

# MANAGERIAL PREROGATIVE, PROPERTY RIGHTS, AND LABOR CONTROL IN EMPLOYMENT STATUS DISPUTES

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*This Article explores how managerial prerogative shapes disputes over employment classification and reveals a neglected but prominent feature in legal arguments about platform worker rights—the disputed relevance of a platform’s intellectual property rights. In classification disputes, instead of denying that it has a right to control how others perform services for it, the company often concedes its employer-like authority but offers an alternative rationale: managerial prerogative. The company argues, and judges often agree, that its labor control is not the exercise of employer authority but instead reflects a prerogative of enterprise ownership, like a right to protect property and determine product lines. Thus, managerial prerogative both explains labor control and exempts that control from the statutory duties that would otherwise attach under the legal tests. Platform companies appear to have taken notice of such cases and designed their work relationships around property-based rationales. For instance, Uber uses a software “license” in which drivers agree to Uber’s authority as a condition for accessing the app. The license depicts the terms upon which drivers must affirmatively cooperate with Uber to produce transportation as simply the negative duties not to interfere with Uber’s intellectual property. The Article concludes that we must reject appeals to managerial prerogative in employment classification disputes. To assume that a property-based rationale for labor control is inconsistent with employment is to misunderstand the legal basis of employment and the purpose of statutory labor law. The appeals also rely on dubious economic assumptions and conflate property rights with agreements about the use of property.*

## INTRODUCTION

This Article examines how the notion of managerial prerogative shapes disputes over employment status, meaning legal disputes over whether a work arrangement should be classified as employment or something else, like independent contracting or just an indirect relationship between a franchisor and the employees of its franchisees. Only where there is employment or another statutory category of work relationship<sup>1</sup> does the law impose certain obligations on the company towards its workers and the polity, such as a duty to collectively bargain with workers’ chosen

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representative, not to discriminate on the basis of protected characteristics like sex, or to pay unemployment insurance premiums.<sup>2</sup> This Article explores how companies<sup>3</sup> invoke managerial prerogatives to rationalize their authority over workers while exempting that authority from any legal accountability as employers. While scholars have examined the role of managerial prerogative in several other areas of labor law,<sup>4</sup> they have not identified its role in disputes over employment classification.<sup>5</sup>

The Article shows that appeals to managerial prerogative represent another front in the conflict between putative property rights and social legislation, this time fought on what is perhaps the most contested terrain in labor law today—the question of who gets labor rights. Companies appeal to managerial prerogative as a basis for trumping any legal duties to workers, and these appeals sometimes cause judges to lose their bearing in applying the legal standards. The companies are in effect asking judges to create an exception to the legal standards without any warrant for doing so. However, judges often do not “see” appeals to managerial prerogative in these terms or otherwise try to understand them as legal claims. The appeals are, in a sense, guerrilla *Lochnerism*. They are difficult to apprehend, and therefore to reject in clear terms, for several reasons, including that we lack a clear understanding of the private-law dimensions of employment and have not subjected the concept of managerial prerogative, or the empirical assumptions that buttress it, to adequate scrutiny.

Thus, the Article responds to the call for more engagement between the explicanda of private law and labor law scholarship by positing that a better understanding of both, and of their relationship, requires taking private law more seriously. This means subjecting private-law claims to greater scrutiny, on their own terms, where they brandish themselves in labor disputes.

Managerial prerogative is the notion that a company has, and should have, near absolute authority over a commercial enterprise, meaning an organization

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- 1 For instance, in the UK statutory law grants certain rights to “workers.” Employment Rights Act 1996, c. 18 (UK); National Minimum Wage Act 1998, c. 39 (UK). Where this Article refers to “employment” status or classification, it includes these other statutory categories.
- 2 See Maya Pinto et al., *Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It*, NATIONAL EMPLOYMENT LAW PROJECT (Mar. 25, 2019), <https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it>.
- 3 This Article uses the term “company” loosely to refer to the business form of an enterprise, such as a corporation, partnership, or sole proprietorship.
- 4 JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINN. L. REV. 265 (1978); Cynthia Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921 (1992); Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79 (2021).
- 5 However, scholars have critiqued courts for dismissing evidence of an employment relationship between a franchisor and its franchisee’s employees where the franchisor claims its control is for purposes of brand protection. See Andrew Elmore, *The Future of Fast Food Governance*, 165 U. PA. L. REV. 73 (2017); Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy Is Actually Minimally Disruptive*, 2017 U. CHI. LEGAL F. 35 (2018).

engaged in a continuing undertaking to finance, produce, and market goods and services. Managerial prerogative includes a right to make decisions about investment, operational structure, product lines, marketing, methods of production, personnel, worker schedules, compensation, and the details of the work.<sup>6</sup> The legal basis of managerial prerogative is at best unclear, and those who assert it rarely bother trying to find one.<sup>7</sup> Nonetheless, judges<sup>8</sup> use managerial prerogative to limit worker rights in many areas of labor law, from collective bargaining to dismissal law.<sup>9</sup> The apparent legitimacy of managerial prerogative derives from a policy assumption: judges assume that managerial prerogative is necessary for the efficient operation of an enterprise, and, on a macroeconomic level, for the health or survival of a market economy.<sup>10</sup> The supposition is that government or worker interference with managerial prerogative will have adverse consequences.

In recent years, companies have earned plaudits from investors for adopting business strategies involving minimal inventory, physical assets, and employees to achieve market agility. Companies have reimagined themselves as flexible networks of contractual relationships and sleek logistical operations that have shed both ponderous property rights in the tools of production (like plant and equipment) and any legal or moral responsibility as stewards of their workers' livelihoods.<sup>11</sup> Many such businesses maintain that they no longer need either the authority of employers or the rights of property owners to coordinate production and compete successfully in product markets; rather, they can use information and communications technology to coordinate operations, where such technology enables them to rely on arms-length contracts with independent suppliers.<sup>12</sup> Platform companies have portrayed themselves as avatars of this trend. The taxi-app Uber, for example, submits that it can provide reliable, branded, on-demand local transportation without owning cars or employing drivers.<sup>13</sup>

Yet, how companies explain themselves to investors and how they explain themselves to judges often diverges. As illustrated in this Article, some companies rely heavily on their property rights to account for their control over production, and over the labor of those involved. At the same time, the companies claim that

6 Racabi, *supra* note 4; Stanley Young, *The Question of Managerial Prerogatives*, 16 ILR REV. 240 (1963); ATLESON, *supra* note 4.

7 See ATLESON, *supra* note 4, at 122-23; Young, *supra* note 6.

8 I use "judges" broadly to refer not only to court judges, but also to other officials who adjudicate legal disputes, including arbitrators and those who sit on administrative tribunals.

9 Racabi, *supra* note 4; Julia Tomassetti, *The Powerful Role of Unproven Economic Assumptions in Work Law*, 3 J.L. & POL. ECON. 49 (2022).

10 Neil W. Chamberlain, *The Union Challenge to Management Control*, 16 INDUS. & LAB. REL. REV. 184 (1963); Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 49 (1988); Estlund, *supra* note 4.

11 DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); Lilly Irani, *Difference and Dependence among Digital Workers: The Case of Amazon Mechanical Turk*, 114 S. ATLANTIC Q. 225 (2015).

12 JEREMIAS PRASSL, *HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY* (2018).

13 UBER, <https://www.uber.com> (last visited Apr. 9, 2022).

their authority does not make them the employer of those whose labor efforts they direct. For example, *Aslam v. Uber BV* was a dispute over whether Uber's London drivers were statutory "workers" under UK law.<sup>14</sup> Uber repeatedly argued that, rather than instructing, managing, or controlling drivers as their employer, it was "preserving the integrity of the platform."<sup>15</sup> Uber's "overarching" argument to the UK Court of Appeal was that the requirements it imposed on drivers that suggested the drivers were statutory workers were "simply conditions of the licence to use the App,"<sup>16</sup> Uber's property. Thus, not all market-agile companies have conceded the authority over the productive process that property rights seem to confer. Rather, they claim that these property rights include a right to direct what workers say and do on a discretionary basis, without assuming any obligations as employers. Such appeals are not unique to platform companies but appear also in disputes involving other service-producing companies. Further, companies raise them in classification disputes in many jurisdictions and in similar forms, despite their ostensible lack of legal relevance.

Appeals to managerial prerogative appear where the standards for determining employment status entail some consideration of whether the alleged employer "controls" the work or worker, a common and often ascendant factor in the legal tests in many common law and civil code jurisdictions.<sup>17</sup> For example, the legal standard for determining employment status under several U.S. federal statutes is the common-law agency test. Under this test, the judge queries whether an alleged employer has a right to control the "manner and means" of the work, as opposed to only the results of the work.<sup>18</sup> The control question also appears in the "economic realities" test applicable under federal and many state wage and hour laws,<sup>19</sup> and in the "ABC" test adopted by many U.S. states.<sup>20</sup> In the *Aslam* case, the UK Supreme Court evaluated Uber's control over the work to determine whether drivers were performing services "for" Uber and thus fit within the statutory definition of a worker.<sup>21</sup> Civil code jurisdictions tend to use the analogous concept of "subordination" to describe the worker's subjection to direction by the principal.<sup>22</sup>

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14 *Uber BV v. Aslam* [2021] UKSC 5 (UK).

15 *Aslam and Farrar v. Uber*, Case Nos 2202550/2015, para. 47 (London Emp't Trib. 2015), *aff'd* *Uber BV v. Aslam*, [2017] No. UKEAT/0056/17/DA (London Emp't App. Trib. 2017), *aff'd* [2018] EWCA Civ 2748 (Ct. of Appeal 2018), *aff'd* [2021] UKSC 5 (UK).

16 *Aslam* [2018] EWCA Civ 2748, para. 74, *aff'd* [2021] UKSC 5. The UK Supreme Court rejected this argument, unanimously finding that London Uber drivers were workers.

17 See Pinto et al., *supra* note 2, at 2; Guy Davidov & Pnina Alon-Shenker, *The ABC Test: A New Model for Employment Status Determination?*, 51 *INDUSTRIAL L.J.* 235 (2022); Christina Hiessl, *The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis*, 42 *COMP. LAB. L. & POL'Y J.* 465 (2022).

18 E.g., *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

19 E.g., *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003).

20 E.g., *Matter of Doster*, 187 A.D.3d 1255, 1256-57 (N.Y. App. Div. 2020).

21 *Uber BV v. Aslam* [2021] UKSC 5 (UK).

22 Unless distinguished, hereinafter, I use "control" to include subordination.

Despite a common core based on direction of the work or worker, the control concept assumes different meanings depending on the jurisdiction, the legal test, and even the judge. For example, some judges adopt a narrow understanding of control by looking to the institutional characteristics of industrial employment, such as whether the principal schedules and controls working time, supervises and directs the work in person and in real-time, provides the tools of work, pays by the hour, and assigns and supervises work not specified in a written agreement.<sup>23</sup> Other judges and legal tests use a broader concept of control. For instance, some judges focus on forms of control that prevent workers from running independent businesses, such as whether the principal exercises detailed control over the design and provision of the marketable service, unilaterally sets prices, prevents workers from building goodwill and brand recognition, implements and enforces performance standards on a discretionary basis, blocks market information that would be relevant or critical if workers were in fact self-employed and competing for customers, and takes other measures to integrate workers into the principal's business.<sup>24</sup> Thus, some courts have become more skeptical of claims that companies cannot control workers across their capital boundaries, instead recognizing that companies can impose rather exacting control through information technologies, market power, and contractual specification. Observers of European jurisprudence on the status of platform workers have suggested that courts might be shifting towards this latter interpretation of control, leading more tribunals to find that platform workers are entitled to labor law protections.<sup>25</sup>

The significance of this partial survey of the control concept is twofold: First, it illustrates the pervasiveness of the control concept in the legal tests. Second, it suggests why platform companies are making novel claims about their managerial prerogative and even configuring work relationships around such claims: If shifting conceptions of control make it harder for platform companies to simply deny control, companies will look for other ways to avoid compliance. History offers many examples of employers re-engineering their business practices to avoid, preempt, or displace legal duties but also retain power over workers.<sup>26</sup>

As this Article reveals, instead of simply denying that they have a right to control how workers perform services for them, companies often argue that they should not be liable as employers if they can explain their authority based on some inherent right in managing their business, framed as a property or entrepreneurial right. The most common prerogatives that companies assert are the rights to protect and

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23 *E.g.*, Nolan Enterprises, Inc. d/b/a Centerfold Club & Brandi Campbell, 370 NLRB No. 2 (July 31, 2020) (finding that an exotic dancer was an employee); FedEx Home Delivery v. N.L.R.B., 563 F.3d 492 (D.C. Cir. 2009) (finding that delivery drivers were independent contractors). *See also* Hiessl, *supra* note 17.

24 *E.g.*, *Aslam* [2021] UKSC 5 (UK); Matter of Vega, 149 N.E.3d 401, 405 (N.Y. 2020) (finding Postmates liable for insurance premiums due to the courier's employee status). *See also* Hiessl, *supra* note 17.

25 *See* Hiessl, *supra* note 17; Antonio Aloisi, *Demystifying Flexibility, Exposing the Algorithmic Boss: A Note on the First Italian Case Classifying a (Food-Delivery) Platform Worker as an Employee*, COMP. LAB. L. & POL'Y J. Dispatch No. 35 (2021).

26 Racabi, *supra* note 4. *See also* Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOCIO. 888 (2011).

exclude others from intangible property, like brand identity, and the entrepreneurial rights to decide what kind of services to create and how to market them. In sum, companies appeal to property and entrepreneurial rights to rationalize their direction of labor and exempt that direction from the liability that would otherwise attach under the legal standards.

These arguments deserve our attention. The relevance of the alleged employer's appeals to managerial prerogative forms an acute point of disagreement among judges. Some accept these arguments as a reason to exclude workers from statutory protections, even though nothing in the legal standards suggests that the rationale or reason for the alleged employer's control, as opposed to its mere existence, should matter. Other judges reject these arguments. Yet scholars have not identified managerial prerogative as a potential, partial explanation for the inconsistency in the case law on employment classification.<sup>27</sup> It is well-established that the case law is unpredictable and excludes many workers deserving of protection; scholars have attributed this to the open-endedness of the legal tests, including a reliance on multifactor tests; to the lack of a guiding purpose or principle to direct the application of the tests; to the difficulty of applying tests designed around employment relationships of the past to contemporary work arrangements; and to different understandings of the control concept and its manipulability.<sup>28</sup> Thus, scholars and some judges have attributed uncertainty regarding the employment status of platform workers to the control question.<sup>29</sup> These scholars and judges are not wrong, but this Article reveals another point of disagreement and another way of manipulating the control concept: Rather than argue about the meaning of control or what elements are most important under the tests, judges disagree on the relevance of managerial prerogative.

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- 27 Michael C. Harper, *Using the Anglo-American Respondeat Superior Principle to Assign Responsibility for Worker Statutory Benefits and Protections*, 18 WASH. U. GLOBAL STUD. L. REV. 161 (2019); GUY DAVIDOV, *A PURPOSEFUL APPROACH TO LABOUR LAW* (2016); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187 (1999); SERGIO GAMONAL & CÉSAR F. ROSADO MARZÁN, *PRINCIPLED LABOR LAW: U.S. LABOR LAW THROUGH A LATIN AMERICAN METHOD* (2019); Noah Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279 (2011).
- 28 In addition to the sources cited in note 27, see Davidov & Alon-Shenker, *supra* note 17; Katherine V. W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees with Employers*, 27 BERKELEY J. EMP. & LAB. L. 251 (2006). Scholars have recognized and critiqued how companies use property rights to establish "capital boundaries" that locate workers outside the *de jure* or *de facto* scope of labor law, for instance, through subcontracting, outsourcing, and using temp agencies. Hugh Collins, *Ascription of Legal Responsibility to Groups in Common Patterns of Economic Integration*, 53 MOD. L. REV. 731 (1990); Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609 (2006); WEIL, *supra* note 11.
- 29 *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015). Hiessl, *supra* note 17; Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479 (2016); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 BOSTON U. L. REV. 1673 (2016); Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL'Y J. 1 (2016); Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017).

Recent scholarship has highlighted how some of today's precarious work arrangements, including in the gig economy, resemble preindustrial work patterns like home-work.<sup>30</sup> The appeals to property rights in classification disputes are also in part a throwback to an earlier time, where employment was viewed as a property-based relationship in which the employer invited workers to use its property on conditions that it dictated. The irony here is that what was once thought by some to be the basis of employer authority is now an excuse to avoid employer status.

In this regard, the arguments examined in this Article reveal another way in which "algorithmic management" obscures employer power by concealing the labor-capital relationship. Algorithmic management refers to the use of digital technology to direct, monitor, correct, compensate, and discipline workers.<sup>31</sup> What is somewhat distinctive about the classification disputes involving platform companies is that their property-based rationale for controlling the work is more than a defensive argument raised in litigation: it is explicit in the basic design of the work relationship. Uber and its competitor Lyft use software "licenses" to delineate their relationships with drivers. These licenses construe the companies' authority over how drivers perform services on their behalf as the conditions of drivers' access to the Apps. Likewise, the companies depict the employer-like controls programmed into the Apps as components of their proprietary software. If a driver does not comply, the company exercises its property right to exclude, i.e., it terminates the driver. In this way, automation and digitalization give the company greater power to direct the worker and justify excluding this power from the reach of labor law.

I argue that judges must reject appeals to managerial prerogative. Even if property rights can explain the authority that companies claim over those working under their direction,<sup>32</sup> this should be irrelevant in determining employment status. The notion that this should matter is based on a mistaken assumption about the legal basis of employer authority. Further, creating an exception in the legal standards for managerial prerogative is inconsistent with the policy purposes of statutory labor law, rests on the dubious assumption that managerial prerogative has a compelling economic rationale, and conflates property rights with agreements regarding the use of property.

The Article proceeds as follows. Part I introduces the concept of managerial prerogative and the legal tradition of appealing to managerial prerogative to limit worker rights. Part II surveys how companies assert managerial prerogative in disputes

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30 Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 *COMP. LAB. L. & POL'Y J.* 603 (2015).

31 Min Kyung Lee et al., *Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers*, in *PROCEEDINGS OF THE 33RD ANNUAL ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS* 1603-12 (2015), <http://dl.acm.org/citation.cfm?id=2702548>.

32 This is unclear. In the emerging U.S. capitalist economy of the 19th century, it was via the master-servant relationship, not property rights, that courts rationalized employer control. CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993); ALAN FOX, *BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS* (1974); PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 136-37 (1969). Nonetheless, the viability of these rights *qua* property rights is beyond the scope of this Article.

over employment status and shows that judges disagree on the relevance of these claims. It also shows how platform companies use the creative and practical metaphor of a software license to design employment as a property-based relationship. The Article focuses on U.S. law but draws on cases from other jurisdictions to illustrate the broader relevance of the analysis. Part III critiques the arguments for their mistaken legal premises, empirical assumptions, and policy derogations.

## I. THE CONCEPT AND APPEAL OF MANAGERIAL PREROGATIVE

At first glance, it is puzzling that any tribunal would defer to claims about managerial prerogative when they are trying to categorize a work relationship. Nothing in the legal standards suggests that the reason for the alleged employer's control, as opposed to its mere existence, should matter. Nor do the standards provide for any exception based on managerial prerogative, whether in the form of property rights, entrepreneurial rights, or something else. However, the arguments draw upon a judicial tradition of recognizing and deferring to the idea of managerial prerogative in labor law.

### A. Managerial Prerogative

Managerial prerogative refers to the notion that a company has a near complete prerogative to control the enterprise: "Management prerogatives are the rights or authority to organize and direct men, machinery, materials, and money in order to achieve the objectives of the enterprise."<sup>33</sup> Companies claim different kinds of prerogatives: entrepreneurial prerogatives to determine what to produce and how to service customers,<sup>34</sup> prerogatives to protect property and determine access conditions, and a prerogative to exercise plenary authority over employees.<sup>35</sup>

Managerial prerogative is largely the product of judges.<sup>36</sup> Its legal basis is unclear, and the courts that created or expanded it rarely sought to identify a legal basis.<sup>37</sup> Courts often defend managerial prerogative on the policy assumption that it is

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33 Young, *supra* note 6, at 241.

34 See First Nat. Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 676-77 (1981) (locating "management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements" within managerial prerogative).

35 See Clyde Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

36 See Racabi, *supra* note 4.

37 *Id.*; Young, *supra* note 6. *E.g.*, Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964) (recognizing managerial prerogative on the basis of tradition and policy). Some cases intimate that managerial prerogative derives from the company's rights as enterprise "owner." *E.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (referencing the "rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers . . ."). See also ATLESON, *supra* note 4, at 32-33. As explained *infra*, however, managerial prerogative over employment has no sound legal justification.

necessary for economic efficiency and an essential part of a free-market system.<sup>38</sup> Neil Chamberlain captured its faith-based, almost deific status when he recalled that every time workers organized and attempted to assert some right to decent working terms and conditions, such as a reduction of the 16-hour workday, they were charged with trespassing on “. . . such matters [that] were really in the hands of those who represented the workings of a systematic order, perhaps even in the hands of God.”<sup>39</sup>

The idea that business has the lawful authority to direct the enterprise with little or no interference from government or workers is a sticky background assumption running through virtually every area of labor law. It leads tribunals—courts, agencies, and arbitrators—to view common law, statutory, and even constitutional incursions on managerial prerogative with suspicion and to construe them narrowly.<sup>40</sup> In the common law, courts invoke managerial prerogative to defend the employer’s at-will authority and to limit public policy and contractual limitations on the employer’s termination authority.<sup>41</sup> In the statutory context, the notion of managerial prerogative limits the reach of the National Labor Relations Act (NLRA), the principal statute governing worker organizing, unionization, and collective bargaining in the U.S.<sup>42</sup> In the Constitutional domain, courts delimit the scope of public employees’ free speech rights by measuring them against managerial prerogative.<sup>43</sup>

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38 *E.g., Fibreboard*, 379 U.S. at 226 (attributing managerial prerogative to “traditional principles of a free enterprise economy”); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396, 397 (Tenn. Ct. App. 1981) (fearing that the “very foundation of the free enterprise system could be jeopardized” if the legislature or court prohibited discharges in bad faith or in violation of public policy, and suggesting that the employer’s right to fire employees for any reason was responsible for the state’s “enormous strides in recent years in its attraction of new industry of high quality designed to increase the average per capita income of its citizens and thus, better the quality of their lives”); *N.L.R.B. v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956) (terminating employees was a “normal, lawful legitimate exercise of the prerogative of free management in a free society”); *Bass v. M & S Music Co.*, No. 78-556, 1979 WL 1969, at \*4 (S.D. Ala. Oct. 12, 1979) (expressing concern over limiting the employer’s power to fire employees “[i]n a day-and-age when government regulation tends to act as an impediment to free enterprise, stifling initiative in the private sector”); *Dumas v. Auto Club Ins. Ass’n*, 437 Mich. 521, 532 (1991) (noting the “traditional reluctance of courts to interfere with management decisions and the needed flexibility of businesses to change their policies to respond to changing economic circumstances”); *Cotran v. Rollins Hudig Hall Int’l, Inc.*, 17 Cal. 4th 93, 104 (1998) (declining to apply breach of contract principles to employer termination, given that juries were “unexposed to the entrepreneurial risks that form a significant basis of every state’s economy”) (quoting *Southwest Gas v. Vargas*, 111 Nev. 1064, 1075 (1995)).

39 Chamberlain, *supra* note 10, at 185.

40 *See Racabi, supra* note 4.

41 *E.g., Taylor v. Nat. Life Ins. Co.*, 161 Vt. 457, 466 (1993) (finding that the employer could fire employees for economic reasons despite a contract term limiting termination to good cause, given that “history is replete with examples of technological and business innovations which have created new markets and destroyed old ones, thereby necessitating changes and shifts in the work force”). *See also Tomassetti, supra* note 9.

42 *E.g., Textile Union Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (limiting the antidiscrimination provisions of the NLRA); *N.L.R.B. v. Mackay Radio & Telegraph* 304 U.S. 333, 345 (1938) (holding that the employer could hire permanent replacements for striking employees without violating the NLRA). *See also ATLESON, supra* note 4; Tomassetti, *supra* note 9.

43 *E.g., Garcetti v. Ceballos*, 547 U.S. 410, 431 (2006).

The example of at-will employment illustrates how the notion of managerial prerogative—specifically the assumption that the employer has an inherent prerogative over termination—trumps contract law. For most purposes, courts describe employment as a contract.<sup>44</sup> However, in all but one U.S. state, the law presumes that, in the absence of incredibly clear evidence to the contrary, the employer and employee have agreed that the relationship will be “at will.” This means that either the employee or employer can end the relationship at any time, for any reason or for no reason.<sup>45</sup> This presumption creates a contradiction without resolution: employment cannot be a contract and be at-will, since a contract is by definition a relationship that is not at-will but rather includes a commitment.<sup>46</sup> Courts do not presume that any other kind of “contract” is at-will and do not recognize any other at-will agreement as a “contract.”<sup>47</sup>

Rather than articulate a legal rationale for at-will employment or eliminate the presumption, some courts drop the pretense that the at-will term is contractual. As explained in Part III, it is difficult to defend the idea of employment as a “contract” from a doctrinal perspective; however, employment is contractual in a looser, sociological sense: it is, formally, a relationship whose existence and content is a matter of agreement between the parties.<sup>48</sup> This distinguishes employment from a “status” relationship whose existence and content is prescribed by an outside authority, like law or custom.<sup>49</sup> Nonetheless, courts have described the employer’s right to terminate employees at will as a non-bargained-for prerogative that it may choose to bargain away or not:

... the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment. Because the employment relationship is “fundamentally contractual,” limitations on these employer prerogatives are a matter of the parties’ specific agreement, express or implied in fact.<sup>50</sup>

In the collective bargaining context, arbitrators have long assumed that, except for discrete matters specifically conceded in a collective bargaining agreement, the employer has a “reserved” authority to manage every aspect of the enterprise,

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44 See Julia Tomassetti, *Power in the Employment Relationship: Why Contract Law Should Not Govern At-will Employment*, ECONOMIC POLICY INSTITUTE (2021); Restatement of Emp’t Law § 2.01 cmt. b (Am. Law Inst. 2015) (“At its core, employment is a contractual relationship.”).

45 Restatement of Emp’t Law § 2.01 cmt. b.

46 See A.L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW (1995).

47 Generally, in the absence of a notice term or good faith obligation, the agreement would be unenforceable for want of consideration. *E.g.*, U.C.C. § 2-309 (Am. Law Inst. & Unif. Law Comm’n 2002); Rachel Arnov-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513 (2014) (at-will employment without a notice term is an illusory contract).

48 Otto Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MOD. L. REV. 635 (1967).

49 SIR HENRY MAINE, ANCIENT LAW (1917). See also Sabine Tsuruda, *Good Faith as Contractual Foundation for Workers’ Rights*, 24 THEORETICAL INQUIRIES L. 206 (2023); Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24 THEORETICAL INQUIRIES L. 49 (2023).

50 *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 350 (2000) (internal citation omitted) (emphasis added).

including terms of employment that are putatively contractual rather than part of management's inherent rights.<sup>51</sup>

Courts also limit worker statutory rights based on managerial prerogative. To provide one example from the NLRA context, when interpreting the requirement that an employer bargain collectively “with respect to wages, hours, and other terms and conditions of employment,” the Supreme Court held that this provision did not compel an employer to bargain over a decision to terminate a client contract.<sup>52</sup> The Court recognized that the decision entailed terminating the employees working on the contract; however, citing the “employer’s need for unencumbered decision making,” it found that employee interests should not factor into determining the scope of the employer’s duty to bargain.<sup>53</sup>

### B. Property Rights

Courts have likewise limited worker rights based on the employer’s real, personal, and intangible property rights. Regarding real property rights, the U.S. Supreme Court has made it difficult for workers to access employer property in organizing efforts where they are not employed by that particular employer.<sup>54</sup> A recent NLRB decision restricted worker associational rights by finding that an employer could, on the basis of its property rights, prohibit employees from using the workplace email system to communicate about non-work matters.<sup>55</sup> NLRA caselaw also recognizes some intangible employer property rights to reputation and brand.<sup>56</sup>

In contrast to the case law on employment status, however, NLRA jurisprudence sometimes recognizes that one might be able to account for some decisions based on *either* property rights or employer authority. Rather than categorize all of these decisions as incidents of “property rights” and locate them outside the NLRA’s reach, the case law generally finds that, where employees are “rightfully on the employer’s

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51 FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 634-833 (Kenneth May ed., 6th ed. 2003). *But see* *Columbian Chemicals Co.*, 307 NLRB 592 (1992) (the arbitrator erred in relying on “basic management prerogative” to allow the employer’s unilateral rule changes in the absence of an express contractual term).

52 *First Nat. Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666 (1981). The employer was required, however, to bargain over the effects of the contract termination decision on the employment of its union members.

53 *Id.* at 679. The Supreme Court has also held that antidiscrimination law is “not intended to ‘diminish traditional management prerogatives.’” *Texas Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 259 (1981) (internal quotation omitted). Arguably, however, the Court has been more willing to restrict managerial prerogatives to protect employee rights against discrimination than when dealing with other statutory rights. For instance, the Court recognized a claim for disparate impact discrimination under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Yet scholars have critiqued the courts for subordinating statutory rights to managerial prerogative in discrimination cases, in particular, for allowing employers to maintain job requirements that disadvantage women and for undermining the burden-shifting framework that is supposed to make it easier for plaintiffs to prove discrimination. *See* Samuel Bagenstos, *Consent, Coercion, and Employment Law*, 55 *HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV.* 409 (2020); Deborah Dinner, *Beyond Best Practices: Employment-Discrimination Law in the Neoliberal Era*, 92 *INDIANA L.J.* 1059 (2016).

54 *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992); *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021).

55 *Id.*; *Caesars Ent.*, 368 NLRB No. 143 (Dec. 16, 2019).

56 *In-N-Out Burger, Inc. v. N.L.R.B.*, 894 F.3d 707, 716-17 (5th Cir. 2018).

property,” “the employer’s management interests rather than his property interests were [] involved.”<sup>57</sup> Thus, where the employer prohibits employees from wearing union insignia to protect its “public image,” notwithstanding the employer’s invocation of a property right in its image, courts find that the issue implicates only the employer’s management interests and are more deferential to employees’ associational rights than when dealing with the employer’s real property rights.<sup>58</sup>

## II. MANAGERIAL PREROGATIVE AS AN ALTERNATIVE BASIS OF LABOR CONTROL

The arguments invoking managerial prerogative in employment status disputes follow a basic pattern: to some extent, the company concedes that it has a right to control the labor process in a manner probative of an employment relationship under the legal standards; however, the company argues that this control should not count, because the control reflects a managerial prerogative. As noted, some notion of control is relevant under most of the tests for determining employment status.

### A. Managerial Prerogatives—Entrepreneurial and Property Rights

#### 1. What to Make

The alleged employer often invokes a prerogative to determine what service it will sell. It characterizes its control over how workers produce the service either as part of the service itself or as an incident of a right to determine the nature of the service. Regardless, the direction of labor appears as part of the company’s saleable product.

As an example, in an Italian case by the Tribunal of Turin, now largely reversed by the Supreme Court, the judge found that delivery workers for the food platform Foodora who were terminated after striking were not entitled to protection either as subordinate employees or under a less restrictive status for individuals who personally perform work subject to the organizational control of a principal.<sup>59</sup> The judge decided that Foodora’s control over how its delivery workers performed services was within the company’s prerogative to decide what it wanted to produce and how it wanted to dispose of its product on the market. Antonio Aloisi describes and translates the judge’s argument:

[E]lements such as working conditions determined by the platform, the indication of the places where and precise time limit within which the deliveries must be completed, the frequent monitoring activity through the GPS feature must be considered “defining

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57 *Hudgens v. N.L.R.B.*, 424 U.S. 507, 522 (1976).

58 *In-N-Out Burger*, 894 F.3d 707.

59 Del 24-1-2020, Corte di cassazione. Sentenza, n.1663 (2020). The Supreme Court did not consider whether the Foodora workers were subordinate employees but found that they were entitled to all of the legal protections of employees because their work was organized by Foodora.

patterns of the business model, rather than distinctive elements of the nature of the relationship.”<sup>60</sup>

The court characterizes managerial direction—even of the work pace—as part of Foodora’s prerogative to determine its “business model.”<sup>61</sup>

Where a customer interaction with a worker largely comprises the service that the company is selling, companies often characterize their direction and supervision as an inherent part of the product, and thus subject to entrepreneurial rights. For most services involving customer interaction, the labor overlaps in time and place with the exchange of the service and its consumption. For example, a customer receives and consumes a manicure as the manicurist produces it. This overlap appears to fold the labor process into the product and turn labor control into an incident of an entrepreneurial right to dictate the product.

For example, in *FedEx Home Delivery v. NLRB*, a U.S. appellate court held that drivers for the package delivery company FedEx had no right to unionize, because they were not FedEx’s employees. The court’s ruling overturned a decision by the National Labor Relations Board (NLRB), the agency responsible for enforcing the NLRA. The court interpreted FedEx’s authority over how drivers performed pickup and delivery services as control over *what* the company was selling.<sup>62</sup> The court sought to explain why FedEx’s work rules, training and scheduling requirements, determination of routes, and supervision were consistent with an independent contracting relationship. The problem was that previous decisions involving delivery drivers suggested that this kind of control was more consistent with employment. The court argued that these elements of FedEx’s control “reflect differences in the type of service the contractors are providing rather than differences in the employment relationship.”<sup>63</sup>

## 2. Customer Demand

Companies and courts also invoke a prerogative to satisfy customers and meet market demand to exempt their employer-like control from the legal standards. These appeals often illustrate another variation on the pattern of the basic argument, where the company or court focuses on the asserted motivation for the control. The legal standards query only whether the company has control or a right to control the work, not the company’s motivation in claiming this right. However, where the

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60 Antonio Aloisi, ‘With Great Power Comes Virtual Freedom.’ *A Review of the First Italian Case Holding That (Food-Delivery) Platform Workers Are Not Employees*, COMP. LAB. L. & POL’Y J., Dispatch No. 13 (Dec. 3, 2018). External quotes are from Aloisi, and internal quotes are from the decision. Certain platform workers in Italy are now protected by legislation covering workers who perform work organized by someone else. Antonio Aloisi & Valerio De Stefano, *Delivering Employment Rights to Platform Workers*, IL MULINO (2020), [https://www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS\\_ITEM:5018](https://www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS_ITEM:5018).

61 See also Hiessel, *supra* note 17 (discussing a decision by the Malmo Administrative Court, which found that some control exercised by the platform Taskrunner did not count because it was part of the platform’s “business model”).

62 563 F.3d 492 (D.C. Cir. 2009).

63 *Id.* at 501 (emphasis added). See also *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 691–92 (D. Md. 2010).

company claims that its motivation is not to control workers for the sake of control, but to meet another objective within its entrepreneurial rights, some courts will find that it does not count as evidence of employment.

For instance, in *FedEx Home Delivery*, the court argues that where a company's control, such as the requirement that drivers wear a uniform, was motivated by the need to satisfy customers, it should not count as evidence of employment: "With this [business] model come certain customer demands, including safety . . . a uniform requirement often at least in part 'is intended to ensure customer security rather than to control the [driver].'"<sup>64</sup> And, "a rule based on concern for customer service does not create an employee relationship."<sup>65</sup> In another case about the status of FedEx drivers, the court found that determining the drivers' schedules was not evidence of employment, because "It is in the very nature of the work—delivering and picking up packages—that obliged them to work on certain days and at certain times. Customers would surely not accept deliveries at all hours of the night."<sup>66</sup>

Companies and courts often frame these entrepreneurial appeals within the means/results standard for employment status. This standard distinguishes between an alleged employer's control over the "means and manner" of the work, which indicates employment, versus control over only the "results" of the work, which is consistent with independent contracting.<sup>67</sup> The company or court contends that what looks like authority over the means and manner of the work is only control over the results: Given the company's entrepreneurial right to design its product and service customers just as it likes, the "results" of the work are whatever it claims as its product.

To illustrate, in multi-district litigation, in response to evidence that FedEx asserted employer-like authority over drivers, like obligating them to complete daily assigned work, the court argued, "These requirements weigh in favor of employee status, but are more suggestive of a results-oriented approach to management when viewed with the totality of circumstances. FedEx has contracted for the performance of certain work and has the right to require that the work be completed as agreed."<sup>68</sup> The court also exempted FedEx's control, because "Many general instructions set forth by FedEx are based on customer demands. FedEx's requirement that drivers meet these customer demands involves the results of the drivers' work."<sup>69</sup>

That courts accept these arguments reveals the potency of managerial prerogative. They are ceding their judicial authority to determine legal meaning to the alleged employer, allowing it to define the "results" as congruent with the company's entrepreneurial prerogative to design its product and service customers.

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64 563 F.3d at 501 (internal citation omitted).

65 *Id.* at 503 (citing *C.C. Eastern, Inc. v. N.L.R.B.*, 60 F.3d 855 (D.C. Cir. 1995)).

66 *Johnson v. FedEx Home Delivery*, No. 04-CV-4935, 2011 WL 6153425, at \*14 (E.D.N.Y. Dec. 12, 2011).

67 Restatement of Emp't Law § 1.01 cmt. d (Am. Law Inst. 2015); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

68 *In re FedEx Ground Package System, Inc.*, 734 F.Supp.2d 557, 589 (N.D. Ind. 2010), *rev'd in part* *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313 (11th Cir. 2015), and *rev'd in re FedEx Ground Package Sys., Inc. Emp. Pracs. Litig.*, 792 F.3d 818 (7th Cir. 2015).

69 *Id.* at 588.

### 3. *Protecting (Intangible) Property*

Companies have also argued that their control over workers and the labor process should not factor into the evaluation of their legal responsibility as employers because the control is necessary to protect their property. These cases seem inevitably to involve companies that produce consumer services. The company invokes the need to protect intangible property, like its reputation, brand, or trademark.

For instance, in *FedEx Home Delivery*, the court exempted virtually all of FedEx's control over its drivers on the basis that, "once a driver wears FedEx's logo, FedEx has an interest in making sure her conduct reflects favorably on that logo, for instance by her being a safe and insured driver . . . ."<sup>70</sup>

The underlying notion is that when workers interact with the company's customers, they are entrusted with the company's valuable but delicate property—its brand and reputation—and could easily damage this property by saying or doing something off script.<sup>71</sup> Therefore, to protect this property, the company has an absolute right to dictate how the worker handles it, just like a factory owner might prescribe that workers handle its machinery only at certain speeds.

The property-protection exception is often well-received in disputes over whether a franchisor should be liable as a "joint employer" along with its franchisee for labor and employment law violations perpetrated against the franchisee's direct employees. Scholars have shown that fast-food franchisors often determine the terms and working conditions of workers by leveraging their economic power over franchisees.<sup>72</sup> For example, a restaurant chain might use software to direct how the franchisee schedules its employees. It might dictate details of the labor process, such as how fast employees must work, through policies that franchisees ignore at their peril.<sup>73</sup> In several jurisdictions, courts exempt much of the franchisor's authority over its franchisees' workers from legal consideration.<sup>74</sup> For instance, when Jimmy John's workers sued the franchisor for labor law violations, the court recognized that the franchisor controlled the franchisee employees, even taking "aggressive measures" to supervise and evaluate them.<sup>75</sup> However, it held that the franchisor was not a joint employer, because the purpose of its authority was not to control workers for the sake of controlling them, but rather to protect its trademark and assert entrepreneurial control over its product and customer service:

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70 *FedEx Home Delivery*, 563 F.3d at 501. See also Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007) (discussing how employers use managerial prerogative to require service workers to create their branded property).

71 See, e.g., *Uber Technologies Inc.*, NLRB Advice Memorandum, Cases 13-CA-163062 et al. (April 16, 2019) at 8.

72 Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CAL. L. REV. 1317 (2021); Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New Intermediary Theory of Joint Employment*, 94 WASH. L. REV. 171 (2019).

73 Elmore, *supra* note 5.

74 E.g., *Juarez v. Jani-King of Cal., Inc.*, No. 09-3495, 2012 WL 177564, at \*4 (N.D. Cal. Jan. 23, 2012).

75 In re Jimmy John's Overtime Litig., No. 14-C-5509, 2018 WL 3231273, at \*22 (N.D. Ill. June 14, 2018).

Jimmy John's has developed a system under which each franchise store will provide an identical atmosphere, product, and customer service regardless of its owner or location. In order to achieve that goal, Jimmy John's must impose requirements, including sandwich preparation, store organization, and systems software, and ensure that each store complies with these requirements. The purpose of these requirements is not to control franchise employees but to protect the Jimmy John's Brand Standards that make it a successful business.<sup>76</sup>

### *B. The Disputed Relevance of Managerial Prerogative*

Courts disagree on whether to recognize exceptions to the legal standards for employment status based on appeals to property and entrepreneurial rights. For example, in a dispute over a franchisor's liability as a joint employer, a court noted that state law "does not distinguish between controls put in place to protect a franchise's goodwill and intellectual property and controls for other purposes."<sup>77</sup> Another court found no reason to dismiss a company's control on the basis of its commercial objective: "[A]t some level, all company control and supervision over its workers are geared toward satisfying its clients and customers."<sup>78</sup>

In another case, FedEx argued that "its appearance standards do not connote the exertion of control over its drivers; rather, those standards are designed and intended to assure its customers that they may feel safe in opening their homes and businesses to drivers displaying the FedEx brand."<sup>79</sup> The court rejected this argument:

[T]he irony of that argument is that FedEx's customers would not feel safe in the presence of the FedEx logo if they did not believe that FedEx's branding of its drivers meant that the company had taken responsibility to conform the drivers' actions to replicate the integrity of the company.<sup>80</sup>

The court rejected FedEx's attempt to define its supervision of the minutiae of drivers' work as the "results" rather than its "means and manner," noting that "the place that the independent contractor parks or the number of steps the contractor must walk to fulfil the contract should not be a concern for the company, so long as the package is delivered when and where the customer expected."<sup>81</sup>

### *C. Algorithmic Management and Managerial Prerogative: A New Twist*

Companies that use online platforms to coordinate the production of on-demand services, like the taxi apps Uber and Lyft, have also argued that any employer-like

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76 *Id.* at \*20.

77 *Williams v. Jani-King of Philadelphia Inc.*, 837 F.3d 314, 324 (3d Cir. 2016) (quoting lower court).

78 *Hurst v. Buczek Enterprises, LLC*, 870 F. Supp. 2d 810, 826 (N.D. Cal. 2012).

79 *Craig v. FedEx Ground Package Sys., Inc.*, 300 Kan. 788, 807 (2014).

80 *Id.* at 807-08.

81 *Id.* at 812. *See also* *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 429 (7th Cir. 2012), certified question answered, 300 Kan. 788 (2014) (questioning why FedEx should be exempt from employment consequences of its customer service choices: "Of course, it is FedEx that decides what services are provided to its customers, and when").

authority they exercise over their workers is an incident of managerial prerogative lying beyond the reach of labor law.<sup>82</sup>

What is different about these appeals in the hands of platform companies is that the property-based rationale for labor control is more than a defensive argument raised in litigation. Rather, it is fundamental to how they design the work arrangement. Uber and Lyft require drivers to sign a putative software “license.”<sup>83</sup> In exchange for using the App, drivers agree to follow the companies’ directions as conveyed by the apps, and to meet the companies’ *ex post* determination of performance standards, like what customer rating the driver must meet to avoid termination. The companies expressly construct their authority over the labor process and drivers as conditions for “access”<sup>84</sup> to their intellectual property.

For example, one hallmark of employment is that an employer, unlike a client hiring an independent contractor, has a right to assign tasks on a discretionary basis following formation of the agreement.<sup>85</sup> One version of Uber’s license permits it to deem that a driver has breached the license if the driver (delineated as both “Driver” and “Customer”) declines more ride requests than Uber deems, at its discretion, is appropriate:

Customer acknowledges and agrees that repeated failure by a Driver to accommodate User requests for Transportation Services while such Driver is logged in to the Driver App creates a negative experience for Users of Uber’s mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of (sic) the Driver App.<sup>86</sup>

And, in fact, Uber penalized drivers for not accepting an adequate number of requests.<sup>87</sup>

The language the companies use in their agreements and litigation suggests that the companies are not regulating action—how drivers work—but rather inaction, by proscribing certain driver behaviors. For instance, in a version of the Uber agreement, under the headings “License Grant” and “Restrictions,” one finds provisions not atypical of a software license required by a social media app. Thus, Uber prohibits

82 *E.g.*, *Uber BV v. Aslam* [2021] UKSC 5 (UK), para. 97.

83 *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2017 WL 4052417, at \*3 (E.D. Pa. Sept. 13, 2017); Defendant Lyft, Inc.’s Motion for Summary Judgment Against Plaintiffs Patrick Cotter and Alejandra Maciel; Opposition to Plaintiffs’ Motion for Summary Judgment (hereinafter “Lyft Summary Judgment Motion”), Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

84 *Uber BV v. Aslam*, [2018] EWCA Civ 2748, para. 15 (Ct. of Appeal 2018) (quoting Services Agreement between Uber and driver).

85 *See* Restatement of Emp’t Law § 1.01 (Am. Law Inst. 2015).

86 *Aslam* [2021] UKSC 5, para. 127 (quoting Services Agreement).

87 *Id.* at para. 97. Uber also sanctioned drivers for not following other app instructions. *Id.* at paras. 98-99, 128. Uber has since stopped penalizing drivers for not accepting assignments in at least one jurisdiction. *James v. Uber Techs. Inc.*, No. 19-CV-06462-EMC, 2021 WL 254303, at \*8 (N.D. Cal. Jan. 26, 2021). One reason for the prolonged legal controversy over the rights of platform workers is that the companies can be moving targets. Penalizing workers for not accepting assignments or not carrying them out fast enough remains common, however. *See* Hiessel, *supra* note 17.

drivers from copying and reverse engineering the app.<sup>88</sup> The Uber “license,” however, also states that drivers “shall not use the Software or Uber Service to . . . interfere with or disrupt the integrity or performance of the Software or Service . . .”<sup>89</sup> One of Lyft’s “licenses” with drivers also “prohibit[ed] individuals accessing the platform from interfering or disrupting the ridesharing services.”<sup>90</sup>

References to “integrity” and “disruption” appear prominently in Uber and Lyft’s arguments that their control should not figure into the evaluation of drivers’ employment status because the companies were protecting their property. The London Employment Tribunal summarized Uber’s case under the subheading, “Instruction, management and control or preserving the integrity of the platform?”

The Claimants’ [drivers’] case was that, in a host of different ways, Uber instructs, manages and controls the drivers. The Respondents . . . stoutly deny doing so and say that, to the extent that the documentary evidence points to them guiding or directing drivers’ behavior, it merely reflects their common interest in ensuring a satisfactory “rider experience” and (to adopt a formula repeatedly employed by [Uber’s counsel]) “preserving the integrity of the platform.”<sup>91</sup>

Lyft argued that assigning rides to drivers and penalizing them for not accepting requests was within its rights under the software license to prevent drivers from “interfering or disrupting the ridesharing services.”<sup>92</sup> The company made a similar argument to rationalize its asserted authority to monitor, evaluate, and penalize drivers for not meeting Lyft’s discretionary performance standards:

The metrics identified by Plaintiffs (passenger rating, acceptance rate and reliability rating) are tools for ensuring that drivers and riders have the best experience possible and limit instances where individuals improperly interfere with the efficient functioning of the Lyft platform in violation of the [license].<sup>93</sup>

Lyft expressly invoked its intellectual property rights, arguing that “To the extent any control is given to Lyft in the agreement, it is minimal and related mainly to . . . protect Lyft’s intellectual property rights . . .”<sup>94</sup>

In the U.S., the right to terminate a worker, especially at will, is evidence of an employment relationship under many legal standards;<sup>95</sup> however, Uber and Lyft have depicted this authority as an exercise of the property right to exclude.

88 Software License and Online Services Agreement (July 2013), Ex. 1 Defendants’ Notice of Motion and Motion to Dismiss Plaintiffs’ Class Action Complaint (hereinafter “Software License”), *O’Connor v. Uber Technologies*, 82 F.Supp.3d 1133 (N.D. Cal. 2015).

89 *Id.*

90 Lyft Summary Judgment Motion, *Cotter v. Lyft*, 60 F. Supp. 3d 1067.

91 *Aslam and Farrar v. Uber*, Case Nos 2202550/2015, para. 47. In another case, Uber characterized its disciplinary policy of logging off drivers for rejecting ride requests as “a system integrity measure.” *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2017 WL 4052417, at \*5 (E.D. Pa. Sept. 13, 2017).

92 Lyft Summary Judgment Motion 13, *Cotter v. Lyft*, 60 F. Supp. 3d 1067.

93 *Id.*

94 *Id.*

95 *In re FedEx Ground Package Sys., Inc. Emp. Pracs. Litig.*, 758 F. Supp. 2d 638, 662 (N.D. Ind. 2010), *rev’d in part* *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313 (11th Cir. 2015) (listing right of discharge as evidence of employment in many states).

In one license version, Uber asserts, “Uber will have the right, at all times and at Uber’s sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App . . . .”<sup>96</sup> Similarly, Lyft argued that exercising a right to terminate drivers was “managing access to the platform.”<sup>97</sup>

In sum, Uber and Lyft’s appeals to managerial prerogative differ somewhat from the arguments of other companies. The platforms portray their authority over workers not only as part of the service they are selling, but as a component of their intellectual property. By programming work instructions into proprietary algorithms, these controls appear to lose their character as such and become incidents of the companies’ intellectual property.

#### *D. Rejecting the Appeal to Managerial Prerogative in Platform Disputes*

The UK judgments on the worker status of London’s Uber drivers illustrate both the confidence Uber had in its managerial prerogative and the correct response—not to take these claims seriously qua legal arguments. As noted above, before the UK Court of Appeal, Uber’s “overarching” argument was that elements of the work relationship suggesting that drivers were working “for” Uber were instead “simply conditions of the licence to use the App.”<sup>98</sup> The Court rejected this argument. Referring to Uber London (ULL), the entity licensed by the regulatory authority as a Private Hire Vehicle Operator (PHV), it noted:

ULL enforces a high degree of control over the drivers and for the most part does so (quite understandably and properly) in order to protect its position as PHV operator in London . . . . We do not accept as realistic the argument that ULL is merely acting as local enforcer for UBV as holder of the intellectual property in the App.<sup>99</sup>

Thus, the Court of Appeal rejected both Uber’s suggestion that its authority over drivers was based on its intellectual property rights and that the *reason* for its control—protecting this property—mattered.

When the UK Supreme Court unanimously ruled that London Uber drivers were statutory workers, it also rejected Uber’s proposition that its entrepreneurial choices trumped findings of control. Uber argued that penalizing drivers for not accepting enough ride requests or for cancelling requests was “justified because refusals or

96 Software License, *O’Connor v. Uber Technologies*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

97 Lyft Summary Judgment Motion, *Cotter v. Lyft*, 60 F. Supp. 3d 1067.

98 *Uber BV v. Aslam*, [2018] EWCA Civ 2748, para. 74 (Ct. of Appeal 2018).

99 *Id.* at para. 91. See also *Uber South African Technology Services v. NUPSAW*, C 449/17 (Labor Court of S. Africa 2018). To avoid losing on jurisdictional grounds, Uber drivers in South Africa sought to hold Uber’s South African subsidiary (Uber SA) liable rather than the parent company, Uber BV. Drivers argued that Uber BV’s “supervision and control” of their work through the app was simply an aspect of software development. The Court rejected this argument:

To the extent that the drivers contend that the automated aspects of the supervision and control exercised over the drivers as mediated through the Uber App are to be imputed to Uber [South Africa] and not what is referred to as the “software developer, Uber BV” there is no factual basis of this contention. The role of Uber BV . . . . is manifestly not a role that is limited to that of a software developer.

*Id.* at para. 90.

cancellations of trip requests cause delay to passengers in finding a driver and lead to customer dissatisfaction.” The Court responded that Uber’s claimed prerogative was irrelevant: “I do not doubt this. The question, however, is not whether the system of control operated by Uber is in its commercial interests, but whether it places drivers in a position of subordination to Uber. It plainly does.”<sup>100</sup>

Another welcome development—the ABC test—should preempt claims of managerial prerogative. The ABC test adopted in several U.S. jurisdictions creates a presumption that an individual providing services for another for remuneration is an employee. To rebut the presumption, the alleged employer must show that three conditions obtain. The second condition, Prong B, is that the individual “performs work that is outside the usual course of the hiring entity’s business.”<sup>101</sup> Prong B makes it irrelevant whether the hiring entity can claim an entrepreneurial prerogative to determine *what* services to sell, because Prong B makes those providing the services its employees by definition. To put it another way, a company’s claim that a prerogative to determine what services to sell renders its control over those providing these services irrelevant in essence acknowledges that its workers are performing services in the regular course of its business.

### III. CRITIQUE

Judges should not relieve companies from their statutory responsibilities to workers and the state based on claims that their authority over workers is an exempt aspect of entrepreneurial or property rights. These arguments are wrong for doctrinal, policy, and empirical reasons.

#### *A. Doctrinal Consistency: Property Rights are not Inconsistent with Employer Authority*

In the past, the employer’s authority was sometimes conceptualized as that of a “host inviting the worker to come and make use of his property, but only on conditions that the owner of the property should dictate.”<sup>102</sup> By using software licenses to delineate their relationship with their workers, some platform companies quite literally construct themselves as “hosts” dictating the conditions upon which others access and use their apps. Now, however, companies contend that these property rights are reason to deny their legal status as employers.

A property-rights rationale for a company’s authority over workers is consistent with an employment relationship. In fact, it is more reason, not less, to reject appeals

100 Uber BV v. Aslam [2021] UKSC 5 (UK), para. 97. See also Hogan v. InStore Grp., LLC, 512 F. Supp. 3d 157, 178 (D. Mass. 2021) (“The case law however is clear that why InStore ‘controls its [vendor associates] . . . is irrelevant to the inquiry . . .”) (internal citation omitted).

101 Sportsman v. A Place for Rover, Inc., 537 F. Supp. 3d 1081, 1095-96 (N.D. Cal. 2021). The other two prongs address whether the hiring entity controls the performance of the services and whether the individual is engaged in her own trade or business.

102 THOMAS CHILDS COCHRAN & WILLIAM MILLER, THE AGE OF ENTERPRISE: A SOCIAL HISTORY OF INDUSTRIAL AMERICA 238 (1961).

to managerial prerogative in disputes over employment classification. As a doctrinal matter, the reluctance to see the exercise of property rights as employer control betrays a misunderstanding of the legal basis of employment. It assumes that the source of the employer's right to control the work is properly contractual or derives from another private-law basis apart from property. However, the history and definition of common-law employment shows that the employer's right of control is not contractual, or at least violates major tenets of contract law.

The semblance between property rights and employer authority is not coincidental. Employment is modeled on the preindustrial master-servant relationship, which was not a contractual relationship but one in which the master had a property right to the servant's labor.<sup>103</sup> In the nineteenth century in the U.S., courts and treatise writers recategorized it as a "contract" without much changing the employer's super-contractual authority: The "contract" included an implied term giving the employer complete authority over performance. Thus, the master-servant relationship explained the employer's power to determine and direct a complex division of labor where workers' contractual consent could not do so.<sup>104</sup>

The barely contractual nature of employment is still apparent in today's common law, particularly in the U.S. Doctrinally, common-law employment consists of one party's agreement to work for the other, under the other's control, in exchange for pay.<sup>105</sup> But to work is to mobilize one's faculty for purposive action towards an end (to create something that was not there before). To work under another's right of control is to place this faculty at the disposal of another. In other words, one party agrees to obey the other while the other makes up the essential terms of the bargain as they go along, like what work to provide, how much, under what conditions, and according to what quality and performance standards.<sup>106</sup> It is difficult in the legal definition to find anything that would be recognized as an upfront (*ex ante*) bargain under contract law. The "bargain" is not to have a bargain.<sup>107</sup>

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103 See TOMLINS, *supra* note 32; ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870* (1991); SELZNICK, *supra* note 22.

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

105 Restatement of Emp't Law § 1.01, *supra* note 85; Restatement (Second) of Agency § 220 (1958) ("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").

106 See Tomassetti, *supra* note 44; Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083 (2015).

107 For a related critique of at-will employment, see Tsuruda, *supra* note 49. Like Dagan and Heller's Article in this Volume, Tsuruda tries to recover the purpose of contract law from the theory of "contract" as a modern social-ordering principle in opposition to "status." The theory is that contract enables individuals to author their own relationships. In contrast, in a status-based society, involuntarily imposed ascriptions, like class or caste, determine the content and scope of one's relationships. Under this theory, contract is a means of self-determination and thus an important constituent of a democratic, pluralistic society. Therefore, the warrant for the state throwing its coercive power behind private agreements is that these agreements reflect *choices* by self-determining subjects. By making unenforceable (or even denying the existence of) the employee and employer's shared understandings about the content and purpose of their relationship, at-will employment fails to recognize the employee as a contracting subject: it does not recognize the employee as having made a meaningful *choice*.

To illustrate, we can compare employment to the contract case law and the Uniform Commercial Code (UCC). Employment is more open-ended than any other agreement that courts or the UCC is willing to recognize as entailing a contractual commitment. For no other “contract” do courts permit one party to delegate to another such license to determine the terms as it goes along, without implying additional terms to constrain the discretion of the other party (like a notice requirement before termination or a requirement of good faith or best efforts).<sup>108</sup> This implication saves the agreement from failing as a contract for indefiniteness or illusory consideration.<sup>109</sup> To translate the definition of employment into contractual terms then, an employee agrees to exercise her very capacity for contractual choice according to the *ex post* direction of another.<sup>110</sup> In sum, while deemed a “contractual” relationship, the employer’s broad, open-ended authority over the employee registered in its doctrinal expression more closely resembles the property rights that the preindustrial master enjoyed over the labor of the servant.<sup>111</sup>

A property-based rationale is also consistent with the class configuration of employment. The doctrinal expression of employment aligns the employer’s authority as “master” with the rights of owners to prescribe conditions for access to their property and to exclude others from their property. Employment almost always involves one party working with the property of another. Normally, this is because employment is inscribed in a class relationship between one party in the group that monopolizes productive social resources and a party in a much larger group of persons who have only their ability to work to ply in the market for survival.<sup>112</sup> To

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108 Tomassetti, *supra* note 44.

109 *Id.*; *Centronics Corp. v. Gemicom Corp.*, 562 A.2d 187 (N.H. 1989); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

110 Dagan and Heller suggest that the problem with the employment contract is that it has “not been contractualized enough.” Dagan & Heller, *supra* note 49, at 70. Similar to the argument in this Article, they show that central aspects of the employment contract do not comport with the liberal spirit (the “DNA”) of contract law. *Id.* at 52. For example, they contend that the employer-promisee’s nearly unlimited, unaccountable authority over the employee is inconsistent with a liberal contract law. *Id.* at 71. My argument goes further, illustrating why it is difficult to construe employment as a “contract” even under a view of contract law not inflected by liberal theory, and even under utilitarian or “libertarian” (see Epstein, this Volume) contract law theories.

111 Not all the master’s property rights or property-like rights are part of the contemporary employment relationship. Courts no longer recognize common-law actions based on enticement, the tort of interference, or the entire contract doctrine. The master-servant relationship has been decriminalized, and employers/masters no longer have recourse to specific performance, corporal punishment, or capture (of indentured servants). On the history of the master-servant relationship and the fragmental, partly nominal contractualization of employment, see STEINFELD, *supra* note 103; TOMLINS, *supra* note 32; M.W. Steinberg, *Capitalist Development, the Labor Process, and the Law*, 109 AM. J. SOCIOLOGY 445 (2003); KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); Lea VanderVelde, *Servitude and Captivity in the Common Law of Master-Servant: Judicial Interpretations of the Thirteenth Amendment’s Labor Vision Immediately after Its Enactment*, 27 WILLIAM & MARY BILL OF RTS. J. 1079 (2018). For a discussion of the development of the employment contract in the UK, see Simon Deakin, *The Comparative Evolution of the Employment Relationship, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK* 89 (Guy Davidov & Brian Langille eds., 2009).

112 Thus, the at-will default in common-law employment makes the property right to exclude almost coterminous with an employment relationship.

survive and flourish in a capitalist order, companies usually seek more flexibility than a contractual relationship alone can provide.<sup>113</sup> Rather than contract with others only for the provision of completed labor—labor already consummated as a good or service (as when an aircraft company purchases an engine from a supplier, or a law firm purchases catering services for an event), they also seek to direct the labor effort itself in its application to their property (as when the aircraft company directs workers to install engines, or the law firm assigns cases to its associates).

### B. Policy Reasons

Creating an exception to the control inquiry based on managerial prerogative is also inconsistent with the policy purposes behind labor legislation. The premise upon which most, if not all, statutory labor law rests is that unequal bargaining power between the employer and employee warrants recognizing worker rights and benefits to offset and counter those that the law affords to the employer. For example, the Preamble to the NLRA explains that the statute is needed due to the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association.”<sup>114</sup> Courts have also recognized this inequality as the warrant for legislative counter-interventions.<sup>115</sup> Property rights is a significant way in which the state, through cover of law, secures and maintains the ability of a few individuals to monopolize the mass of society’s productive resources. This unequal ownership, while not the only reason, is a substantial one for the acute inequality of power between workers and employers.<sup>116</sup> Therefore, judges should reject appeals to managerial prerogative as a reason to limit the scope of work law even if—or especially if—they think property rights can explain the company’s authority.

Appeals to managerial prerogative are misleading: the alleged employers are not seeking to protect their property rights from legal scrutiny, but rather trying to

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113 In seeking to explain why some production was carried out in firms rather than markets, Ronald Coase nearly equates the firm with employment for the latter’s trans-contractual flexibility: a contract—the legal instrumentality of market production—required upfront commitments regarding the main points of an exchange, whereas the employment relationship did not. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

114 29 U.S.C. §§ 151-169 (Preamble).

115 *E.g.*, *Uber BV v. Aslam* [2021] UKSC 5 (UK), paras. 71, 76, 78. *See also* KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

116 Despite the variety of forms that capitalism has assumed over the years, research has continued to confirm these propositions since Marx’s and Weber’s studies on the history and dynamics of capitalism. *See* MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* (Hans Heinrich Gerth & C. Wright Mills eds., 1959); MAX WEBER, *GENERAL ECONOMIC HISTORY* (2003) [1927]; Karl Marx, *Economic and Political Manuscripts, The German Ideology, and Capital*, in KARL MARX: *SELECTED WRITINGS* 83, 175, 452 (David McLellan ed., 2005); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923); Samuel Bowles and Herbert Gintis, *Contested Exchange: New Microfoundations for the Political Economy of Capitalism*, 18 *POLITICS & SOC’Y* 165 (1990); Aditi Bagchi, *Nondomination and the Ambitions of Employment Law*, 24 *THEORETICAL INQUIRIES L.* 1, 12-13 (2023) (“Modern domination . . . is the assertion of power by the economically powerful, and the latter’s economic power is the product of private law rules of contracts and property.”).

shield their agreements with others about the *use* of their property from scrutiny. As business owner, the alleged employer can determine how to spend the funds of the enterprise. It can decide what good or service it wants to produce and market. But it has no property right to dictate the terms upon which others cooperate to realize its entrepreneurial visions.<sup>117</sup> Just as FedEx has no property right to mandate that a supplier provide it with desired scanning equipment, it likewise has no property right to determine how drivers cooperate to produce its pickup and delivery services. Property does not create a status relationship—whether we are dealing with employment or another relationship, these terms exist by virtue of agreement. And work law subjects the nature of this agreement to scrutiny under the legal standards for employment status. When claiming a managerial prerogative to its workers' cooperation, a company “confus[es] its legal rights and economic power.”<sup>118</sup> The common law does little to temper this power, but tempering this power is the point of labor law legislation.

The way that some platform companies design work relationships is clever. By using the practical metaphor of a “license,” Uber and Lyft create the illusion that the only property right they seek to enjoy is to exclude others, and not the rights to use and enjoy their property. Yet, the companies require drivers' cooperation (their labor effort) for the latter. They need drivers to produce the transportation services that make their apps useful to consumers and create their brand value. Therefore, the “license” requires drivers to follow instructions conveyed via the app and to alter their manner of working when it does not comply with the companies' performance standards, or when drivers fail to comply with the companies' *ex post* alteration of performance standards (e.g., when Uber decides in retrospect that a driver has declined too many ride requests). They likewise claim a right to discipline drivers who do not comply, for instance, temporarily logging them off or deducting pay.<sup>119</sup> By depicting their rights to direct, monitor, discipline, and terminate drivers as a right to exclude, the agreements appear more like traditional software licenses, where the licensee agrees not to do various things, like hack the programming or post pornography. The platforms frame the affirmative cooperation needed from drivers as negative duties not to damage their intellectual property and brands. Nonetheless, the cooperation needed from drivers to valorize the platform's property is the product of agreement. It is the nature of this agreement—not the nature of the property rights Uber and Lyft seek to enjoy—that labor law subjects to legal evaluation.

What courts are saying when they recognize an exception to the legal standards for managerial prerogative is, in essence: “The alleged employer cannot figure out

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117 See Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) (“The law does not guarantee me the physical or social ability of actually using what it calls mine”); NEIL W. CHAMBERLAIN, *THE LABOR SECTOR: AN INTRODUCTION TO LABOR IN THE AMERICAN ECONOMY* 314-15 (1965) (“While property rights carry with them a power of disposition of goods, they do not carry an equal power to use those goods if the cooperation of others is necessary to that use.”).

118 Young, *supra* note 6, at 244.

119 E.g., *Matter of Lowry*, 189 A.D.3d 1863, 1866 (N.Y. App. Div. 2020).

how to provide a desired product without assuming the authority of an employer. Therefore, the legal standards constitute an improper restriction on its entrepreneurial freedoms.” From this perspective, the idea of managerial prerogative looks like “transcendental nonsense.”<sup>120</sup>

### *C. Empirical and Policy Reasons: The Dubious Necessity of Managerial Prerogative*

The argument that relevant indicia of employment status are immaterial if they reflect managerial prerogatives is also based on a dubious empirical assumption about the necessity of managerial prerogative. It assumes that a company must have near absolute control over the enterprise to achieve favorable economic outcomes and that most “interference” by workers or law with this control is undesirable. The implication is that the statutory intervention of labor law is only necessary and appropriate where the alleged employer’s control is inexplicable as a rational response to market forces.<sup>121</sup>

This position is vulnerable as an empirical and policy matter. The empirical evidence tending to refute this assumption is too voluminous to relate here.<sup>122</sup> Certainly, the success at the enterprise and national and regional levels of companies operating under corporatist regimes and systems with robust collective bargaining belies this assumption.

Further, it is hard to find evidence in the text or legislative history of labor law statutes to suggest that their protections and obligations apply only if market governance is not working, a company is making irrational decisions, or a company is controlling workers for the sake of it.<sup>123</sup> These ideas are patently at odds with the legislative purpose of the NLRA, whose Preamble recounts the economic tumult

120 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Cohen, a Legal Realist, used this term to critique legal formalism, a method which regarded certain legal precepts, such as “property” and “freedom of contract,” as *a priori*, neutral principles for resolving legal disputes, presumptively beyond reproach by legislators or judges. Cohen emphasized that these precepts were products of social choices and processes (legal and political institutions) that were in turn shaped by concrete, historical, and politically contingent social relations.

121 The question of managerial prerogative underlies another employment status debate—whether employer-like authority necessary to comply with *government* regulation should count as evidence of employment. For example, transport operators often need to comply with regulations regarding driver safety and identification. Many courts find that any control for the purpose of complying with government regulation is not evidence of employment. See *Sida of Hawaii, Inc. v. N.L.R.B.*, 512 F.2d 354, 359 (9th Cir. 1975). I have found no explanation for this position in the case law apart from, “It is the law that controls the driver,” not the company. *Loc. 777, Democratic Union Org. Comm., Seafarers Int’l Union of N. Am., AFL-CIO v. N.L.R.B.*, 603 F.2d 862, 875 (D.C. Cir. 1978). This answer is unsatisfactory given that the alleged employer is responsible for complying with the regulations and chose to operate in the regulated industry. The implicit rationale seems to be, as with the managerial prerogative exception, that the control should be exempt because it is for the purpose of pursuing the rational objective of regulatory compliance.

122 For a recent examination of this subject, see *Unequal Power* (in employment), THE ECONOMIC POLICY INSTITUTE, <https://www.epi.org/unequalpower/home/>.

123 Title VII prohibits discrimination based on customer preferences, for instance, even where the discrimination is profitable. Noah Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discrimination Intent*, 109 COLUM. L. REV. 1357 (2009).

and damage resulting from the “inequality of bargaining power” in the existing system where unorganized labor faced organized capital.<sup>124</sup> As expressed clearly in its Preamble, the premise underlying the NLRA was that the rights of association and collective bargaining were necessary even if, or in fact because, a company was pursuing profit rationally and successfully.

## CONCLUSION

This Article explores how companies assert managerial prerogative to limit the scope of labor law, how judges respond to these arguments, and how the digital mediation of managerial functions shapes these arguments.

In disputes over employment status, companies regularly invoke managerial prerogatives to explain their claimed authority to direct the labor efforts of others and otherwise behave like employers. They argue that these prerogatives should relieve them of legal responsibility for their authority—that such authority must lie beyond the reach of labor law. These arguments draw on a tradition of legal solicitude for managerial prerogatives in which courts, agencies, arbitrators, and unions have assumed that businesses have inherent, almost plenary rights to control the commercial enterprise. They also invoke what is often a legal trump card—property rights. Some platform companies have built a property-based rationale for employer control into the design of the work relationship, using a putative software license in which they construe their employer-like authority over workers as one of the conditions of access to their intellectual property.

Judges must stop buying these arguments. One way that companies preserve their power in labor-capital relationships is to hide the relationship under another title. We keep finding new ways not to apply labor law and if we continue down this path, few workers will have any rights.

In a sense, this Article takes a more traditional approach to the relationship between private law and labor law than some other excellent pieces in this Volume, which show how the norms immanent in private law could provide a proper foundation for a labor law based on relational justice, equality, and worker autonomy.<sup>125</sup> Whether or not there should be a “basic cleavage” between the law of work and private law,<sup>126</sup> however, it is still the case that private law often bears an antagonistic relationship to labor law. It is not yet possible to declare *Lochnerism* and its skepticism of social legislation defeated, and too soon to retire the arsenal of Legal Realism to the museum of legal curios.

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124 29 U.S.C. §§ 151-169 (Preamble).

125 See, e.g., Dagan & Heller, *supra* note 49; Hugh Collins, *Relational and Associational Justice in Work*, 24 THEORETICAL INQUIRIES L. 26 (2023); Tsuruda, *supra* note 49.

126 Cynthia Estlund, *Is Labor Law Internal or External to Private Law? The View from Cedar Point*, 24 THEORETICAL INQUIRIES L. 124, 126 (2023).