 that “the movement of progressive societies has hitherto been a movement from status to contract.”<sup>15</sup> This pronouncement may have contributed to the enthusiasm of the late 19th-century “freedom of contract” movement, and it is not surprising that many people took it as an optimistic projection of the future, associating “status” with serfdom or slavery and “contract” with liberty and individual choice. Most importantly for my purposes, the freedom-of-contract view is arguably rooted in an ideology inspired, at least in part, by Maine’s status-to-contract hypothesis. Accordingly, I will examine it closely, and I encourage readers who are unfamiliar with the text to read the substantial excerpt quoted in my preceding footnoted

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15. SIR HENRY SUMNER MAINE, *From Status to Contract*, in ANCIENT LAW, ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 99, 99-100 (1917) (“The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organisation can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared – it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. . . . The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”).

citation to Maine's *Ancient Law*.<sup>16</sup>

As this passage illustrates, Maine clearly endorses the “movement from *Status to Contract*” as an “advance [that] has been accomplished” rather than merely describing it in the form of an observation about social and legal change. That is, Maine means both to describe a trend he observes in modern legal systems and to endorse the trend as “progress.” It’s not clear whether he thinks this positive change is in some sense *inevitable*, but he does claim to have identified “a formula expressing the *law of progress*” underlying the movement from status to contract.<sup>17</sup> Perhaps we should understand this invocation of “law” as the claim that his “formula” expresses the best or only way to achieve progress, or alternatively, that some law of human nature will always push human societies to progress in the way he describes.<sup>18</sup> Note also that Maine defines the dichotomy he suggests in the excerpt’s closing paragraph by asserting that if we can call all “personal conditions” arising from the family “Status,” we can then refer to all those connections that arise by agreement as “Contract.”<sup>19</sup> This division allows for the possibility that connections will be “coloured by” the previous rights and obligations provided by Status, but he suggests that the more we can abandon such “archaic ideas and customs” and move toward purely contractual relations, the better.<sup>20</sup>

There are various problems with Maine’s suggestion, including the difficulty of separating the deeply intertwined influences of Status and Contract. Indeed, it is ironic that Maine insists on explicitly including both the master-servant and marriage relations in the broad move toward contract, since his discussion of these relations simultaneously demonstrates that these are among the most problematic cases for his “formula” to explain. In his description of work relations, he argues that the “status of the Slave. . . has been superseded by the contractual relation of the servant to his master.”<sup>21</sup> Why “to *his* master” instead of “with *a* master”? If Maine hoped to portray this supersession as a laudable move toward a relation between free and equal contractors, he shouldn’t have described it in terms that make clear the hierarchical and status-based nature of the master-servant relation. To illustrate, it is evident that we could easily describe the “buyer-seller” relation in neutral terms that imply nothing about hierarchy or status, e.g., a buyer contracts *with a* seller to pay money for goods. In contrast, it would sound neither neutral nor intuitively

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16. *Id.*

17. *Id.* [emphasis added]

18. *Id.* at 100.

19. *Id.*

20. *Id.* at 99.

21. *Id.* at 100.

correct to say that she enters a “contractual relation of the buyer to her seller.”

Similarly, when Maine discusses marriage, he explains that the “status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract.”<sup>22</sup> As Nora Flum argues, Maine simply *can’t* pretend that married women of his era could be viewed as entities who were separable from their status.<sup>23</sup> Furthermore, as Maine was surely aware, life as an *unmarried* woman – in his time and long thereafter – typically did not offer significant freedom, contractual or otherwise. A former sociology professor of mine once asserted in lecture that the reason the father of the bride traditionally “gives her away” during the wedding ceremony is “so that the woman is always under male supervision.”<sup>24</sup> I’m not sure to what extent her assertion is historically or culturally accurate, but it sounds roughly right to me as a plausible explanation of the tradition as it persists today, and I suspect it would have seemed *obviously* right to Maine and his contemporaries.

#### B. *Where Maine Went Wrong*

Notwithstanding its substantial influence, Maine’s hypothesis has also been the subject of sustained and frequent criticism. For example, legal academic Nathan Isaacs writes as follows in a 1917 article in the *Yale Law Journal*:

The formula has generally been gratefully accepted as a very useful summary of many phenomena encountered in legal history. . . . Now and then the formula has been modified or limited, or exceptions to it have been noted; then the universality of the doctrines began to be questioned; and finally its applicability to Anglo-American law has been categorically denied.<sup>25</sup>

Isaacs correctly attributes the above-referenced “categorical denial” to Roscoe Pound, then-dean of Harvard Law School, who was a prominent

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22. *Id.*

23. Nora Flum, *Constituting Status: An Analysis of the Operation of Status in Perry v. Schwarzenegger*, 33 WOMEN’S RTS. L. REP. 58, 61 (2011) (“Women were only free from status when they existed outside of a marriage relationship. Despite Maine’s desire to show that Western society had ascended to a purely contractual level, he was forced to concede that married women were prohibited from contract and thus existed in a status relationship within the family.”).

24. Professor Phyllis Atwell, Lecture at Langara College, Vancouver, B.C. (1993).

25. Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 34 (1917).

representative of the emerging school of thought known as “legal realism” or “sociological jurisprudence.”<sup>26</sup> Pound did, indeed, argue that Maine’s purported historical insight constituted little more than his endorsement of a short-lived and anachronistic phase of 19th-Century jurisprudence, and explicitly asserted that Maine’s formula had “no basis in Anglo-American legal history.”<sup>27</sup> Isaacs responds to this assertion by pointing to what he takes to be linguistic evidence supporting Maine’s formula: “‘Employer’ and ‘employee’ (words having reference to the contract) now seem more appropriate terms than the older ‘master’ and ‘servant’ (words having

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26. See, e.g., Thomas J. Miles and Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008) (“In 1931, Karl Llewellyn attempted to capture the empirical goals of the legal realists by referring to early ‘efforts . . . to capitalize the wealth of our reported cases to make large-scale quantitative studies of facts and outcome.’ Llewellyn emphasized ‘the hope . . . that these might develop lines of prediction more sure, or at least capable of adding further certainty to the predictions based as hitherto on intensive study of smaller bodies of cases.’ But Llewellyn added, with apparent embarrassment: ‘I know of no published results.’ . . . Llewellyn wrote in reaction to the formalist view that law, as expressed in statutes and precedents, determined the outcomes of particular cases. He believed that, much of the time, existing law did not compel particular outcomes, False [a]nd at times, the law itself was contradictory: ‘[I]n any case doubtful enough to make litigation respectable[,] the available authoritative premises . . . are at least two, and [ ] the two are mutually contradictory as applied to the case at hand.’ For Llewellyn, the indeterminacy, sometimes even incoherence, of law meant that ‘the personality of the judge’ must to some degree explain case outcomes.”) (quoting Karl N. Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) at 1239-1242) (citing Brian Leiter, *American Legal Realism*, in MARTIN P. GOLDING AND WILLIAM A. EDMUNDSON, EDS., *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* (Blackwell 2005) at 50-52; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) at 401-06)).

27. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 27-28 (1921) (“Puritanism, the attitude of protecting the individual against government and society which the common-law courts had taken in the contests with the crown, the eighteenth-century theory of the natural rights of the abstract individual man, the insistence of the pioneer upon a minimum of interference with his freedom of action, and the nineteenth-century deduction of law from a metaphysical principle of individual liberty – all these combined to make jurists and lawyers think of individuals rather than of groups or relations and to make jurists think ill of anything that had the look of the archaic institution of *status*. The Romanist idea of contract became the popular juristic idea and, as Maitland puts it, contract became ‘the greediest of legal categories.’ . . . This was furthered by the general acceptance . . . of [a] political interpretation of jurisprudence . . . which found the key to social and hence to legal progress in a gradual unfolding of the idea of individual liberty False It was furthered also by the famous generalization of Sir Henry Maine that the evolution of law is a progress from *status* to contract. . . . But in truth the dogma of Sir Henry Maine is a generalization from Roman legal history only. It shows the course of evolution of Roman law. On the other hand it has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it, unless indeed, we are progressing backward.”).

reference to status).”<sup>28</sup>

Isaacs’ half-hearted rhetorical gestures at terminological changes are not at all persuasive, especially since Isaacs refers to – and is therefore aware of – Pound’s much more cogent analysis of early 20th-Century developments in the laws regulating the work relationship. Essentially, Pound demonstrates that rather than moving from status to contract, the legal system of his day was progressing in the opposite direction.<sup>29</sup> Pound explains this change largely on the basis of what he takes to be a widespread rejection of the “liberty of contract” view of social legislation that had briefly taken hold of U.S. courts from the late 19th century to the early 20th. In reaction to the Supreme Court’s repeatedly striking down laws aimed at regulating the work relationship during what is now called the *Lochner* era,<sup>30</sup> many subsequent jurists and legislators focused their regulatory efforts on attaching more and more significance to the *status* of the parties to such relationships rather than the contracts by which they entered them. Pound argues in the above-quoted passage that this more recent movement of the law not only demonstrated that the early 20th-Century legal “progress” was from *contract* to *status*, but also that this was a return to the “spirit” of the traditional common law rather than a departure from it.<sup>31</sup>

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28. Isaacs, *supra* note 25, at 35 (“Is there indeed ‘no basis in Anglo-American legal history’ for the status-to-contract theory as generally understood? Its original application was to personal relations derived from or colored by the powers and privileges anciently residing in the family. Is it not true that the relation of master and servant was originally – and still is nominally – a domestic relation? And whether the nineteenth century was out of line with the common law or not, is it not a fact that it has made of this relation a contractual one? ‘Employer’ and ‘employee’ (words having reference to the contract) now seem more appropriate terms than the older ‘master’ and ‘servant’ (words having reference to status).”).

29. Pound, *supra* note 27, at 29-31 (“[M]ore significant is the legislative development whereby duties and liabilities are imposed on the employer in the relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it. Such is the settled tendency of the present. To me it seems a return to the common-law conception of the relation of master and servant, with reciprocal rights and duties and with liabilities imposed in view of the exigencies of the relation. . . . For it is not out of line with the common law to deal with causes where the relation of master and servant exists differently from causes where there is no such relation. It is not out of line to deal with such causes by determining the duties and the liabilities which shall flow from the relation. On the contrary, the nineteenth century was out of line with the common law when it sought to treat the relation of master and servant in any other way.”).

30. *Lochner v. New York*, 198 U.S. 45 (1905) (holding that law limiting bakers’ hours of labor was unconstitutional because it interfered with “liberty of contract”). *Lochner* was decided in 1905, but I follow convention in using “*Lochner*-era” to refer more generally to late 19th and early 20th-Century Supreme Court ideology and decisions.

31. Pound, *supra* note 27, at 29-31.

I am persuaded by Pound's explanation and reasoning in the above-quoted passages that Maine's status-to-contract formula has not merited the undue influence it has had on subsequent legal and social theory, in large part because it has not proved accurate in the intervening decades. Moreover, I believe that Pound's argument against the applicability of Maine's view also suggests an indictment of the freedom-of-contract view of work law. I will expand on this contention in the next section.

#### IV. WHY THE FREEDOM-OF-CONTRACT VIEW IS MISTAKEN

##### A. *Master and Servant*

West Publishing's legal research website Westlaw.com provides access to myriad legal materials, including state and federal cases, law review articles, statutes, regulations, and transcripts of legislative debates. Westlaw also features West's distinctive and proprietary "West Key Number System," which organizes legal issues discussed in reported cases into major topics and – according to West Publishing – constitutes "the de facto classification system for all American law."<sup>32</sup> These topics provide titles for the "headnotes" which appear in many Westlaw cases and provide brief summaries of the issues discussed therein. The Digest System's topics are organized by numbers as well as titles. Topic number 29, "Labor and Employment," is especially interesting. Whenever the Westlaw editors judge that an issue discussed in a case is pertinent to topic 29, they indicate this with a headnote, such as the following sample from the Westlaw version of a 2002 case decided by the Supreme Court of Texas:

Labor and Employment  29

231Hk29 Most Cited Cases

(Formerly 255k5, 255k1 Master and Servant)

The test to determine whether a worker is an "employee" rather than an "independent contractor" is whether the employer has the right to control the progress, details, and methods of operations of the work, because an employer controls not merely the end sought to be accomplished, but also the means and details of its accomplishment, with respect to the work of an employee.<sup>33</sup>

This example provides a concise statement of the current and longstanding common law standard for determining whether a worker is an

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32. See, e.g., Thomson Reuters, *Differences: WestlawNext Legal Research System*, available at [https://info.legalsolutions.thomsonreuters.com/pdf/wln2/L-373938\\_v3.pdf](https://info.legalsolutions.thomsonreuters.com/pdf/wln2/L-373938_v3.pdf) (2014).

33. *Limestone Products Distribution, Inc., v. McNamara*, 71 S.W.3d 308 (Tex. 2002).



“employee” rather than an “independent contractor.” As the headnote makes clear, the key element in the test for employee status is presence or absence of the employer’s “right to control . . . the work of an employee.”<sup>34</sup> This may sound familiar to the attentive reader, as I briefly mentioned the “right to control” test in my discussion in Section II of lawsuits based on the claim that employees have been misclassified by their employers as “independent contractors.” As I explained in that discussion, when the plaintiffs prevail in such lawsuits, the law requires courts to hold that it is the nature of the relationship – *not* the terms set forth in the contract – that determine whether a given worker is an “employee” or an “independent contractor” in the eyes of the law. This alone seems to give us a reason to reject the freedom-of-contract view.

Moreover, the headnote implies that the relationship in question has been defined by the same “right to control” test for quite some time, as it notes parenthetically that the content of the current section 231Hk29 of topic 29, which sets forth the test, was previously listed as sections 255k5 and 255k1 of a subject area titled “Master and Servant.” From its inception in 1910 until the late 20th Century, West’s Digest System referred to the body of law governing work relationships as the law of “Master and Servant.” I have referred to the “master-servant” relation several times in previous sections, especially in my discussions of Maine’s formula and Pound’s criticism thereof, and I suspect that this term for the work relationship strikes most of us as outdated and unappealing – nobody wants to think of herself as a “servant” toiling for a “master.” Fortunately for our modern sensibilities – but unfortunately perhaps for sociological clarity and historical understanding – West and other legal commentators largely abandoned the old terminology in the latter half of the 20th century. As the above headnote indicates, West’s Digest topic “Master and Servant” became “Labor and Employment,” and – as Isaacs was quick to point out in his defense of Maine’s formula – the roles of “master” and “servant” became “employer” and “employee.” However euphonious these changes in terminology might be, it seems clear that according to the understanding of work law advanced by the editors of West’s Digest System, the new names were appended to *existing* roles rather than to newly created ones.

These roles – whether “master” and “servant” or “employer” and “employee” – are clearly better conceived as designations of status rather than creations of the agreements between free and independent contractors. I hold that the main aim of work law has long been and continues to be the legal recognition and regulation of hierarchical relationships in which the “master” is understood and permitted to exercise a significant right of

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34. *Id.*

control over the “servant.” This uncomfortable reality is obviously in tension with Maine’s view of progressive modernity as moving “from status to contract.”<sup>35</sup> While there is undoubtedly some truth to Maine’s generalization, the work relationship is one of several important exceptions to its applicability. This is because work law provides work relationships with much of their default – and in many cases, mandatory – content, such that many or even most aspects of the work relationship are governed by non-contracted terms of work law rather than bargained-for results of negotiation between two independent parties.

For example, many substantive rights and obligations attach to the employer-employee relation – such as those requiring minimum wages, maximum hours, and the employer’s provision of worker’s compensation and unemployment insurance – and employers often seek to avoid these obligations by inducing workers to agree to work as purported “independent contractors.” But work law prohibits this practice by defining and identifying work relationships in its own mandatory terms, which cannot lawfully be waived by contract. Thus, one’s rights and obligations as a party to a work relationship are mostly determined by one’s status – i.e., whether one meets the legal definition of a “master” or a “servant” – rather than by contract. And therefore, the freedom-of-contract view is as deeply mistaken, and for many of the same reasons, as Maine’s status-to-contract formula. At the risk of appearing glib, I’ll venture that the body of law in question just does not *work* that way.

#### B. *Blackstone*

As I argue above, the roots of modern work law in the master-servant relation provide compelling reasons to reject the freedom-of-contract view. This is because the master-servant relation is clearly one of status rather than contract, and it requires that the parties to it accept status-based roles within a hierarchical governance relationship. To illustrate this point in more detail, I will now turn to a discussion of the 18th-Century master-servant relation as described in Sir William Blackstone’s 1759 treatise *Commentaries on the Laws of England*.

It is difficult to overstate the influence of Blackstone’s *Commentaries*, especially in the United States.<sup>36</sup> As Amy Dru Stanley explains – after

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35. Maine, *supra* note 15, at 100.

36. See, e.g., Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-19 (1996); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 465 (1909) (“Until a comparatively recent date, all legal education, whether in school or in office, began with the study of Blackstone. Probably all serious office study begins with Blackstone or some American imitator to-day. Many schools make Blackstone the first subject of instruction to-

referring to the *Commentaries* as “the most influential legal treatise in the Anglo-American world of the late eighteenth century” – the pioneering lawyers who brought the common law to the New World in the 18th century didn’t have the luxury of acquiring or transporting extensive libraries of legal tomes, but they could easily carry the two-volume *Commentaries* on a mule or wagon and count on it to offer an answer to nearly any question about the common law they might encounter.<sup>37</sup> Accordingly, Blackstone became, perhaps as much as a matter of convenience as of respect for his work, even more influential in America than in his native country. Note, however, that I do not emphasize the influence of his treatise in order to bolster its credibility as an *accurate* description of the “laws of England” in Blackstone’s day. Instead, I mean to suggest that Blackstone’s *Commentaries* had a perhaps inordinately powerful effect on what most jurists and lawyers *believed* about the common law – especially in America – whether or not all, most, or few of his pronouncements were accurate. Accordingly, it is worthwhile to look at what Blackstone said about the law of master and servant in order to trace its influences on modern work law.

The England of Blackstone’s time was marked by a meticulously-ordered hierarchy of social statuses and titles, and Blackstone explains at length how the various sorts of nobility and “commonalty” – i.e., all those persons who lacked clerical or noble rank – were ranked and esteemed.<sup>38</sup> After extensive discussion of the ranks of the nobility, Blackstone moves on to discuss the commonalty: “The commonalty, like the nobility, are divided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility.”<sup>39</sup>

Blackstone then describes in great detail the various sorts of knights,

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day, and in others Blackstone is a subject of examination for admission or of prescribed reading after admission, or there are courses on elementary law in which texts reproducing the theories of the introduction to and the first book of the *Commentaries* are the basis of instruction.”).

37. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 7 (1998).

38. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, \*397 (1759) (“The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour. All degrees of nobility and honour are derived from the king as their fountain: and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons.”).

39. *Id.* at \*403.

including knights of the garter, knights banneret, knights of the bath, and knights bachelors.<sup>40</sup> These are the highest-ranking members of the “commonalty,” according to Blackstone and his contemporaries, and their titles are “names of dignity.” He then offers a summary of the remaining ranks of the commonalty.<sup>41</sup>

Notably, “gentleman” was a title of respect and status among the commonalty, and this status could be attained by anyone with a university education and enough income or wealth to “live idly, and without manual labour.”<sup>42</sup> Anyone who fulfilled these requirements and could carry himself with the bearing of a gentleman “shall be called master.”<sup>43</sup> This makes plain what we might have assumed in any case, namely, that “master” has never been a mere designation of the party who *happens* to be issuing the orders in a given master-servant pairing. Instead, “master” is a “name of worship” that is reserved for those members of the commonalty who have enough education and noble bearing to function in polite society, and enough money to “live idly, and without manual labour.”<sup>44</sup> The second noteworthy detail is that the last sentence of the preceding quoted passage<sup>45</sup> is all Blackstone has to say about those members of the commonalty who fell below the rank of knights, esquires, or gentlemen: “The rest of the commonalty are tradesmen, artificers, and labourers.”<sup>46</sup>

Thus, in a chapter titled “Of the Civil State,” Blackstone describes the “master” as an educated gentleman who is wealthy enough to dress properly and live idly.<sup>47</sup> Although he has little to say about the socially undistinguished “rest of the commonalty” in that chapter, he has much more to say about these industrious, non-idle persons in the context in which Blackstone and his fellow gentlemen presumably valued them most, namely, in his chapter titled “Of Master and Servant.”<sup>48</sup>

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40. *Id.*

41. *Id.* at \*404-07 (“These, Sir Edward Coke says, are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank all colonels, serjeants at law, and doctors in the three learned professions. . . . As for *gentlemen*, says Sir Thomas Smith, they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. . . . The rest of the commonalty are *tradesmen, artificers, and labourers* False”).

42. *Id.*

43. *Id.*

44. *Id.*

45. See note 41, *supra*.

46. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, \*407.

47. *Id.*

48. *Id.* at \*422.

Blackstone describes the master-servant relation as one of three great relations in *private* life,<sup>49</sup> which is not at all consistent with the standard freedom-of-contract view of employment as an arms-length arrangement that is separate from home and family.<sup>50</sup> In Blackstone's time, servants were considered members of their masters' households, and many interesting consequences followed from the domestic nature of the relation.

First, Blackstone explains that the master of a household was not only in charge of his wife, children, servants, and other inferiors, but also responsible for most torts committed by them. This – which obviously describes the 18th-Century precursor to the modern rule of *respondeat superior* or vicarious liability – followed because the other members of the master's household were viewed by the law as extensions of his person, under his care, and among his many responsibilities.<sup>51</sup>

The master's responsibility for the actions of his servants or other members of his household also extended to any business they might transact in accordance with his orders *or* in cases in which the master did not explicitly order or authorize the transaction, but third parties might reasonably believe that the servants were acting at the master's behest.<sup>52</sup>

The master, accordingly, was quite generally held responsible for the

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49. *Id.* (“The three great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labor will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child*, which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated.”)

50. See, e.g., Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1542 (2006) (citing IRVING BROWNE, *ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED* (1883); JAMES SCHOUER, *LAW OF THE DOMESTIC RELATIONS EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY AND MASTER AND SERVANT* (1905)) (“The American employment system originated from British master-and-servant law. During the eighteenth and early nineteenth centuries, work relations were based on the idea of prolonged status-based, and in some cases involuntary, servitude. Legal historians of the pre-industrial era describe employment as akin to family relations, in which status defined and determined relationships and powers.”).

51. Blackstone, *supra* note 46, at \*431-32 (“A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people: for the master hath the superintendance and charge of all his household.”).

52. *Id.* at \*430 (“[W]hatever a servant is permitted to do in the usual course of [the master's] business, is equivalent to a general command. . . . A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* [i.e., to this extent] his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience.”).

acts of all those who were part of his household and therefore “under his charge.”<sup>53</sup> It is noteworthy that the master’s wife, friend, or other relations could sometimes be viewed as “servants” in this context. Apparently, all and any members of the master’s household were seen to be at his service and working for his purposes, so if they caused damage or transacted business, the master could be held responsible. Again, this general doctrine survives in the modern common law rule of *respondeat superior*, according to which an agent’s principal – often, though not always, the employer of an employee – may be held liable for torts of the agent committed while acting for the principal or for business transacted by the agent on the principal’s behalf.

Blackstone discusses various classes of servants, including menial servants, apprentices, labourers, and “superior” servants, “such as stewards, factors, and bailiffs.”<sup>54</sup> But the first sort of servant he discusses is the slave.<sup>55</sup> According to Blackstone, in his time one could agree to “sell oneself” to another as a servant, so long as the agreement did not purport to give the master power over the servant’s life and liberty.<sup>56</sup> Such an agreement could and did, however, give the master a *property interest* in the servant – or at least, in certain of his services – as Blackstone states explicitly in his discussion of the master-servant relation, explaining that “[t]he reason and foundation upon which all this doctrine is built, seem to be the *property* that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.”<sup>57</sup>

This, to me, is the most striking passage in the chapter. Blackstone makes clear that the master has an interest – a *property* interest, no less – in

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53. *Id.* at \*431.

54. *Id.* at \*425-27.

55. *Id.* at \*423 (“I have formerly observed that pure and proper slavery does not, nay, cannot, subsist in England: such, I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. . . . But, secondly, it is said that slavery may begin ‘*jure civili*,’ when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible.”).

56. *Id.*

57. Blackstone, *supra* note 46, at \*429 (emphasis added) (“A master likewise may justify an assault in defense of his servant, and a servant in defense of his master: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them False The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.”).

the “service of his domestics,” such that he would be justified in assaulting a third party in order to defend his servant, thereby protecting the property interest in that servant which he acquired upon hiring and purchased with wages.<sup>58</sup> The servant, on the other hand, takes on a duty to “stand by and defend his master” whenever he is in danger – presumably the master’s right to expect this duty is purchased along with his property interest in the servant, though *not* as a result of arms-length contracting.<sup>59</sup> Instead, Blackstone’s explanation shows that English law in his day assumed that *every* master acquired a property interest in *every* servant by paying wages, and *every* servant took on the duty to protect his master in the event of danger by accepting wages.

This assumption, in turn, makes plain that Blackstone and his contemporaries did not use “master” and “servant” as mere descriptions of particular roles in a workplace, but rather as designators of *status*. The servant, needless to say, had lower status than the master in all contexts: in the hierarchy of the master’s household, field, or factory; in English society; and in the eyes of the law. This last inferiority of status is starkly illustrated by the law’s provision that a servant who struck a master would receive harsh punishment, while a master who struck a servant would only be “punished,” if at all, by the servant’s gaining the right to depart from the master’s service.<sup>60</sup>

Luckily, *this* rule has not been preserved in modern work law, but many other influences of the master-servant relation have remained with us.<sup>61</sup> As I discussed above, the modern rule of *respondeat superior* or vicarious liability is based on similar doctrines in the law of master and servant.<sup>62</sup> The modern “master” no longer has a cause of action against another master who hires away his servant, but modern work law does provide for a very general duty on the part of the employee to obey the employer’s orders, within certain limits, and not to act against the employer’s interests while in his employ. Most importantly, however, the modern master/employer retains, by definition, a broad right of *control* over the servant/employee. I will discuss this right of control in depth in the next subsection.

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58. *Id.*

59. *Id.*

60. *Id.* at \*428 (“A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation: though, if the master or master’s wife beats any other servant of full age, it is good cause of departure. But if any servant, workman, or labourer, assaults his master or dame, he shall suffer one year’s imprisonment, and other open corporal punishment, not extending to life or limb.”).

61. I will discuss these remaining influences at length in the subsequent subsection “C,” *infra*.

62. Blackstone, *supra* note 46.

### C. *Modern Law*

Against the status-laden backdrop provided by Blackstone's picture of the master-servant relationship, we can consider the ideal contract-based model toward which modernization – according to Maine, Isaacs, and many other scholars – promises to lead us. Recall Maine's approbation of this welcome trend when he observes, "Starting from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals."<sup>63</sup> As Amy Dru Stanley explains, this sentiment was much in line with the thinking of other 19th century American thinkers.<sup>64</sup>

This is undoubtedly appealing, especially when one contrasts this picture of freedom with the evils of serfdom or slavery. But how accurate is this picture? Are "employees," as they are defined in modern work law, considered or treated as free and independent contractors?

The answer is a resounding and unequivocal "no." In fact, the definition of "employee" under both the common law and statutory law of work is now and has long been, essentially, "one who works under the control and authority of another and is *not* an independent contractor."<sup>65</sup> Noah Zatz expounds upon the rule defining "employee" as follows:

Most federal employment statutes contain brief, vague, and often circular definitions of the related concepts of employee, employer, and employment." See, e.g., 42 U.S.C. §§ 2000e(b), (f), 2000e-2(a) (2000) (defining an "employee" as "an individual employed by an employer" and an employer as "a person . . . who has . . . employees"). The Supreme Court has held that, absent specific provisions to the contrary, such definitions incorporate the common-law test for employment developed in agency law. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). This test emphasizes "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323 (quoting *Cmty. for Creative Non-*

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63. Maine, *supra* note 15, at 99.

64. Stanley, *supra* note 37, at 7 ("In revolutionary America the dominant conception of covenant no longer was a relation of submission and dominion premised on protection and obedience. Rather, it suggested a voluntary association created by citizens equal under the law, a compact guaranteeing inalienable individual rights as well as the private contract relations arising from those rights.").

65. See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 871 n. 50 (2008) (defining loosely the relationship between employee, employer, and employment).



Violence v. Reid, 490 U.S. 730, 751 (1989)); *accord* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 445-46 (2003).”<sup>66</sup>

As Justice Souter observes in the *Darden* opinion Zatz references, the standard statutory “definition of ‘employee’ as ‘any individual employed by an employer’ . . . is completely circular and explains nothing.”<sup>67</sup> The Court’s solution to these circular definitions has consistently been to hold that whenever courts are called upon to construe the meaning of such definitions, they must apply the common law definition derived from the law of master and servant. The preceding sentence may look suspiciously like the sort of “ambitious” interpretation one might be tempted to advance in order to suit one’s pet thesis, but there is no ambiguity in this *unanimous* holding – i.e., all nine Justices voted for it – which follows a long line of cases affirming the same rule.<sup>68</sup>

There are two especially noteworthy aspects of the Court’s above-cited definitions of “employee” that I’d like to point out. First, notice that the common-law definition of the term “employee” endorsed by U.S. courts is derived from the law of agency, not contract.<sup>69</sup> Second, the preceding quote is from *Darden* (1992), which quotes *Reid* (1989), which in turn cites *Kelley* (1974), *Baker* (1959), and *Robinson* (1915). These Supreme Court cases – which constitute binding authority over every court in the United States – spanning nearly a century are all cited as precedent for the same holding: When Congress does not define “employee” in a statute, courts construing the statute should apply the test for “the conventional master-servant relationship as understood by common-law agency doctrine.”<sup>70</sup>

Moreover, Congress has consistently endorsed the Supreme Court’s interpretation of its legislative intent in two clear ways. First, Congress continues to use circular and uninformative definitions of “employee” – e.g., “any individual employed by an employer.”<sup>71</sup> This is so despite the fact that Congress – or at least, the lawyers advising them – is doubtless

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66. *Id.*

67. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

68. *Id.* at 322-23 (“In the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. *See, e.g., Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-23 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (per curiam); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).” (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989))).

69. *Id.* (referencing “the conventional master-servant relationship as understood by common-law agency doctrine”).

70. *Id.*

71. *Id.* at 323 (quoting 29 U.S.C. § 1002(6)).

aware that the Court regards such definitions as “circular.” Moreover, the Court has clearly expressed that wherever Congress makes use of such definitions, the Court will interpret that as Congressional intent to continue endorsing the traditional common-law understanding of “the conventional master-servant relationship.”<sup>72</sup> Following the Court’s lead, I infer that if Congress had any desire to endorse a different standard, it would stop using the same non-explanatory “definition.”

Second, as the *Darden* Court notes in support of its continuing endorsement of the common-law understanding of the master-servant relationship, on those rare occasions – the *Darden* opinion cites only two – when the Court has presumed to interpret a statutory definition as departing from the common-law test, Congress has “overruled” the Court’s interpretation by amending the statute to make it clear that Congress did, in fact, intend to statutory definition in question to conform to the traditional common-law test. Thus, Congress has never strayed from the traditional “master-servant” understanding of employment, and on the two occasions in which the Supreme Court attempted to stray therefrom, Congress “reigned in” the Justices’ expanded interpretation.<sup>73</sup>

And the Supreme Court has not changed its view since issuing its opinion in *Darden*. In 2003, when the Court next had occasion to construe a statutory definition of “employee,” in the case of *Clackamas Gastroenterology Assocs., P.C. v. Wells*,<sup>74</sup> the Court did what anyone familiar with its past decisions on the matter would expect it to do: It affirmed *Darden* by quoting *Darden*’s quotation of *Reid*.<sup>75</sup>

Incidentally, the Court does not perpetually quote itself in these cases out of laziness – the Justices do not seem averse to writing extremely long opinions – but rather to signal that it is affirming its prior holdings without modification. In other words, the cases indicate that the rule has been exactly the same for a long time – at least since 1915 – and the Court is

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72. *Id.*

73. *Id.* at 324-25 (“But *Hearst* and *Silk*, which interpreted ‘employee’ for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read “employee,” which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning.” (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *United States v. Silk*, 331 U.S. 704 (1947))).

74. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

75. *Id.* at 444-45 (“Quoting *Reid*, 490 U.S. at 739-740, we explained that ‘when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.’” (quoting *Darden*, 508 U.S. at 323))).

showing no inclination to change it in the foreseeable future.

The *Clackamas* case is also interesting because it presented a novel question, namely, how to distinguish an “employee” from a “partner.” Recall for a moment the misclassification lawsuits I briefly mentioned – and will return to in a moment – earlier in this chapter. Such cases usually involve workers’ claims that they have been misclassified as “independent contractors” rather than “employees” or a third party’s claim that a purported “independent contractor” was actually an “employee,” so that the third party can sue the hiring party under the doctrine of *respondeat superior* (or, conversely, the hiring party might offer, as a defense to such a lawsuit, the argument that a purported “employee” was actually an “independent contractor”).

In *Clackamas*, the defendant medical clinic sought to avoid liability under the Americans with Disabilities Act (ADA),<sup>76</sup> which only applies to employers with 15 or more employees.<sup>77</sup> If the medical clinic could prevail in its argument that several of its doctors were not “employees” but “partners,” since they owned shares in the clinic and were professionals with a great deal of responsibility, then the clinic’s former employee would not be permitted to pursue an ADA claim against the clinic. But the Court held that just as employers cannot evade liability by labeling workers who meet the common-law definition of “employee” as “independent contractors,” it didn’t matter whether the clinic called the personnel in question “partners,” “shareholder-directors,” or any other title. If the doctors met the common-law definition of “employee,” then they were employees for the purposes of any statute incorporating the common-law definition.<sup>78</sup>

Accordingly, modern work law simply does not permit hiring parties and workers to craft their own distinctive working relationships with exactly the features they select. Instead, work law insists that it doesn’t matter what you say in the contract – i.e., the parties can agree to describe

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76. The Americans with Disabilities Act of 1990, 104 Stat. 327 – 385 (codified as amended at 42 U. S. C. § 12101).

77. *Id.* at § 12111(5).

78. *Clackamas*, 538 U.S. at 445-46 (“Rather than looking to the common law, petitioner argues that courts should determine whether a shareholder-director of a professional corporation is an ‘employee’ by asking whether the shareholder-director is, in reality, a ‘partner.’ . . . The question whether a shareholder-director is an employee, however, cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner. Today there are partnerships that include hundreds of members, some of whom may well qualify as ‘employees’ because *control* is concentrated in a small number of managing partners. . . . Thus, asking whether shareholder-directors are partners-rather than asking whether they are employees-simply begs the question.”) (internal citations omitted) (emphasis added).

the worker as a “partner,” “independent contractor,” “franchisee,” or “comrade” – if the relationship as it is conducted in reality, after the contract is signed, fits the common law definition of the master-servant relationship. What, one might ask, *is* this common-law definition? So far, the only element of the test for employee status I have mentioned is “control,” which is the central focus of the definition.<sup>79</sup>

However, the *Darden* Court notes that control is not the only factor relevant to determinations of employee status and explains that “[s]ince the common-law test contains ‘no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’”<sup>80</sup> Accordingly, the *Darden* Court quotes *Reid* for its previous summary of the several factors involved in the test.<sup>81</sup>

As the above-cited cases make clear, no matter how anachronistic the “master-servant relation” might seem to our modern sensibilities, it is still the foundation of the employment relation as it is defined and discussed in 21st-century work litigation in the U.S. For example, the shipping company FedEx classifies most of its “Ground” and “Home Delivery” drivers as “independent contractors” rather than “employees,” and many of these drivers have brought a class action against the company to sue for damages

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79. *Id.* at 448 (“At common law the relevant factors defining the master-servant relationship focus on the master’s control over the servant. The general definition of the term “servant” in the Restatement (Second) of Agency §2(2) (1957), for example, refers to a person whose work is ‘controlled or is subject to the right to control by the master.’ See also *id.*, §220(1) (‘A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control’). In addition, the Restatement’s more specific definition of the term ‘servant’ lists factors to be considered when distinguishing between servants and independent contractors, the first of which is ‘the extent of control’ that one may exercise over the details of the work of the other. *Id.*, §220(2)(a). We think that the common-law element of control is the principal guidepost that should be followed in this case.”).

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

81. *Id.* at 323-24 (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”).

and a declaration that they have the status and rights of employees.<sup>82</sup> As investigative journalist Steven Greenhouse reports, in one such lawsuit “filed in California, a state judge ruled that the company was essentially engaged in a ruse in maintaining that its drivers were independent contractors.”<sup>83</sup>

The plaintiffs in misclassification lawsuits of this sort assert that it is unlawful for businesses to label workers as “independent contractors,” thereby shifting many costs – such as those associated with providing unemployment insurance, workers’ compensation insurance, the employer’s share of federal taxes, health care coverage, vacation and sick time, and vehicles and other equipment and maintenance thereof – to their workforce, while nonetheless retaining and/or exercising the right of control traditionally enjoyed by employers.

These lawsuits bring into sharp relief the main point I want to establish through discussing the work law of past and present, which I hope has already become clear throughout this section: Modern work law defines an “employee” as someone who is hired to work but is *not* an “independent contractor.” This is much the same as it was in Blackstone’s day, and while other aspects of the master-servant relation have changed, the test for servant/employee status persists largely undisturbed. The freedom-of-contract view distorts the nature of work law because it suggests that we focus on the contracts by which an employer and employee may choose to enter a work relationship, despite the fact that a survey of modern work law demonstrates that there is precious little about how the relationship itself is defined, constituted, regulated, or conducted that the parties can lawfully establish or modify by contract.

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82. STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* 123 (2008) (“In more than thirty lawsuits, FedEx Ground drivers have argued that they are employees, not independent contractors, and that the company should, as a result, pay for their trucks, insurance, repairs, gas, and tires. Many drivers mock FedEx Ground’s claim that they are independent entrepreneurs who can “grow” their business, considering that their business is delivering packages that FedEx assigns them. Similarly, many drivers ridicule the company’s assertions that they can show their business acumen and increase their profits through such supposedly enterprising steps as finding cheaper ways to repair their trucks. In a lawsuit that FedEx Ground drivers filed in California, a state judge ruled that the company was essentially engaged in a ruse in maintaining that its drivers were independent contractors. The judge wrote that FedEx Ground “has close to absolute control” over the drivers, adding that the operating agreement that the drivers sign “is a brilliantly drafted contract creating the constraints of an employment relationship . . . in the guise of an independent contractor model.” An appeals court upheld that decision in August 2007, writing that FedEx has “control over every exquisite detail of the drivers’ performance, including the color of their socks and the style of their hair.”).

83. *Id.*

## CONCLUSION

I hope I could be forgiven for harboring the conceit that I have the freedom-of-contract view “on the ropes” at this point. After all, that view, which is arguably motivated by Maine’s enthusiastic endorsement of the relations created by free and independent contractors, holds that we should consider work law to be a mere branch of contract law, a branch that guides contract law by specifying what sorts of work relationships free contractors may choose to create. But as I have shown herein, modern work law simply doesn’t *allow* anyone to be both an “employee” and an “independent contractor,” and in the context of work, contractors are not at liberty to *create* any sort of relationship. To the contrary, although contracting parties are certainly free to describe the relationship they purport to “create” via contract in any way they like, if a court is ever called upon to apply the substantive provisions and requirements of work law to the relationship in question, the court and the law – *not* the contract – will determine the nature of the relationship in question and the rights and obligations that attach to the parties to the relationship. So why not simply call it a “win” for the relationship view and end this paper here? Well, it can’t be quite *that* easy to dispense with such a doughty dialectical opponent as the freedom-of-contract view.

Even if my arguments in this paper convinced – or should convince – any erstwhile supporter of the freedom-of-contract view to reconsider her position, I wouldn’t be satisfied with that limited success, nor should a freedom-of-contract proponent feel especially deterred by it. For I have made clear from the outset that although I am interested in describing the way work law *is*, I am even more intent on arguing for a particular conception of how it *should be*. I assume that proponents of the freedom-of-contract view would share my interest in offering a normative account of how work law should be, and I further assume that they would therefore argue that even if work law *is* just as I say it is, we should respond to this by *cleansing* modern work law of its 18th-Century trappings of “masters” and “servants” in favor of a work law that fulfills Maine’s bold prediction. *Shouldn’t* we freedom-loving folk strive to discard all connections with “property interests” in persons, entrenched hierarchy, and servitude, and strive to remake work law to allow everyone to bargain for no more and no less than he or she wills? In other words, the freedom-of-contract view might well offer the undeniably compelling argument that perpetuating the master-servant relation is a *problem*, and that we should solve this problem by moving – as Maine suggests – toward ever-greater independence and freedom to contract as we please.

In response to this argument, I offer a sketch of a normative argument

I will expand upon in future work, which is that work law not only *is* a status-based relationship, but also that it *should* remain so, albeit with further modifications. In short, no matter how unsavory we might find its lingering associations with the law of master and servant, work law's function of offering a hierarchical relationship of private governance within the workplace is not some quaint remnant of the past that we could easily slough off. As R. H. Coase argues in his seminal article "The Nature of the Firm," modern systems of production seem to *require* governance and control of employees within firms rather than a series of one-off contracts between free and independent contractors.<sup>84</sup> Coase entertains and attempts to answer several questions economists had previously taken for granted, such as why capital hires labor, rather than the other way around, and why firms exist at all, instead of leaving production entirely up to the market and the price mechanism.<sup>85</sup> Since the price mechanism could theoretically lead independent capitalists, laborers, and entrepreneurs to collaborate on discrete projects in accordance with their respective needs and preferences, Coase investigates why individuals might have reason to create firms at all.<sup>86</sup>

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84. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); see also Friedrich Engels, *On Authority*, in 4 *FRIEDRICH ENGELS AND KARL MARX, THE MARX-ENGELS READER* 731 (1978) ("Wanting to abolish authority in large-scale industry is tantamount to wanting to abolish industry itself, to destroy the power loom in order to return to the spinning wheel.").

85. *Id.* at 387 ("An economist thinks of the economic system as being co-ordinated by the price mechanism and society becomes not an organization but an organism. The economic system 'works itself.' This does not mean that there is no planning by individuals. These exercise foresight and choose between alternatives. This is necessarily so if there is to be order in the system. But this theory assumes that the direction of resources is dependent directly on the price mechanism. Indeed, it is often considered to be an objection to economic planning that it merely tries to do what is already done by the price mechanism. [This] description, however, gives a very incomplete picture of our economic system. Within a firm, the description does not fit at all. For instance, in economic theory we find that the allocation of factors of production between different uses is determined by the price mechanism. The price of factor A becomes higher in X than in Y. As a result, A moves from Y to X until the difference between the prices in X and Y, except in so far as it compensates for other differential advantages, disappears. Yet in the real world, we find that there are many areas where this does not apply. If a workman moves from department Y to department X, he does not go because of a change in relative prices, but because he is ordered to do so." (citing Friedrich A. Hayek, *The Trend of Economic Thinking*, 40 *ECONOMICA* 121 (1933))).

86. *Id.* at 388 ("Outside the firm, price movements direct production, which is co-ordinated through a series of exchange transactions on the market. Within a firm, these market transactions are eliminated and in place of the complicated market structure with exchange transactions is substituted the entrepreneur co-ordinator, who directs production. It is clear that these are alternative methods of co-ordinating production. Yet, having regard to the fact that if production is regulated by price movements, production could be carried on

Coase argues that relying entirely on the market and price mechanism in this way would significantly increase costs, as it would be prohibitively expensive to negotiate and agree to a protracted series of contracts with various workers.<sup>87</sup> Therefore, modern capitalist systems of production seem heavily to rely on firms, and firms, in turn, seem heavily to rely on the internal systems of governance made possible by our current, status-based work law. If Coase is correct, the goal of maintaining efficient production would give us strong reason to continue to allow employers<sup>88</sup> to retain and exercise a broad “right of control” over their employees within firms. On the other hand, if Maine and like-minded thinkers are right to value freedom of contract and the relationships we would form thereby above all else, then we would have reason to eliminate any status-based influence that colors the employment relation, thereby converting all work relationships to purely contractual arrangements. But this would be impracticable if not impossible.

For example, assume that it would be relatively simple and efficient for an individual to contract with another to perform a discrete task, such as moving a refrigerator, in exchange for payment, such as \$20, on a one-time basis, so long as both parties shared a sufficient understanding of what the task involved, the nature of the payment, etc. However, it would be nigh-impossible for two parties to draw up and fully specify a contractual agreement to the effect that one party would perform *all* the tasks that would or could be involved in occupying the role of servant or employee in

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without any organization at all, well might we ask, why is there any organization?”)

87. *Id.* at 390-91 (“The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism. The most obvious cost of ‘organising’ production through the price mechanism is that of discovering what the relevant prices are. This cost may be reduced but it will not be eliminated by the emergence of specialists who will sell this information. The costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market must also be taken into account. Again, in certain markets, e.g., produce exchanges, a technique is devised for minimizing these contract costs; but they are not eliminated. It is true that contracts are not eliminated when there is a firm but they are greatly reduced. A factor of production (or the owner thereof) does not have to make a series of contracts with the factors with whom he is co-operating within the firm, as would be necessary, of course, if this co-operation were as a direct result of the working of the price mechanism. For this series of contracts is substituted one. At this stage, it is important to note the character of the contract into which a factor enters that is employed within a firm. The contract is one whereby the factor, for a certain remuneration (which may be fixed or fluctuating), agrees to obey the directions of an entrepreneur *within certain limits*. The essence of the contract is that it should only state the limits to the powers of the entrepreneur. Within these limits, he can therefore direct the other factors of production.”).

88. Or worker-managers, in the case of worker-managed firms, which constitute a small but significant section of the economy and are consistent with Coase’s view of the nature and value of firm-based production.



exchange for wages and/or other compensation. It would not be sufficient – even if it were practicable in any realistic scenario – to provide an exhaustive list of tasks that the servant would be obliged to perform and when, where, and how they would all be performed. This is because such a list would not only be prohibitively difficult to generate, but also fail to provide the hiring party anywhere near the value he or she would receive by entering a standard, status-based work relationship as it is constituted by current work law.

Under current work law, when two parties agree to enter a work relationship, they understand that they will occupy roles within a hierarchical relationship, such that the employee is agreeing to be subject to the employer's authority and to do what the employer orders him or her to do – within limits defined and regulated by work law – at whatever times and places and in whatever manner the employer wants or requires. On the other hand, a purely contractual list of when, where, and how the employee agrees to perform various tasks would not provide the employer with any of the flexibility, the ability to respond to unforeseen (or unforeseeable) circumstances, or the simplicity of the traditional status-based work relationship. Moreover, such a list would offer no significant advantage over the similarly labor- and time-intensive process of executing a series of one-off agreements – apart from avoiding the transaction costs associated with negotiating a long series of contracts on an individual basis – to perform each task on the list as each became necessary, perhaps along with the worker's agreement to be available in the places and times he or she is likely to be needed for these one-off tasks. So “purely contractual” work relationships sound not only outrageously difficult, but downright unappealing, especially for the hiring party. The average hiring party wants to be the *boss*, and he or she wants someone to join his or her firm and be an *employee*. Contracts alone don't offer these options.

In response, advocates of the freedom-of-contract view might protest that so long as both parties understand the nature of the traditional work relationship, they could use “employ” and other work-related terms in their contractual agreements and count on their shared understanding of such terms' meaning in much the same way other contracting parties count on their shared understanding of terms like “purchase,” “insure,” or “widget.” But this would be wholly parasitic on the prior legal constitution of the employment relationship created by work law, rather than some widely shared and socially constructed linguistic or conceptual understanding of the terms.

Moreover, even if the parties were somehow able to *insist* in their contract that they were adamantly *not* adopting various pre-existing legal terms of art, such as “employ,” “employee,” “right of control,” etc., the

newly created relationship they could thereby enter would almost certainly be far too unstable and uncertain for any savvy free contractor to accept. Without a substantive, independent (from contract law), and fully specified body of work law to define what these terms mean and entail as a matter of law, neither party could assume that the right of the “boss” to issue reasonable orders to the “worker” did or did not include a right to, e.g., indulge in sexual harassment or racially discriminatory put-downs, require engineers or other professional employees to clean toilets or paint fences – which our current work law, incidentally, probably would allow but arguably should not – and/or permit employees to take bathroom breaks at will. That is, even if we could somehow discard work law’s constitutive understanding of work relationships in order to make way for the unfettered creation of *sui generis* work relationships, it seems far from clear that anyone would have reason to seek that outcome.

In summary, since work law is neither consistent with the freedom-of-contract view’s portrayal of it nor likely to be improved by the view’s normative prescriptions for it, I conclude that we should abandon the freedom-of-contract view and adopt the more descriptively and normatively accurate relationship view that I have described and for which I have argued herein.