INDEPENDENT CONTRACTORS AND THE ABCS OF CONTRACT LAW

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Many states, notably California, have adopted the ABC test to determine whether work relationships are employment subject to minimum labor standards. Businesses that classify their workforce as independent contractors argue that the adoption of the ABC test violates the freedom to contract on any terms the parties choose. We argue that conceiving of the ABC test as a departure from or infringement of contract law is misguided. The ABC test, rather, represents a long overdue alignment of the contractual doctrines governing work with the liberal conception of contract. Its foundation is in the so-called common law definition of employment. Moreover, a genuinely liberal conception of contract requires that contracts for the provision of labor or services for remuneration be subject to minimum terms like those mandated by New Deal and Civil Rights Era legislation. Put differently, rather than an antidote to the ills of contract, the ABC model is, by and large, an entailment of liberal contract. Jurisdictions that adopt the ABC model have not effected a rupture from contract; quite the contrary, they have prevented abusing the idea of contract for a purpose that contravenes the telos of liberal contract. The ABC test does so, first, by preventing hiring entities' use of what we deem a spurious version of contract law to opt out of the minimum labor standards laws that legislatures have deemed necessary to protect workers, their families and communities, and the economy. Second, it informs the analysis of the contractual relationship between hiring entities and their workforce even if the workers are properly deemed independent contractors. Contract, in other words, need not be the enemy of the effort to establish minimum labor standards. Because the ABC test aligns the law governing work agreements with the principles animating modern contract law writ large, the test should be proudly defended, expansively interpreted, and broadly followed.

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INTRODUCTION

The story of employment and labor law as a distinct legal category is conventionally portrayed as an ongoing struggle against the regulation of work through contract. The basic idea of work law is that working with or for another is radically different from selling a product, and work's distinctiveness requires a floor of minimum terms and immutable rights regarding issues such as safety in the workplace, nondiscrimination, minimum wages, working hours, and labor organization.[1] Contract law, in contrast, is typically characterized (at least by scholars sympathetic to workers' rights) as the enemy of fair labor.[2]

The path of work law, on this view, is convoluted, if not cyclical: once law imposes minimum terms, as New Deal and civil rights legislation do, contract seems to resurface and threatens to undermine them.[3] In particular, employers use contracts to escape from the regulation of work using two main strategies, both of which seek to sever the employer–employee relationship as a legal matter while retaining their workforce as a practical matter.[4] Some employers cut the thread that connects them with the people who work for them by replacing employment contracts with their workforce with contracts with intermediary labor suppliers who hire and manage the

1. *See, e.g.*, Hugh Collins, *Is the Contract of Employment Illiberal?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 48 (Hugh Collins et al. eds., 2018).

2. *See infra* Section II.A.

3. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

4. *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

workers. This is the joint-employer strategy: the entity that receives the services retains enough residual power via its contract with the entity that employs the workforce (e.g., a staffing agency or labor contractor) to meet its goals while consigning responsibility for labor law compliance to the agency. Alternatively, employers do not sever the thread connecting them to their workforce but, rather, attenuate the thread by seeking to turn employees—workers who enjoy the full spectrum of work law rights—into independent contractors, who have no rights. Through the joint-employer strategy or the independent contractor strategy, employers attempt to contract out of legal responsibility to maintain decent working conditions. For the law to ensure the floor of decent work, it seems that it must constantly fend off the dangers of contract.[5]

This Article focuses on the independent contractor strategy and adoption by several states, including California, of the so-called ABC test to combat it.[6] Under the ABC test, "a person providing labor or services for remuneration" is presumed to be an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[7]

This broad ABC test, in which the employer's failure to demonstrate even one of these conditions requires classification of the worker as an employee, "is seen by many as a new model."[8] The ABC test has attracted many friends who celebrate it and seek to export it beyond the states where it has been adopted. It has also acquired a considerable number of foes who try to limit its application and warn

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5. *Cf.* John Gardner, *The Contractualisation of Labour Law*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW, *supra* note 1, at 33 [hereinafter Gardner, *Labour Law*]. Although here we focus primarily on the law of the United States, a similar phenomenon has occurred in the United Kingdom and Europe. *See* Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD. J. LEGAL STUD. 353, 353–61 (1990).

6. Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 55–57 (2015).

7. CAL. LAB. CODE § 2775(b)(1) (2020)); *see also* Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 7 (Cal. 2018), *superseded by statute*, Act of Sept. 4, 2020, ch. 28, § 2, 2020 Cal. Legis. Serv. 91, 94 (codified as amended at CAL. LAB. CODE §§ 2776–2784), *as recognized in* Seviour-Iloff v. LaPaille, 295 Cal. Rptr. 3d 762, 777 n.11 (Ct. App. 2022).

8. Guy Davidov & Pnina Alon-Shenker, *The ABC Test: A New Model for Employment Status Determination?*, 51 INDUS. L.J. 235, 237 (2022).

against its adoption elsewhere.[9] But notwithstanding the heated debate over the ABC test's desirability, both friends and foes agree (explicitly or implicitly) that it is an intervention or a departure from the otherwise expected workings of contract. In other words, the current ABC debate fits nicely into the conceptual framework that underlies the conventional story of work law with which we've started.

We argue that conceiving of the ABC test as a *departure from* liberal contract law is seriously misguided, and that this mistake is possibly consequential. The ABC test, rather, is firmly *rooted in* private law, properly understood. Its foundation is in the so-called common law definition of employment. Moreover, a genuinely liberal conception of contract requires that contracts for the provision of labor or services for remuneration be governed by a doctrine quite similar to the New Deal and Civil Rights Era frameworks. Put differently, rather than an antidote to the ills of contract, the ABC model is, by and large, an entailment of (liberal) contract. Jurisdictions that instantiate the ABC model have not effected a rupture from contract; quite the contrary, they prevent abusing the idea of contract, that is, the attempts to use law for a purpose that contravenes the telos of liberal contract. The ABC test does so, first, by preventing hiring entities' use of what we deem a spurious version of contract law *to opt out of the minimum labor standards laws* that legislatures have deemed necessary to protect workers, their families and communities, and the economy. Second, it informs the analysis of the contractual relationship between hiring entities and their workforces *even if the workers are properly deemed independent contractors*. The ABC test in California and elsewhere represents a long overdue alignment of the contractual doctrines governing work with the liberal conception of contract. Contract, in other words, need not be the enemy of the effort to establish minimum labor standards.

The thesis of this Article is significant in practice as well as in theory, and we explain the practical significance as well as the theory in the pages that follow. Once the contract baseline, as we sometimes refer to it, is rightly set, some of the main arguments of the foes of ABC fall apart, while the case of its friends is easier than they imagined. There is, to be sure, always some distance between legal reasoning and legal doctrine. But the power of reason in law is not insignificant, which means that our thesis may be consequential both in those states that have adopted the ABC test and elsewhere. Mainstreaming the ABC model into liberal contract can affect its interpretation and thus its application in California and beyond. In California, Assembly Bill 5 ("A.B. 5"), which prevents entities from using contracts to evade the many protections for California workers, adheres to this

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9. Hundreds of law review and bar journal articles have been published in the last decade discussing the misclassification of workers as independent contractors. Commenters typically compare the advantages of greater worker protection against the costs to businesses of higher wages and the complexity of complying with many employment laws and weigh the advantages of the clarity and predictability afforded by the ABC test against possible instances of overinclusiveness that it may entail. *Compare* Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 106–13 (2021) (generally praising the ABC test), *with* Henry Moreno, *The Statutory Death of the Gig Economy: How California Incentivizes the Automation of Five Million Jobs*, 75 U. MIA. L. REV. 945, 966–67 (2021) (criticizing the ABC test).

view of private law. By contrast, Proposition 22, which deems app-based transportation and delivery drivers independent contractors, is an abuse of liberal contract. Outside California, the ABC test—which most states have already adopted to define employees eligible for unemployment insurance—should become the basic model for determining workers' rights.

We begin, in Part I, with a bird's-eye view, sketching the history of labor and employment law as a conflict between different conceptions of contract, and as a conflict between a spurious vision of contract and legislatively established minimum terms of fair work. We then zoom in on the development and current predicament of ABC. Part II criticizes the conventional conceptual framework that unifies the history and the current ABC debate. We reject the notion that contract is the nemesis of minimum terms and immutable rights. Moreover, we argue that a floor of fairness is built into the most defensible account of contract, and, furthermore, that it fits a broad swath of core contract doctrine. This means that California and the other states that have adopted the ABC test are neither mavericks nor even outliers. Rather, ABC jurisdictions properly aligned the law governing work contracts with the principles animating modern contract law writ large. It also means, as we explain in Part III, that ABC should be proudly defended, expansively interpreted and generously applied, as well as broadly followed.

The history, justification, and future of ABC is our sole focus in this Article. But our thesis and conclusions may yield further implications. They imply that even though labor and employment statutory law explicitly exclude from its coverage a significant number of workers—indeed, the most vulnerable ones[10]—contract law may (surprisingly?) help remedy this gap in protection by offering a

10. For example, statutes either expressly exclude, or have been interpreted to exclude, some students, some volunteers, and all prisoners from the protections of many laws, including wage and hour laws and antidiscrimination laws, among many others. *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 119 (2d Cir. 1997) (holding a student performing field work mandated by her degree program in social work was not an employee and therefore was not protected under Title VII from egregious workplace sexual harassment); Vanskike v. Peters, 974 F.2d 806, 812 (7th Cir. 1992) (holding inmates are not employees covered by the Fair Labor Standards Act of 1938 ("FLSA")); Castle v. Eurofresh, Inc., 731 F.3d 901, 907–08 (9th Cir. 2013) (holding inmate not covered by Americans with Disabilities Act of 1990). The literature criticizing these exclusions includes Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 875–79 (2008), and Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. BUS. L. 147, 149–52 (2006). In addition, because law prohibits employment of undocumented workers, they have been held not to be entitled to full remedies under labor law. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002). Undocumented workers are covered under most laws if they otherwise meet the test of employee. CAL. LAB. CODE § 1171.5 (2020); Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1308 (11th Cir. 2013) (holding that undocumented workers may recover unpaid wages under FLSA). However, they cannot participate in government and employer social insurance programs because they cannot obtain Social Security numbers and are, in any event, subject to terrible exploitation because they face removal if they come out of the shadows to enforce their legal rights. *See* Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 U.C. IRVINE L. REV. 125, 131–35 (2012) (observing that employers play a significant role in shaping labor markets that concentrate undocumented workers in poorly paid, difficult, and dangerous work).

significant layer of analogous measures. Furthermore, upsetting the conventional wisdom of a divorce between contract and the floor of decent work in the context of work law's classification doctrine may suggest that contract law—or maybe private law more generally—can also offer ways for addressing employers' other floor-avoidance strategy of breaking their contractual privity with the people who work for them.[11] Examining these potential implications requires further study and thus must wait for another day.

I. FROM FREE LABOR TO ABC

In this Part, we briefly canvass the twentieth-century history of the relationship between contract, employment, and labor law in regulating the work relationship. The familiar story, briefly limned in Section I.A, is that legislatures reacted to the abuse of labor enabled by laissez-faire contract rules by imposing minimum standards of employment and by protecting workers' right to unionize and negotiate collective agreements. The legislation of the New Deal and the Great Society eras *both* took certain aspects of the work relationship out of the realm of contract *and* enabled, through unionization, workers to negotiate contracts from a position of equality. Employers fought back, using contracts to exempt themselves from this legislation. They deemed their workforce independent contractors, or contracted with other entities to provide labor, and/or required workers to agree to assert all statutory and other claims in arbitration forums.

In Section I.B, we explore the various legal rules courts have adopted to determine whether employers can deem their workforces to be independent contractors, not employees, and therefore not entitled to the protections of public law. We show that the ABC test is less of a departure from the private law than is often thought.

A. A Brief History of Escaping Contract

Until the twentieth century, an amalgam of contractual and status-based doctrines reflected in a mix of common law and statutes defined the mutual obligations of the hiring party and the hired. Courts in the late nineteenth century tried to amalgamate most labor relations into a singular "master–servant" or "employer–employee" contractual relationship with few employer obligations of fairness, enabled by the rule that employers could terminate employees "at will . . . for good cause, for no cause, or even for cause morally wrong."[12] Yet there long had

11. *See* Jinks v. Credico (USA) LLC, 177 N.E.3d 509, 520–21 (Mass. 2021) (holding that the ABC test applies to determine whether a worker is an employee or independent contractor under Massachusetts law but does not apply to question whether an entity is the worker's joint employer); *cf. Dynamex*, 416 P.3d at 22, 26–35 (noting the origins of the California wage law in the "suffer or permit to work" standard that was proposed at the turn of the twentieth century to determine whether entities were joint employers of child laborers who had been requested by adult employees to help).

12. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884). *Payne* is the classic statement of the at will rule, but it was not a suit for breach of an employment contract, or for wrongful termination; it was a suit by a merchant against a railroad for interfering with the merchant's business relations challenging the railroad's threat to discharge any worker who traded with the plaintiff. Although the origins of the at-will rule are disputed, see Jay M.

been, and there remained even in the heyday of "freedom of contract" and the at-will rule, a variety of both common law and statutory doctrines imposing mutual obligations on both employer and employee, and the obligations varied depending on whether the worker was a household servant, a farm hand, an apprentice learning a trade, a skilled artisan or mechanic, or something else.[13]

The early nineteenth-century relations of master, journeyman, and apprentice, which were never as well developed in North America as they had been in England, required of both parties certain obligations of training and fair treatment (and in that respect differed radically from the relations of chattel slavery before the Thirteenth Amendment). Even after the demise of the master–journeyman–apprentice system in the early nineteenth century, most states had some rules in their law governing contracts of hire that constrained self-interested behavior by employers that was inimical to the public good. These doctrines predated the "freedom of contract" laissez-faire era of the late nineteenth century but remained in effect throughout it. Many states restricted post-employment agreements not to compete and refused to enforce overly broad efforts to restrict post-employment use of what today would be called trade secrets.[14] Some states protected workers from retaliation in employment for speech or voting.[15] To enforce traditional obligations regarding fairness in payment, many states gave laborers a lien on real property to secure payment, or regulated the time and form of payment.[16] Statutes protected the

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Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990), by the late nineteenth century many states had adopted it. *See, e.g.*, Carl v. Children's Hosp., 702 A.2d 159, 159–60 (D.C. 1997) (recognizing a very limited exception to the at-will rule, with majority, concurring, and dissenting opinions disagreeing on the role of courts as opposed to legislatures in creating exceptions to the at-will rule).

13. ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870, at 15–16 (1991); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 259–92 (1993).

14. *See* CATHERINE L. FISK, WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1930, at 23–58 (2009).

15. For example, Louisiana law prohibits employers as well as "[a]ny planter, manager, overseer or other employer of laborers" from controlling employees' participation in politics, or from influencing their political activities or affiliations. LA. STAT. ANN. §§ 23:961–:962 (2024). Eugene Volokh identifies this statute and a few similar ones as products of the immediate post-Civil War efforts to prevent retaliation during Reconstruction, but notes that statutes protecting workers from retaliation for voting were proposed and enacted beginning in the 1820s. Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 296, 299–300 (2012).

16. Nineteenth-century cases discussing the efforts of workers to secure unpaid compensation through liens against corporations to which they had provided services are discussed in JEAN-CHRISTIAN VINEL, THE EMPLOYEE: A POLITICAL HISTORY 13–19 (2013). *See also* Vane v. Newcombe, 132 U.S. 220 (1889).

rights of married women to keep the money they earned in wage labor away from their husbands and their husbands' creditors.[17]

The turn of the twentieth century saw the enactment of scores of statutes granting rights to workers to address the abuses of labor in factories, mines, tenements, and (occasionally) on farms. States imposed maximum hours for some occupations (such as underground mining or other hazardous jobs) or for some workers (such as women and children), regulated wages, prohibited payment in scrip, and so forth.[18] The rise of "freedom of contract" in labor, a version of contract stripped of traditional obligations of employer to employee, and a constitutional argument that state and federal regulation of labor standards was unconstitutional, was, in part, a reaction to laws protecting employees.[19]

The use of contracts (or freedom of contract rhetoric) to evade the minimum labor standards statutes made increasing sense to businesses with the growth of the number of statutes imposing obligations on "employers" or granting rights to "employees."[20] For example, by 1920, almost every state had enacted a workers' compensation law providing no-fault recovery for occupational injuries and illnesses suffered by employees, and funded by a scheme of compulsory insurance financed by per capita payroll taxes on employers.[21] Although some businesses considered workers' compensation preferable to tort litigation, many favored whichever legal regime would reduce businesses' liability for injury and, therefore, sought to define workers as something other than employees if doing so could reduce the risk of liability.[22] Many other statutes imposing obligations on employers were enacted in the 1930s and thereafter. The Social Security Act of 1935 created a regime of payroll taxes levied on employers to fund payments upon retirement, or upon involuntary unemployment, excluding certain categories of

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17. *See* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 199–217 (1998).

18. *See, e.g.*, Dayton Coal & Iron Co. v. Barton, 183 U.S. 23, 23 (1901) (upholding legislation requiring mining companies to pay workers in legal tender rather than scrip).

19. Lochner v. New York, 198 U.S. 45, 64 (1905) (finding a New York law limiting the maximum hours for bakery workers to ten per day and sixty per week violated the constitutional "freedom of master and employee to contract with each other in relation to their employment"). *But see* Holden v. Hardy, 169 U.S. 366, 396–98 (1898) (upholding against constitutional challenge a statute setting maximum hours for underground miners); Atkin v. Kansas, 191 U.S. 207, 224 (1903) (upholding legislation regulating employment on public works projects). On the social conflict over minimum labor standards to which *Lochner* was a response, and its connection to the nineteenth century evolution of the contractual framework for understanding the obligations of employer and employee (or master and servant, or firm and hireling, or any of the many other conceptions of the work relation), see VINEL, *supra* note 16, at 36–37.

20. That the existence of social insurance programs costing employers money only for employees motivates the growth in independent contractor designations was shown empirically with respect to Medicare benefits and older workers in a recent article. Eleanor Wilking, *Independent Contractors in Law and in Fact: Evidence from U.S. Tax Returns*, 117 NW. U. L. REV. 731, 801–19 (2022).

21. Roy Lubove, *Workmen's Compensation and the Prerogatives of Voluntarism*, 8 LAB. HIST. 254, 264 (1967).

22. *Id.* at 267.

people such as the "self-employed" and, initially, domestic and agricultural workers.[23] The Norris–LaGuardia Act of 1932[24] and the National Labor Relations Act of 1935 ("NLRA") granted to "employees" the right to unionize and bargain collectively.[25] The Fair Labor Standards Act of 1938 ("FLSA") granted "employees" the right to be paid the minimum wage and premium pay for overtime, and prohibited the employment of children.[26] Another wave of laws in the 1960s and since then have prohibited discrimination in hiring and employment on the basis of various identities and traits.[27]

All of these laws, and many more, created rights and obligations for employees and employers regardless of the terms of a contract of hire, and most prohibited waiver of the rights by contract.[28] Regardless of the terminology used to describe the scope of coverage (usage in the periods when the statutes were enacted indicates the term "employee" was to refer to anyone who worked for wages or

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23. Many of the workers in these excluded groups were, through later amendments, ultimately included in the statute. *See* ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 23–66 (1998) (describing the reasons for and contours of exclusions of agricultural, domestic, and casual workers, and self-employed people, from the Social Security Act programs). Research into the history of the design and drafting of the Social Security Act in 1934 reveals a variety of perspectives on whether it was feasible to include "self-employed" workers in the social insurance programs the statute created. SOC. SEC. BD., SOCIAL SECURITY IN AMERICA 106, 223–24 (1937), https://www.ssa.gov/history/reports/ces/cesbook.html [https://perma.cc/RSX4-YPPJ] (scroll to "Table of Contents"; then click on "Standards of Unemployment Compensation: Structural Provisions" hyperlink under Part I- Unemployment Compensation"; or click on Old-Age Provisions of the Federal Social Security Act" hyperlink under Part II- Old-Age Security").

24. 29 U.S.C. §§ 102–04, 107.

25. *Id.* §§ 152(3), 157.

26. *Id.* §§ 203, 206–07.

27. For example, Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, religion, gender, and national origin, defines "employee" as an "individual employed by an employer." 42 U.S.C. § 2000e(f). Most laws prohibiting status- or identity-based discrimination in employment are modeled on Title VII and apply only to employees or applicants for employment.

28. One of the earliest federal statutes to explicitly prohibit contracts that seek to force workers to give up labor rights is the Norris–LaGuardia Act of 1932, which broadly prohibits not only a traditional "yellow dog" contract (a promise not to join a union), but also "any other undertaking or promise in conflict with the public policy declared in section 102 of this title." § 103. Section 102 declares "the public policy of the United States" as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor . . . .

Id. § 102.

salary),[29] or whether the principal object was worker protection as opposed to efficient tax collection,[30] laws that recognized the legal salience of the employer–employee relation prompted employers and their lawyers to seek ways to evade them.[31]

A major strategy was to classify the employer–employee relationship as something else. In the decade after state workers' compensation laws were enacted, some employers figured out they could avoid liability for the payroll taxes, and vicarious liability for the injuries their delivery drivers caused, by firing the driver, selling the truck to the driver, and then contracting with the driver as a peddler to deliver ice, baked goods, or whatever product the company sold.[32] In garment and

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29. The Merchant Marine Act of 1920 grants a right of recovery to any "sailor who shall suffer personal injury in the course of his employment"; it expanded rights available to injured "seamen" that had long existed in admiralty law. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 326–27 (2d ed. 1975). The Federal Employers Liability Act of 1908, a system of compensation for injured railroad workers adopted in the same era, uses the terms "employee" and "employ." 45 U.S.C. § 51. The Supreme Court recently acknowledged that the term "employee" was understood to mean anyone who worked for pay. New Prime Inc. v. Oliveira, 586 U.S. 105, 114, 121 (2019).

30. Federal and state income tax laws require employers to withhold income taxes of "employees"; those who provide labor or service as independent contractors are responsible for payment of their own income taxes on a regular basis and the entity that hires them simply must issue an IRS Form 1099 reporting the total sum paid. The Social Security and Medicare programs require the employer to pay its share of the taxes, based on wages paid (hence the term payroll tax) to fund Social Security retirement, disability Medicare benefits (so-called FICA taxes), and unemployment insurance ("UI") benefits (FUTA taxes). INTERNAL REVENUE SERV., INDEPENDENT CONTRACTOR OR EMPLOYEE? (2023), https://www.irs.gov/pub/irs-pdf/p1779.pdf [https://perma.cc/4YBU-6VM3]. As the IRS advises employers, "If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker." INTERNAL REVENUE SERV., 2024 PUBLICATION 15 (CIRCULAR E), EMPLOYER'S TAX GUIDE 14 (2023), https://www.irs.gov/pub/irs-pdf/p15.pdf [https://perma.cc/6ND2-G4H2]; *see also Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes [https://perma.cc/6J57-5FER] (Aug. 25, 2024).

31. Gerald M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 188–89 (1939) (noting the "pivotal importance of the employer-employee relationship" in Progressive era and New Deal legislation and the likelihood of continuing struggles over whether a particular work relationship is covered); Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76 (1945).

32. The Court observed in *Bakery & Pastry Drivers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 771 (1942):

> The peddler system has serious disadvantages to the peddler himself. The court has found that he is not covered by workmen's compensation insurance, unemployment insurance, or by the social security system of the State and Nation. His truck is usually uninsured against public liability and property damage . . . . If injured while working, he usually becomes a public charge, and his family must be supported by charity or public relief.

This, the Court continued, led unions to object to employers' contracting with drivers as peddlers because "the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost." *Id.*

other tenement- or factory-based work, manufacturers or jobbers paid a piece rate and left to the sewers or other workers the "choice" (constrained, of course, by poverty) of how many items to make and how many hours a day to work.[33] Similarly, in agriculture, growers recognized that they could avoid any legal responsibility for farmworker wages and working conditions by sharecropping arrangements, paying farmworkers based on the quantity of produce harvested.[34]

The use of the independent contractor label as an all-purpose category to exempt the labor force from protective laws gained high-profile attention and validation from Congress in 1947 in reaction to a case against the Hearst newspapers. Hearst deemed its salesforce—the men (called "newsboys" or "newsies") who sold the afternoon paper on the street—as nonemployee contractors and argued, when they sought to unionize, that they were unprotected by the NLRA. The National Labor Relations Board ("NLRB") disagreed; it ruled, and the Supreme Court affirmed, that the salesforce were employees.[35] Congress disagreed with the NLRB and the Supreme Court and enacted an amendment to the NLRA stipulating that independent contractors are not employees, thus legislatively overruling the *Hearst* case and opening up the possibility that any employer might exempt itself from the law by declaring its workers to be independent contractors.[36] In the years immediately after, lawyers representing workers and journals on labor began writing on the use of the independent contractor classification as a business strategy to evade protective law.[37] And employers in industries ranging from fishing and transportation to journalism, advertising, and theater also discovered they could use the independent contractor label to deprive workers of the right to unionize under federal labor law and, indeed, could assert that antitrust law outlawed collective bargaining by independent contractors.[38]

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33. *See* Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old is New Again*, 104 CORNELL L. REV. 557, 573–80 (2019); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1693 (2016).

34. *See, e.g.*, S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 402 (Cal. 1989); Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674, 684–85 (2022).

35. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 124–34 (1944).

36. 29 U.S.C. § 152(3) (defining the term "employee" as not to include "any individual having the status of an independent contractor").

37. An article by a union lawyer in that era observed that scores of federal and state laws made worker protection turn on designation as an employee and that a person who labors as a contractor "has thus become a kind of legal orphan in the field of modern labor law." Joseph M. Jacobs, *Are "Independent Contractors" Really Independent?*, 5 LAB. L.J. 345, 345 (1954); *see also* Charles S. Hoffman, *We Need a Definition of Independent Contractors*, 1 LAB. L.J. 684, 686–87 (1950).

38. *See, e.g.*, Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65, 69 (2019) (discussing how antitrust grants coordination rights to corporations but has been wrongly interpreted to prevent workers from forming collectives to exercise coordination rights); Brent Salter & Catherine L. Fisk, *The Fragility of Labor Relations in the American Theatre*, 83 OHIO ST. L.J. 217, 223–30 (2022) (examining the history of the use of antitrust law to prevent or weaken collective negotiation by labor in theatre); Chamber of

B. ABC: Common Law Origins and Elusive Function

Because neither "employee" nor "independent contractor" is defined in much of the twentieth-century federal legislation, the Supreme Court has frequently asserted that the so-called common law test, also known as the "right to control" test, is to be used.[39] That test—which the Court held in concluding that insurance agents were NLRA statutory employees, not contractors—mandates consideration of certain "decisive factors":

> [T]he agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the 'Agent's Commission plan' that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.[40]

Some statutes, including the FLSA, have been interpreted to require a more worker-protective test, often known as the "economic realities" test, which focuses on whether, as a matter of economic reality, the worker is dependent on the putative employer for a living.[41] Because the FLSA defines employment as including to "suffer or permit to work," the economic realities test has deemed poorly paid farmworkers and many other low-wage workers to be employees, even though they worked largely without supervision. The factors are similar to the common law test—the degree of control exercised by the putative employer; the opportunities for profit or loss dependent on the managerial skill of the worker; the degree of skill; the permanence of the work relationship; and whether the service is an integral part

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Com. v. City of Seattle, 890 F.3d 769, 795 (9th Cir. 2018) (holding Seattle ordinance authorizing collective negotiation by drivers not exempt from antitrust scrutiny); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 146–47 (1942) (holding union contract requiring canners and packers to purchase from unionized fishermen could be enjoined under antitrust law because dispute regarding sale of fish did not concern wages or conditions of employment within the labor exemption to antitrust law).

39. *E.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989) (stating that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine" (first citing Kelley v. S. Pac. Co., 419 U.S. 318, 322–23 (1974); then citing Baker v. Tex. & Pac. Ry. Co., 359 U.S. 227, 228 (1959) (per curiam); and then citing Robinson v. Balt. & Ohio R.R. Co., 237 U.S. 84, 94 (1915))).

40. NLRB v. United Ins. Co., 390 U.S. 254, 258–59 (1968).

41. Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947).

of the putative employer's business—but the emphasis is on economic vulnerability rather than control.[42]

Although scholars, courts, and litigants have written at length about whether, or the extent to which, the more employee-protective tests are consistent with or depart from the "common law" test,[43] these multi-factor analyses have several common elements. Employees are those who: (A) are subject to some degree of control or supervision by the hiring entity (though the requisite nature and degree are hotly disputed); (B) render services that are integral or essential to the hiring entity's business; (C) do not operate their own independent business; (D) work for an indefinite period of time rather than being hired to perform a discrete job or work for a discrete period; and (E) work on terms set by the hiring entity rather than dictated by the worker or negotiated individually.

There is a substantial similarity between the first three elements, (A) through (C), of the common law test and the ABC test. In this sense, the ABC test is not a dramatic break with the common law but rather a reformulation. It makes the doctrine clearer, the correct classification of workers more predictable, and evasion more difficult. Yet, as we've already noted, an important, indeed critical, feature of the ABC reformulation of the common law test is that workers are presumed to be employees unless all three elements are established by the hiring party. Thus, the ABC test is not merely an enforcement tool that prevents employer evasion of legal obligations (what we call an "anti-trickery" device). Rather, the ABC test, and especially its presumption of employee status except where workers truly are independent or self-employed, is a recognition that the employment relationship is inherently one of mutual obligation in which the employee has indefeasible rights to decent pay and working conditions.[44]

Both the anti-trickery and the indefeasible-rights understandings of the ABC test are evident in *Dynamex Operations West, Inc. v. Superior Court*—the California Supreme Court case that adopted the ABC test for California wage and hour law.[45] The Court there emphasized that the test presumes that workers are

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42. California, which also has a "suffer or permit to work" standard for its wage and hour law, used a ten-factor test that considers these factors along with the "right to discharge at will, without cause"; "the kind of occupation, with reference to whether, in the locality the work is usually done under the direction of the principal or by a specialist without supervision"; "the skill required in the particular occupation"; "whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work"; the "method of payment, whether by the time or by the job"; and "whether or not the parties believe they are creating the relationship of employer-employee." S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 404 (Cal. 1989).

43. *Compare* Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 170 (2014) (stating without deciding that newspaper delivery workers may be employees and characterizing the "suffer or permit" test as embodying the common law test"), *with* Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 19 (Cal. 2018) (emphasizing that the test for employee status should focus "on the intended scope and purposes of the particular statutory provision" and clarifying that the ABC test is more employee-protective than the common law test).

44. *Cf.* Davidov & Alon-Shenkar, *supra* note 8, at 244, 258.

45. 416 P.3d at 35.

employees, so that any entity that disclaims obligations to its labor force must be prepared to prove each of the three elements of the test, thus showing that the workers are truly independent.[46] This protects workers, first and foremost, because the ABC test reduces the circumstances in which employers can classify workers as contractors. It also protects the public fisc. Because it is more difficult and expensive to collect taxes from individuals than from businesses, governments benefit from withholding of income and payroll taxes by employers. Moreover, because a misclassified worker is eligible for unemployment insurance ("UI") and/or workers' compensation benefits regardless of whether the employer paid the payroll taxes that fund the program, the sound administration of these compensation systems benefits from making misclassification more difficult. The increased clarity and predictability provided by the ABC test serve both workers and the government.[47] The need to litigate each case on its facts works to the advantage of employers which have lawyers to design and defend such schemes through years of expensive litigation. For example, Uber and Lyft have been litigating the question whether they must pay their drivers as employees since *Dynamex* was handed down in 2018. And through litigation and a ballot measure, they have tied up legislation enacted in 2019 clearly stating that drivers are employees.[48]

The facts of *Dynamex* illustrate the application and significance of the rule. Dynamex, the Court explained, "is a nationwide same-day courier and delivery service [that] offers on-demand, same-day pickup and delivery services" to individuals and large businesses.[49] Although it previously had treated its drivers as employees, in 2004, Dynamex decided to reclassify its California drivers as independent contractors "after management concluded that such a conversion would generate economic savings for the company."[50] Thus, henceforward, it required its drivers "to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance," and required drivers to purchase Dynamex-branded uniforms and mobile phones to maintain contact with Dynamex.[51] Other than allowing drivers to decide which days they would work, Dynamex controlled the rates charged to customers, the number and type of deliveries, and the compensation drivers received per delivery.[52]

By reclassifying drivers as independent contractors, companies like Dynamex (and others, including FedEx, Uber, and Lyft) shift the fixed costs of running a transportation and delivery business onto the workforce. The classification of the company's drivers or other workers simply recapitulates the peddler–sweatshop–sharecropping relationship for the twenty-first century. Like those historically exploitative labor practices, contracting seems to enable companies to

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46. *Id.* at 35.
47. *Id.* at 33.
48. Olson v. California, 62 F.4th 1206, 1211 (9th Cir. 2023), *aff'd en banc*, 104. F.4th 66 (9th Cir. 2024); Castellanos v. State, 305 Cal. Rptr. 3d 717, 724 (Ct. App. 2023), *aff'd in part*, 552 P.3d 406 (Cal. 2024).
49. *Dynamex*, 416 P.3d at 8.
50. *Id.*
51. *Id.*
52. *Id.*

extract the profit from labor and disclaim responsibility to the workers. Drivers bear the cost of maintaining and operating the fleet of vehicles and the risk of a downturn in demand for the service. This, the companies assert, means that the drivers are entrepreneurs rather than employees under the usual test. The company is guaranteed whatever portion it can extract from the fees customers pay, while still attracting enough drivers to do the work, and it bears no risk of damage to the vehicles, liability to third parties who might be injured by drivers, or losses associated with idle time. Highlighting the factor in the test that looks at who owns the instrumentalities of work, the companies portray these financial advantages to them as evidence that the workforce consists of entrepreneurs who own their own vehicles and enjoy the flexibility of when to work. And, because the work requires no training and can be supervised by computer (and now through artificial intelligence and GPS tracking), the company can disclaim any control or supervision and assert that the absence of it is proof of independent contracting.

The ABC test appears to have originated as early as 1935 in Maine.[53] Massachusetts's 2004 adoption of the ABC test gained significant attention. Several states adopted the ABC test between 2004 and 2012, apparently because the massive economic recession of 2008 revealed how underfunded the UI programs were relative to the needs of employees and because states suffered huge budget shortfalls.[54] By 2015, sixteen states used the ABC test, and 14 of the 16 presumed that any work relationship was one of employment, at least for some purposes.[55] The rapid growth continued—by 2021, twenty-one states had adopted the ABC test (most for UI eligibility),[56] and at the most recent count, 35 states and 1 territory (Puerto Rico) use some form of the ABC test.[57] We explore the development and possible future of the ABC test below in Part III.

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53. Deknatel & Hoff-Downing, *supra* note 6, at 65, 65 n.66.

54. *Id.* at 57–59, 65–67.

55. Two authors reported that as of 2015, sixteen states had adopted some version of the ABC test for some or all purposes. *Id.* at 64 n.63, app. at 103–04. These included Delaware, Illinois, Kansas, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Utah, and Washington. *Id.* app. at 103–04. Their Appendix compiles citations to statutes in existence at that time. *Id.*

56. This list included the sixteen listed above (excluding Kansas, Oregon, and Utah) plus Alaska, California, Connecticut, the District of Columbia, Hawaii, Indiana, Louisiana. LYNN RHINEHART ET AL., ECON. POL'Y INST., MISCLASSIFICATION, THE ABC TEST, AND EMPLOYEE STATUS (2021), https://files.epi.org/uploads/229045.pdf [https://perma.cc/PM5F-3GHD]. Of these, the 2021 publication identified California, Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, Nebraska, New Jersey, New York, and Vermont as states that use the ABC test for wage and hour protections for some or most workers.

57. That list is: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Employee or Contractor? The Complete List of Worker Classification Tests by State*, WRAPBOOK (Dec. 20, 2023), https://www.wrapbook.com/blog/worker-classification-tests-by-state [https://perma.cc/KQ2M-SBQW].

II. CONTRACT AND THE PATH OF PRIVATE LAW

An important part of the past and present of the struggle for workers' rights is, as we've just seen, overcoming contract. Indeed, by now the schism between contract and workers' rights seems to be the theme of the story of work law, and the recent wave of attempts to use contracts to undermine workers' rights seems to bolster contract's dangerous potential. But contract need not—indeed, it should not—be the foe of workers' rights. The putative divide between contract and decent work relies, as we claim in Section II.A, on a specific, strictly voluntaristic conception of contract, under which *all* contractual norms are norms created by the parties. This conception, which is indeed particularly inhospitable to those workers who do not have the protection of union contracts, echoes familiar theories of contract; but it is deeply misguided. Thus, in Section II.B, we outline a sketch of a genuinely liberal conception of contract that is not only more normatively defensible, but also better fits the modern law of contract. On that better view of contract, we conclude in Section II.C that the ABC test aligns with, rather than departs from, liberal contract's animating principles. The improved worker protections guaranteed by the ABC test vindicate, rather than undermine, the liberal telos of contract. Properly conceived, contract cannot be the refuge of employers who seek to avoid the floor of decent work. Quite the contrary: requiring such a floor is not only compatible with liberal contract; it is a necessary feature thereof.

A. Contract as the Nemesis of Decent Work

Karl Polanyi's celebrated account of labor as a "fictitious commodity" seems to capture what led advocates of workers' rights to view contract as the enemy of fair labor. Whereas commodities are "objects produced for sale on the market," labor obviously isn't.[58] "Labor is only another name for a human activity which goes with life itself"; it is neither produced for sale, nor can it be "detached from the rest of life, be stored or mobilized." But in a "commercial society," which is "best served by the application of freedom of contract," labor's supply is nonetheless organized as if labor was a commodity, with devastating destructive consequences:[59] "For the alleged commodity 'labor power' cannot be shoved about, used indiscriminately, or even left unused, without affecting also the human individual who happens to be the bearer of this peculiar commodity."[60] The use, abuse, or discarding of labor "would, incidentally, dispose of the physical, psychological, and moral entity"—the person attached to the labor.[61]

"Economic liberals," as Polanyi called them, represent this principle of freedom of contract "as one of noninterference."[62] But this is "merely the expression of an ingrained prejudice in favor of a definite kind of interference, namely, such as would destroy noncontractual relations between individuals."[63] To follow the true "meaning of freedom in a complex society," Polanyi insisted, requires a radically

58. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 75 (Beacon Press 2d ed. 2001) (1944).
59. *Id.* at 75, 171.
60. *Id.* at 76.
61. *Id.*
62. *Id.* at 171.
63. *Id.*

different organization.[64] We should rid ourselves of the fallacious notion that "there is nothing in human society that is not derived from the volition of individuals and that could not, therefore, be removed again by their volition."[65] Therefore, we must reject the view that equates "contractual relations with freedom."[66] Accordingly, labor must cease "to be a private contract except on subordinate and accessory points."[67]

Less familiar, but no less sharp and informative, is John Gardner's more recent condemnation of the rampant contractualization of labor law. Writing in a very different scholarly tradition (and with no reference to Polanyi), Gardner claimed that "[f]reedom of contract on its own . . . [is] a freedom-destroying monster with a freedom-friendly face."[68] It "gives its blessing to authoritarian work regimes and lends social acceptability to the depressing idea that work is there to pay for the life of the worker without being part of that life."[69] It also invites "the exploitation of the plasticity of contractual relationships to create hybrid arrangements, some of them designed to subvert or evade the law's residual uses of the employee/non-employee distinction."[70]

To be sure, Gardner recognized contract's service to our freedom—how it allows us to craft our relationships "to suit our particular personal goals"[71]—and thus he acknowledged "Maine's pride in the shift 'from Status to Contract'," which put an end to feudal forms of bonded labor.[72] But he nonetheless agonized over modernity's "tendency towards what might be called contractual reductivism."[73] This tendency is devastating since by rendering our special relationships—such as employer–employee—"comprehensively plastic, because contractual, in law," it erodes their "relatively fixed deontic content."[74] Thus, a contractual rationale of employment "yields the wrong limits" to "the employer's authority over the employee."[75] The reason for this is that once the authority has been assigned to the employer, it is "as if one's working life is not part of one's life" and "the law of contract does not imply a legal duty, on the part of the employer, to use his authority reasonably while the contract of employment subsists."[76] The resulting predicament is indefensible.

Polanyi and Gardner elucidate the principled grounding for the critical stance of workers' rights on the contractualization of employment. But they also helpfully expose the view of contract which this stance presupposes. Gardner is

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64. *Id.* at 268.
65. *Id.* at 266.
66. *Id.*
67. *Id.* at 259.
68. Gardner, *Labour Law*, *supra* note 5, at 46.
69. *Id.* at 35, 46.
70. JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 45 (2018) [hereinafter GARDNER, PRIVATE LAW].
71. *Id.*
72. Gardner, *Labour Law*, *supra* note 5, at 47.
73. GARDNER, PRIVATE LAW, *supra* note 70, at 44.
74. *Id.* at 44–45.
75. Gardner, *Labour Law*, *supra* note 5, at 35.
76. *Id.* at 43–44.

relatively explicit about this view of a simple bargain-exchange, as he recurrently referred to the picture of *This for That* as capturing the essence of contract. "Contracts assign authority," he writes along these lines, and thus it only requires "that one accepts an offer from another and gives, or promises, something in return."[77] Accordingly, "[o]n the *This for That* model, going to work is a cost to the employee, a sacrifice of time and effort that calls for compensation, a burden to be borne in return for wages."[78] Because contract, on this view, necessarily "regards us as *merely contractually related* humans," work is fully alienated and "is not *supposed* to have a place within [the employee's] wider life."[79] As long as the employer complies with the obligation to compensate the employee for their work, he has no further duties.[80]

Gardner's view of contract as a reassignment of the parties' entitlements echoes the recently revived transfer theory of contract,[81] which figures in some prominent philosophical accounts of contract, notably those of Kant and Hegel.[82] The same view seems to also underlie Polanyi's critique of labor contractualization, which helpfully emphasizes that this conception of contract perceives it in strictly voluntaristic terms. Contract, thus conceived, is a wholly open-ended, empty framework for voluntary reassignment, which is blind both to the nature of the performance that a promisee is entitled to enforce and to the relative bargaining power of the parties.[83]

This picture of contract implies that subordination and alienation are inevitable concomitants of contractualization. It thus suggests, as Gardner writes, that resorting to contract beyond the sphere of commerce (as in the famous widget transaction) is intrinsically troubling: the contractualization of employment is, more specifically, "a process that lovers of freedom, as well as lovers of self-realisation, should resist."[84] Hence, if this were indeed the essence of contract, friends of workers' rights would have had no alternative other than fully relegating the task of remedying these pitfalls to an exogenous overlay of "regulation" guided by "public

77. *Id.* at 36, 46.
78. *Id.* at 45.
79. *Id.* at 41, 45.
80. *Id.* at 36, 41, 44–46.
81. *See* Hanoch Dagan, *The Liberal Promise of Contract*, *in* PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER'S PRIVATE LAW THEORY 312 (Haris Psarras & Sandy Steel eds., 2023). For prominent contemporary accounts of transfer theory, see PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 21 (2019); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 107–44 (2009).
82. *See* Helge Dedek, *A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract*, 25 CAN. J.L. & JURIS. 313, 314 (2012); Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1079–80 (1989).
83. *See* Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and The Law of Work*, 24 THEORETICAL INQUIRIES LAW 49, 53 (2023) (arguing also that the same picture emerges from utilitarian theories of contract).
84. Gardner, *Labour Law*, *supra* note 5, at 41, 45–47.

values."[85] But it is not. The transfer theory of contract is merely one possible conception of contract.[86] Fortunately, there are others, and at least one alternative view of contract is both more normatively defensible and more loyal to the modern canon of contract. It also, as we will see later, nicely aligns with the transformative effect of the ABC test, on which we focus in this Article.

B. Liberal Contract Reinvigorated: Theory and Doctrine

Conceptualizing contract as a transfer (or a reassignment of entitlements) is not only troublesome from the perspective of workers' rights. It also fails to account for the most fundamental features of modern contract law.[87]

Modern contract law is treated as a vital feature of liberal law because its core mission lies in its service to planning, which goes far beyond a spot exchange projected to the future. It thus no longer focuses on what economists call complete contingent contracts, such as simple widget transactions, which may fit transfer theory. In your garden-variety, wholly executory contracts—say, for example, where the promisor will build the promisee's home—the parties' agreement typically implies a temporal sequence in which they are *interdependent*. Performance cannot be plausibly translated into as a set of disconnected exchanges of *This for That*, which means that formation cannot stand for a set of reassignments of the parties' entitlements. The role of modern contract law is not merely to supply enforcement services for a fully scripted agreement, but rather to *proactively* facilitate the parties' *cooperative* endeavor. Indeed, proactive facilitation is the name of the game of modern contract law; contract, in modern liberal law, is not a transfer, but rather a joint plan.[88]

This view of contract explains why contract law does not merely protect promisees' actual reliance. Modern contract law provides people with the indispensable infrastructure that enables them to join forces in the service of their respective goals, purposes, and projects—both material and social. To perform this mission, contract needs to recruit the law's authority and coercive power against promisors even before promisees have been harmed[89]—hence, contract's signature adherence to the promisee's expectation interest, as well as other burdens and duties contract law imposes on the contractual parties. These modest, affirmative obligations and burdens are not confusing aberrations to be marginalized or explained away (as they are under transfer theory, which perceives the parties as

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85. *Compare* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as A Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 380 (2006), *with* Arthur Ripstein, *The Contracting Theory of Choices*, 40 L. & PHIL. 185, 206, 211 (2021).

86. *See* IAN R. MACNEIL, THE RELATIONAL THEORY OF CONTRACT 292, 300–01 (2001).

87. *See generally* Hanoch Dagan, *Two Visions of Contract*, 119 MICH. L. REV. 1247, 1248 (2021).

88. *See* Dagan, *supra* note 81, at 320–21.

89. *See* Hanoch Dagan, *The Value of Choice and the Justice of Contract*, 10 JURIS. 422, 428 (2019).

strictly independent[90]). Rather, they typify a genuinely liberal private law, which is premised on the interpersonal right to reciprocal respect for self-determination (and not only independence).[91] Liberal private law embraces these interpersonal duties since, as H.L.A. Hart explained, not all affirmative obligations "ignore the moral importance of the division of humanity into separate individuals and threaten the proper inviolability of persons."[92] Because "different restrictions on different specific liberties" variously affect "the conduct of a meaningful life," duties of right need not be only duties of abstention.[93]

Grounding the law's justification for enforcing the parties' agreement on contract's service to autonomy along these lines implies that the same commitment to people's autonomy must serve as contract's telos and thus guide the law's animating principles as well as its operative doctrines. This means that even absent any external effects (such as the public concerns that trigger some of the legislation discussed in Part I), contract law must not be strictly voluntaristic. Rather, as one of us claimed in a co-authored work with Michael Heller, contract law must adhere, as it does, by and large, to three autonomy-based principles—addressing *range*, *limit*, and *floor*: (1) law should *proactively facilitate* the availability and viability of multiple contract types in each sphere of human endeavor; (2) contract law must respect *the autonomy of a party's future self*, that is, it must take seriously the ability to *re*-write the story of one's life; and, (3) to justify coercive enforcement by the state, all contracts must comply with the demands of *relational justice*.[94]

Thus, the principle of *proactive facilitation* explains, as noted, contract's vindication of the promisee's expectation, rather than merely their actual reliance. It also grounds the objective approach to party intention that guides the rules on contract formation, given the much more limited autonomy-enhancing potential of its subjective counterpart. Proactive facilitation likewise justifies the law's extensive gap-filling apparatus, which goes much beyond the task of providing enforcement services to fully fledged agreements.[95] The same principle also underlies the law's characteristic supply of a variety of contract types.[96]

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90. *See* BENSON, *supra* note 81, at 8, 12, 16–17, 19, 24, 27, 66, 364, 367–69, 371–72, 377–78, 385, 393–94, 469.

91. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1396 (2016) [hereinafter Dagan & Dorfman, *Just Relationships*]; Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171, 171 (2018).

92. H.L.A. Hart, *Between Utility and Rights*, 79 Colum. L. Rev. 828, 835 (1979).

93. *Id.* at 834–35.

94. *See generally* Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 112–13 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

95. *See* Hanoch Dagan, *Types of Contracts and Law's Autonomy-Enhancing Role*, *in* EUROPEAN CONTRACT LAW AND THE CREATION OF NORMS 109 (Stefan Grundmann & Mateusz Grochowski eds., 2021); Hanoch Dagan & Michael Heller, Autonomy Defaults (Mar. 20, 2024) (unpublished manuscript at 6–7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4754123 [https://perma.cc/Z8NL-L3QD].

96. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACT 67–126 (2017).

Liberal contract's second guiding principle concerns the *autonomy of the parties' future self*. Self-determination requires the ability to both write and rewrite our life story and start afresh. Thus, liberal law, which offers people the autonomy-enhancing power to make contractual commitments, must also safeguard the autonomy of the parties' future selves by carefully defining the scope of the obligations it enforces, and circumscribing their implications. Fine-tuning the ways law both bolsters and limits people's ability to commit is a subtle task with no magic formula for success, but it clearly requires some qualitative distinction between people's ground projects—the projects that make people who they are and give meaning to their lives—and their sheer preferences.[97] The common law's limited doctrine of specific performance nicely follows this prescription; other doctrines, notably rules that excuse performance altogether when changed circumstances imply that the parties' basic assumptions failed, also reflect similar sensitivities.[98]

Finally, liberal contract's third animating principle—which is most relevant to this Article—shifts gears from the *intra*-personal to the *inter*-personal dimension of contracting. The starting point of this dimension is the reliance of contract's legitimacy on the maxim of reciprocal respect for self-determination. Because respect for self-determination is hollow without *some* attention to people's distinctive features, reciprocal respect for self-determination requires contract law to view the parties as more than mere bearers of a generic human capacity for choice. It implies, in other words, a substantive and not just formal view of equality. Therefore, for liberal contract, the injunction of *relational justice*—of reciprocal respect for self-determination and substantive equality—is internal to contract.

This means that any attempt to resort to contract law for the enforcement of scripts that defy this maxim must be treated as a pathology or abuse and thus summarily refused. Relational justice grounds contract law's careful, but important, deviations from the laissez-faire mode of regulating the parties' *bargaining process*. It thus vindicates the expansion of the law of fraud beyond the traditional categories of misrepresentation and concealment to include affirmative duties of disclosure, as well as the modern rules dealing with unilateral mistake, duress, price gouging, and unconscionability.[99] Finally, concern for relational justice also best explains key rules *during the life* of a contract, as epitomized by the duty of good faith and fair dealing. This duty, now read into every contract, protects the parties against the heightened interpersonal vulnerability that contract performance engenders and solidifies a conception of contract as a cooperative venture.[100]

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97. *See* Dagan & Dorfman, *Just Relationships*, *supra* note 91, at 1419.

98. *See* Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 NOTRE DAME L. REV. 1323, 1325 (2023); Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 CAN. J.L. & JURIS. 297, 298 (2021).

99. Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89, 90 (2022) [hereinafter Dagan & Dorfman, *Precontractual Justice*].

100. *See* Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURISPRUDENCE 1, 3 (2022). Our argument is thus consistent with that of other scholars who argue for the recognition of the duty of good faith and fair dealing in all employment contracts. *See* Rachel Arnow-Richman & J.H. Verkerke, *Deconstructing Employment Contract Law*, 75 FLA. L. REV. 897, 958–67 (2023).

The compliance of modern contract law with relational justice is a work in progress. The core principle of fraud used to be "the maxim of *caveat emptor*."[101] The path from this regime of no other-regarding responsibility to contemporary relational-justice-based disclosure obligations often started with judges setting an open-ended standard, which legislators and regulators often codified and specified. This iterative approach typifies a wide range of contract law development, from disclosure statements in real estate transfers all the way to rules regarding unfair and deceptive practices in consumer financial transactions.[102]

C. Mainstreaming the ABC Test

The relationship between contract and workers' rights is improved by discarding the strictly voluntaristic picture of contract, propagated by transfer theorists and agonized by Polanyi, Gardner, and others. Replacing voluntarism with the liberal conception of contract as a joint plan shared by the hiring entity and the worker honors the obligation of relational justice. The subordination and alienation that justifiably alarm Polanyi and Gardner are anathema to liberal contract, properly understood. In short, we argue, securing work law's floor of minimum terms and immutable rights is not an external imposition on, but rather a perfection of, the liberal idea of contract.

Liberal contract can be a friend, rather than a foe, of workers' rights. To be sure, the conception of liberal contract outlined above, like any other legal theory that aspires to apply across time and place, does not—and indeed cannot—prescribe specific detailed blueprints. There is always a remaining indeterminacy between an abstract legal theory or conception and the concrete answers for as-applied, real-world questions. But the contract theory we espouse is nonetheless sufficiently robust to show that the ABC test follows its guideline; that by subscribing to this test, a jurisdiction pushes towards, rather than away from, the liberal ideal of contract. Adoption of the ABC test in the context of working arrangements follows the path of other developments of modern contract law, which have, as we've seen, marked the way away from the laissez-faire mode of regulation and towards an autonomy-enhancing set of doctrines. The California story also follows the institutional route of this happy development, in which courts apply their common law powers to adjust private law rules to comply with the requirements of relational justice, and legislatures further codify and clarify the doctrine.

Indeed, once relational justice is recognized as an endogenous, indispensable component of the liberal idea of contract, proudly premised on contract's justificatory foundation, the floor of acceptable working arrangements can find a happy home within, and not only without, contract.[103] As we have just claimed, liberal contract requires that the floor of legitimate interactions eligible for the law's support exclude interactions of gross relational injustice. Thus, just as with

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101. Barnard v. Kellogg, 77 U.S. 383, 388 (1871).

102. *See* Dagan & Dorfman, *Precontractual Justice*, *supra* note 99, at 110–23.

103. To reiterate: we do not deny the public rationales of this floor, nor do we contest their dominance in the genealogy of the law of work. But this contracting floor is not alien to the logic of contract. Rather, the entrenchment of this floor should be viewed as a necessary reform of the prior doctrine, a reform entailed by the idea of liberal contract, one that pushed it to live up to (liberal) contract's own implicit ideals.

other sections of private law, work law doctrines relating to safety in the workplace, nondiscrimination, minimum wages, working hours, and labor organization set the terms for people's interactions. This floor of minimum terms and immutable rights, we now claim, applies in a rather straightforward way to the parties' interpersonal relationships, unmediated by any public law concern. Because this floor prescribes workers' interpersonal rights, it must be read into any valid working arrangement; (liberal) contract cannot be the hiring entity's refuge from work law's core requirements.

Thus, because contract (and property) vests employers with the normative powers to make choices that change the normative situation of others (workers and potential workers), liberal law must ensure that these powers are not used in a way that might undermine the status of the latter as free and equal agents. Unlike the case of choosing a friend, liberal contract (and property) must follow the maxim of relational justice and thus cannot legitimately vest employers with normative power to subject others to impermissible behavior, such as wrongful discrimination. This means that anti-discrimination rules—including rules that instantiate *fair* equality of opportunity in the workplace—are not (or not only) external constraints on contract. Relationally unjust practices are autonomy-reducing and therefore must not be authorized and coercively enforced by liberal contract, properly conceived. Anti-discrimination rules can help *perfect* contract law's realization of its most fundamental telos, its raison d'être. [104]

A similar analysis applies to other minimum terms and immutable rights of workers as individuals. A particularly poignant example comes from the regime prescribed by the Occupational Safety and Health Act ("OSHA"),[105] which—as Cass Sunstein noted—may seem puzzling from a collectivist perspective.[106] But OSHA's relational structure, whereby "*employers* are responsible for providing a safe and healthful workplace for their workers,"[107] suggests a different rationale. OSHA, as argued elsewhere, is the legislative instantiation of private law's underlying commitment to relational justice.[108] OSHA prescribes a duty to achieve the lowest level of risk practically attainable to workers' safety and health. This prescription follows contract's relational justice underpinning, which privileges the features that make us who we are (and thus first and foremost our bodily integrity) as compared to those that don't (such as financial costs). This means that the duty to ensure the safety and health of one's workers is a prerequisite for the legitimacy

104. *See* Hanoch Dagan & Avihay Dorfman, *The Tort of Discrimination*, 16 J. TORT L. 393, 395 (2023) [hereinafter Dagan & Dorfman, *The Tort of Discrimination*]; Dagan & Heller, *supra* note 83, at 67–68. Furthermore, cases of discrimination should be treated as *a priori* torts. *See* Dagan & Dorfman, *The Tort of Discrimination*, *supra*, at 430.

105. Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. § 651 (2012)).

106. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1410 (2008).

107. OCCUPATIONAL SAFETY & HEALTH ADMIN., ALL ABOUT OSHA 4 (2018) (emphasis added), https://www.osha.gov/sites/default/files/publications/all_about_OSHA.pdf [https://perma.cc/CJN5-5J6Z].

108. *See infra* note 109.

of *any* working relationship.[109] The emerging obligation to ensure a healthy, bullying-free work environment may well also fall under this category.[110]

Even the idea of a minimum wage follows—indeed, is entailed by—liberal contract's commitment to relational justice. Liberal egalitarians struggle to reconcile minimum wage with the commitment to distributive justice given that there may be better ways to promote this public goal.[111] But, as one of us argued in a co-authored work with Avihay Dorfman, minimum wage, just like non-discrimination and safety and health (or, for that matter, accessibility or reasonable working hours), is a prerequisite to any legitimate working arrangement.[112] Relational justice implies that irrespective of whether the interacting parties are co-members of the same political community, their working relationship is an interpersonal source of concern and value in and of itself.[113] It thus offers a freestanding justification for the Universal Declaration of Human Rights' foundational prescription, in which "[*e*]*veryone* who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity."[114] From a relational justice perspective, payment of the minimum wage should be mandatory without regard to whether the worker is lawfully employed (e.g., children, or persons with a visa status that does not authorize paid employment).

Moreover, liberal contract's commitment to relational justice does not stop at individual obligations like the ones we've just addressed. As the introductory section to the Wagner Act explicitly states, the purpose of allowing labor unions is to ensure "actual liberty of contract" by addressing "[t]he inequality of bargaining power between employees . . . and employers who are organized in the corporate or other forms of ownership association."[115] By giving workers the chance to bargain collectively and place themselves on a more equal footing with employers, labor law attempts to solve this structural inequality, and thus redeem the legitimacy of

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109. *See* Hanoch Dagan & Roy Kreitner, *The Other Half of Regulatory Theory*, 52 CONN. L. REV. 605, 631–37 (2020).

110. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 536 (2000); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 253 (2010).

111. *See, e.g.*, Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, U. CHI. LEGAL F., 2009, at 1–2; Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optional Subsidy Policy*, 64 U. CHI. L. REV. 405, 474 (1997).

112. *See* Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice*, 68 AM. J. JURISPRUDENCE 229, 248–50 (2023) [hereinafter Dagan & Dorfman, *Poverty and Private Law*]; *cf.* Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543 (2014). Relational justice provides the justification and the theoretical framework for assessing what should count as minimum. The actual math depends on the circumstances of the particular society and, if necessary, locality; and its prescription must be consistent with rule-of-law commitments to provide effective guidance to employers.

113. Dagan & Dorfman, *Poverty and Private Law*, *supra* note 112, at 249.

114. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 23(3) (Dec. 10, 1948) (emphasis added).

115. National Labor Relations Act of 1935, 29 U.S.C. § 151.

employment contracts qua (liberal) contracts—that is, as a means of empowering people's self-determination. Because this concern applies to workers at large and is ingrained in the normative DNA of liberal contract, the right to labor organization must again be broadly applied, exactly as the ABC test prescribes.

To be sure, current labor law fails in many instances to equalize the bargaining power of employers and employees, and some of its recent developments are, in fact, a real setback.[116] Similarly, there are severe inadequacies in the prevailing employment law, notably the unfortunate persistence of the master-and-servant notion of an implied duty of obedience, which undergirds some of the most notorious abuses of working arrangements.[117] But this only means, as shown elsewhere, that adhering to a genuinely liberal conception of contract can go even beyond the ambitions of the ABC test; that it can serve as a lodestar, which guides judges adjudicating employment contracts to be even more—rather than less—protective of workers' rights.[118] Appreciating the alignment of the ABC test with the most fundamental principles of contract law can, and we think should, bolster ABC's foundation and invigorate its ambitions.[119]

III. THE PROMISE AND FUTURE OF THE ABC TEST

Having established the ABC test's common law and employee-protective origins, its evolution, and its consistency with a liberal theory of contract, we now turn to the practical implications of the history and theory. We begin by exploring the arguments for and against the ABC test that have been made to courts, legislators, or voters. As we explain, the ABC test recognizes that employment contracts have an irreducible minimum guarantee of fairness, and there is no merit to the notion that the ABC test somehow deprives putative employers and their workers of contractual or other legally protected freedoms.

Building on this critique and our more general thesis as per ABC's alignment with (liberal) contract's fundamental principles, we turn to ABC's ambitions. We argue that states that have adopted the ABC test only for unemployment insurance and/or workers' compensation should go further than that

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116. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018).

117. *See* Sabine Tsuruda, *Working as Equal Moral Agents*, 26 LEGAL THEORY 305, 317–18 (2020).

118. *See* Dagan & Heller, *supra* note 83, at 71–73. For a private-law critique of the *Janus* ruling, that unjustifiably upsets labor law, see HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 166 (2024). A recent paper arguing that relational justice is an essential element of employment contracts is Arnow-Richman & Verkerke, *supra* note 100, at 897–98.

119. In other words, courts that adopt the ABC test engage in the same type of common law evolution as those which turn to unconscionability to limit the enforcement of some unfair mandatory arbitration agreements. *See, e.g.*, Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 823 (2020). A similar evolution can be seen in the drafting of statutes or model laws, as rules evolve over various drafts; this happened in the drafting of the Uniform Commercial Code's provision on unconscionability. *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489–501 (1967). Unconscionability doctrine also relies, as we've explained, on (liberal) contract's core commitment to relational justice.

and apply it to all aspects of the employment relation. We then celebrate the wave of states that have joined the ABC club, and we conclude by returning to ABC's elusive function, encouraging courts to read it not only as an anti-trickery enforcement device, but rather as a firmer foundation for setting up the proper scope of the rules that secure the just relationships between workers and the people or firms that hire their services.

A. Bolstering ABC's Foundations

Californians—voters, legislators, and courts—have debated at length whether to adopt or abandon the ABC test. Those debates are reflected in the *Dynamex* case,[120] in legislative debates about A.B. 5, and in debates about whether to repeal it in Proposition 22, judicially invalidate it, or judicially revive it (in challenges to Proposition 22).[121] Proponents of ABC have been insufficiently bold in defending ABC by thinking of it as an exception to freedom of contract. Rather, we contend that the ABC test flows *from* contract as it mandates minimum terms that are essential attributes of relational justice. Connecting the themes that transpire from those debates to the theory of contract sketched out above, we show that the arguments against the ABC test are inconsistent with what contract law requires. Indeed, properly understood, these very arguments support ABC, rather than challenge it.

1. Freedom of Contract

A major line of attack against legislation or judicial decisions adopting the ABC test is that mandating work relationships have the suite of rights conferred on employees infringes the freedom to contract. The most ambitious or potentially far-reaching version of this argument is made under the Constitution's Contracts Clause, which forbids state laws "impairing the Obligation of Contracts."[122] The argument made in California was that the imposition of the ABC test in A.B. 5 "would severely modify key contractual rights in those contracts (such as various rights to flexibility), and would impose new obligations to which the parties did not voluntarily agree to undertake, such as a duty of loyalty, unemployment coverage, and other employment benefits."[123] The companies insisted that by changing independent contractor relationships to employment, the ABC test would "eliminate the very essence of the contractual bargain in these existing contracts, interfere with the reasonable expectations under these existing contracts, and eliminate the primary value of those contracts."[124]

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120. 416 P.3d 1, 35–36 (Cal. 2018).

121. Castellanos v. State, 305 Cal. Rptr. 3d 717, 724–27 (Ct. App. 2023), *aff'd in part*, 552 P.3d 406 (Cal. 2024). Although the focus here is on California, a similar series of events happened in Massachusetts. After Massachusetts adopted a broadly applicable ABC test, Uber and Lyft funded a pair of 2021 ballot measures, Initiative Petitions 21-11 and 21-12, to exempt app-based drivers from it. The Massachusetts Supreme Judicial Court struck the ballot measures down as violating Massachusetts constitutional limits on ballot measures. Koussa v. Att'y Gen., 188 N.E.3d 510, 513 (Mass. 2022).

122. U.S. CONST. art. I, § 10, cl. 1; Olson v. California, 62 F.4th 1206, 1221 (9th Cir. 2023), *aff'd en banc*, 104. F.4th 66 (9th Cir. 2024).

123. *Olson*, 62 F.4th at 1221.

124. *Id.* at 1222.

As a matter of current doctrine, the argument lacks merit. The Contracts Clause does not prevent future regulation of relationships governed by contract; rather, it prevents abrogation of obligations already accrued. And, even then, laws can change contractual relationships if there is "a significant and legitimate public purpose behind the regulation, such as the remedying of a general social or economic problem" and if the regulation is "appropriate to the public purpose."[125] The reason for allowing legislative change is obvious, as the "Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.'"[126] Because it has long been settled that the "power to regulate wages and employment conditions lies clearly within a state's police powers," the freedom of contract attack on the ABC test has been rejected.[127]

But beyond the doctrinal question, there lies the argument about whether adopting the ABC test does indeed infringe on an employer's right (regardless of whether the right stems from contract law or from the Constitution) to hire labor on whatever terms the worker will accept. The principle of relational justice we discussed above makes clear that the answer is no, as a matter of contract law. Contracts to sell oneself into slavery are void because they violate the principle of mutual respect. Contracts to sell children are likewise void. The ABC test recognizes that a large swath of workers are vulnerable to exploitation and are therefore entitled as a matter of law to minimum wages, to compensation in the event of involuntary unemployment or disabling occupational injury or illness, to freedom from invidious discrimination and harassment, and so forth. It therefore sees contractual freedom in the freedom to contract on fair terms, not the freedom to contract on terms that are tantamount to debt peonage. For liberal contract, freedom of contract is, as Sabine Tsuruda puts it, "the freedom to collaborate with others in ways that treat both you and your co-contractor as equally entitled to set your own ends and give shape to your life—as equally moral authorities over the direction your life ought to take."[128]

2. Flexibility and Independence

A related argument made in attacking the ABC test is that it deprives drivers of the freedom to work flexibly and of the independence of running their own businesses. Proposition 22, a ballot measure drafted by lawyers for Uber and Lyft to exclude app-based drivers from the ABC test and all California work protections, announced its principal purposes as protecting the right "to *choose* to work as independent contractors" and "to have the *flexibility* to set their own hours for when, where, and how they work."[129] Proposition 22's drafters imagined a need

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125. Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411–12 (1983).

126. *Id.* at 411 (quoting Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908)) (rejecting the argument that a state law changing price regulation impaired contract, and holding that even if it did impair contract, regulation had a legitimate public purpose).

127. *Olson*, 62 F.4th at 1223 (cleaned up) (quoting RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1150 (9th Cir. 2004)).

128. Sabine Tsuruda, *Collective Bargaining and Workers' Freedom of Contract*, *in* NEW FOUNDATIONS OF WORKPLACE LAW (Richard Chaykowski & Kevin Banks eds., forthcoming 2024).

129. CAL. BUS. & PROF. CODE § 7450(a)–(b) (2020) (emphasis added).

to protect "the basic legal right of Californians to choose to work as independent contractors," and they portrayed minimum labor standards as ominous; the ABC test, they intoned, "threatened to take away the flexible work opportunities of hundreds of thousands of Californians . . . [including] their ability to make their own decisions about the jobs they take."[130] Somehow, they said, adopting a rule granting drivers rights to the minimum wage and other protections would deprive them of the "independence" to choose when and how to work.[131] An article in the conservative *Federalist Society Review* urged policymakers to focus on *control* in distinguishing employees from independent contractors: "An independent worker is just that, *independent*—in control of how her own work is performed. It is this flexibility that millions of independent workers value most."[132] Foes of the ABC test insisted it should be unconstitutional because the law must "preserv[e] the unique flexibility of app-based work."[133]

The rhetoric is compelling: who wouldn't prefer to be independent rather than to be under control, to choose when and how to work, and to have flexibility in their work lives to accommodate other pursuits and obligations? The narrative flips the usual critique of misclassification of low-wage workers as being contemporary wage slavery by invoking the telos of liberal contract, i.e., that contract promotes the parties' autonomy to chart their life course. And empirical studies of taxi and app-based ride-hailing drivers show the appeal of the idea of autonomy.[134]

The flaw in the argument is that nothing in the legal status of being an employee compels the employer to control every aspect of the work, compels employees to work inflexible schedules, or gives contractors the right to work flexible schedules. Many companies that classify their workforce as employees—especially retail sales and restaurant work, which generally cannot classify staff as

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130. Olson v. Bonta, No. CV 19-10956-DMG (RAOX), 2021 WL 3474015, at *6 (C.D. Cal. July 16, 2021) (alteration in original) (quoting CAL. BUS. & PROF. CODE § 7449(d) (2020), *aff'd in part, rev'd in part sub nom.* Olson v. California, 62 F.4th 1206 (9th Cir. 2023), *aff'd en banc*, 104. F.4th 66 (9th Cir. 2024).

131. *See, e.g.*, Grace Gedye, *Court Upholds California Prop. 22 in Big Win for Gig Firms like Lyft and Uber*, CALMATTERS (Mar. 12, 2023), https://calmatters.org/economy/2023/03/prop-22-appeal [https://perma.cc/7GZC-GYZR]; Sara Ashley O'Brien, *Prop 22 Passes in California, Exempting Uber and Lyft From Classifying Drivers as Employees*, CNN, https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html [https://perma.cc/J78Q-HPTN] (Nov. 4, 2020, 4:02 PM); Press Release, *California Court of Appeal Rules Historic Victory for California App-Based Drivers*, PROTECT APP-BASED DRIVERS & SERVICES (March 13, 2023), https://protectdriversandservices.com/california-court-of-appeal-rules-historic-victory-for-california-app-based-drivers [https://perma.cc/3R26-FF8D].

132. Tammy McCutchen & Alex MacDonald, *The War on Independent Work: Why Some Regulators Want to Abolish Independent Contracting, Why They Keep Failing, & Why We Should Declare Peace*, 24 FEDERALIST SOC'Y REV. 165, 192 (2023).

133. Rohan Goswami, *Uber and Lyft Shares Rise After California Court Victory Lets Them Classify Drivers as Contractors*, CNBC, https://www.cnbc.com/2023/03/13/uber-lyft-shares-rise-after-california-court-upholds-prop-22.html [https://perma.cc/7GWW-4HBF] (Mar. 14, 2023, 3:44 PM).

134. V.B. Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 101 (2017).

independent contractors because of the need for control to ensure adequate staffing and good customer service—use extremely flexible scheduling, which often provokes protest from employees about their inability to plan, and has prompted legislation mandating predictable schedules.[135] Conversely, many people who work as independent contractors, whether correctly or unlawfully classified as such, work regular schedules. As anyone who has ever done a home repair or remodel project knows, plumbers, electricians, painters, and many others who are properly classified as independent contractors work regular (and often very long) hours Monday through Friday. One who is only irregularly available is unlikely to succeed in business. Moreover, the gig companies insist on driver availability; one of the leading cases brought by drivers challenging their misclassification involved a driver who was terminated because he failed to work some of the shifts that he had been scheduled to work.[136]

The reality of contract is that it both promotes and constrains freedom and flexibility for both parties. Whether working as contractors or employees, workers are constrained by obligations to perform work as promised; to adhere to norms and rules of the workplace or culture relating to respect, civility, and nondiscrimination; to refrain from dishonesty; and so forth. Regardless of their status as employees or contractors, workers typically remain free to moonlight in other jobs (and many low-wage workers do so as a matter of financial necessity), but they may be constrained by rules of confidentiality or in their ability to use workplace knowledge in competitive employment during or after the termination of the employment relationship. Again, regardless of their status, the law constrains some things that workers can say, protects them against some forms of on-duty speech, and protects their right to speak out on certain topics, including blowing the whistle on unlawful conduct. This mix of protections and constraints mirrors a corresponding range of protections and constraints on the hiring party. Some of the obligations flow from common law tort or contract, some from statute, and some from a mix of the two. The important thing for present purposes is that law has recognized that for the benefit of the hiring party and the hired, the freedom of each to achieve their goals in entering the relationship is promoted by obligating each to adhere to norms of fairness.

Contractual freedom, as we repeatedly argue, is the freedom to tailor a joint plan within the (broad) parameters of legitimate arrangements sanctioned and facilitated by an autonomy-based law. This means that it cannot undermine the justice of (liberal) contract law, and that it must comply with the implications of the

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135. *See* Qiuping Yu, *How to Design Predictable Schedule Laws that not Only Benefit Workers but also Firms' Bottom Line?*, BROOKINGS INST. (Aug. 10, 2023), https://www.brookings.edu/articles/how-to-design-predictable-scheduling-laws-that-not-only-benefit-workers-but-also-firms-bottom-line [https://perma.cc/B6HZ-RPB2] (reporting that 17% of the labor force, particularly in retail and service sectors, work on unpredictable schedules with wide fluctuations in weekly work hours, reporting the state of Oregon and many major cities including Chicago, Los Angeles, New York, Philadelphia, San Francisco, and Seattle have legislated "predictive scheduling" or "fair workweek" laws requiring advance notice of schedules, and analyzing national data in restaurant sector to conclude that predictable schedules can benefit both businesses and employees).

136. Lawson v. Grubhub, Inc., 13 F.4th 908, 910–11 (9th Cir. 2021).

maxim of reciprocal respect to self-determination and substantive equality in the pertinent context (here, work). The requirements of relational justice cannot be the quid pro quo for work flexibility.[137]

3. Dignity of Work

The third line of seemingly compelling arguments propounded by foes of ABC relates to dignity. The flexibility to supplement income, they claim, offers the dignity of being able to earn money on the worker's own terms and "the comfort of knowing I can work extra hours driving to help bring in needed income" while also being available to care for family.[138] An op-ed in the *Los Angeles Sentinel*, a newspaper by and for the Black community, said Proposition 22 reflects the will of drivers, bringing "vast" benefits to the Black community: "Not only does independent contract work give the flexibility for drivers to earn when they want, where they want, but it helps uplift Black businesses and communities as well."[139] The implication is that if Uber and Lyft had to pay the minimum wage, they would cease to operate at all, or cease to operate in Black communities, thus depriving both Black drivers and Black customers of the benefit of the service.

The problem with this argument against incorporating an obligation to maintain minimally decent standards into any work arrangement is that it assumes that dignity exists in the *opportunity* to work at all rather than in the *right* to work on adequate terms. Work itself is neither dignified nor humiliating; it depends on the terms. Forced labor is not intrinsically dignified; indeed, it is the absence of compensation that renders it humiliating. Choosing to work for free may exhibit or create dignity because of the generosity reflected in uncompensated service. But being forced into slavery does not exhibit dignity. A legal system that tolerates poverty wages for a large swath of the population, especially for some social groups (such as immigrants or people of color), reflects neither the dignity of those who labor nor the dignity of those who benefit from cheap goods and services. This brings us back, of course, to our recurrent theme: contract terms must not be so onerous as to treat one party to the contract as what underpaid workers have always derisively called a "wage slave."

There is also a long history, stretching back centuries, to the propositions that paying low wages shows disrespect for labor, working for low wages is dehumanizing, and earning too little to support oneself and one's family is humiliating. Brishen Rogers explained that "low-wage workers often describe the

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137. Our discussion is centered on the flexibility side of the argument at hand. Another way to read it would emphasize the independence side by implying a critique of employees' implied duty of obedience, which undermines their independence. We agree to *this* critique. *See supra* text accompanying note 103.

138. Alexsyia Flora, *Proposition 22 Should Remain Law in California so Gig Drivers Can Retain Flexible Schedules*, L.A. DAILY NEWS, https://www.dailynews.com/2023/04/02/proposition-22-should-remain-law-in-california-so-gig-drivers-can-retain-flexible-schedules [https://perma.cc/BKX7-V833] (Apr. 2, 2023, 9:02 AM).

139. Rick Callender, *California Court of Appeal Got It Right on Prop 22*, L.A. SENTINEL (Apr. 20, 2023), https://lasentinel.net/california-court-of-appeal-got-it-right-on-prop-22.html [https://perma.cc/YT4U-9TT9].

minimum wage as a matter of respect and fairness, not just resources."[140] In adopting the ABC test in *Dynamex*, the California Supreme Court gestured to this history when it asserted that the test ensures work is compensated adequately to enable workers "to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect."[141] Or, as Rogers explained, minimum wage law "enhances workers' self-respect by improving their material lives and by increasing the social value attached to their labor"; it "require[s] employers *themselves* to bear duties toward workers rather than mediating all distribution through the state"; and it "deliver[s] additional resources to low-wage workers as a group." All these things, he argues, "help ensure more egalitarian work based social structures."[142]

In other words, even if we fully accept the old economic theory (now undermined by empirical evidence) regarding the potential regressive effect of minimum wage,[143] paying the minimum wage is necessary for the terms of employment interactions between workers and the entities that hire their services to be relationally just.[144]

B. Invigorating ABC's Ambitions

From freedom of contract to dignity, we end up with the same conclusion. The ABC test is justified not only by public concerns pertaining to distributive justice or the aggregate social welfare, but also because it is the proper way to delineate the scope of the rules that ensure just work relationships. Therefore, we now argue, the ABC test should be stretched along three dimensions: (1) it should broadly apply beyond the narrow context of ensuring the viability of the public fisc; (2) it should continue to expand geographically, to the states that are yet to adopt it; and (3) it should be expansively interpreted, setting the appropriate ground rules of work relations, rather than merely serving as an enforcement tool.

1. Beyond the Public Fisc

The arguments for ABC discussed above have focused primarily on why it serves fundamental contract values by obliging the hiring party to pay adequate wages and to refrain from obvious abuses like invidious discrimination or harassment. But, as noted in Part I, the most widespread use of the ABC test is not to regulate wages or civil rights at work, but instead to determine whether an

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140. Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1544 (2014).

141. Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 32 (Cal. 2018) (citing Rogers, *supra* note 140).

142. Rogers, *supra* note 140, at 1548–49.

143. For an early, and classic, critique, see George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358, 358 (1946). A celebrated empirical study finds that a relatively modest increase in minimum wage need not reduce employment. David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 792 (1994). For a recent empirical study, see Arindrajit Dube, *Minimum Wages and the Distribution of Family Incomes*, 11 AM. ECON. J. 268, 280–302 (2019) (finding empirical evidence that higher minimum wages lead to increases in incomes at the bottom of the family income distribution).

144. *See supra* text accompanying notes 103–04.

employer is obligated to pay the payroll taxes that fund UI or, less often, workers' compensation insurance. With respect to these two social programs, the principal defense of the ABC test is often that it ensures the fiscal solvency of these social insurance programs and saves taxpayers from having to bail them out in times of economic downturn. But a narrow focus on protecting the public fisc is a missed opportunity. Those states that have adopted the ABC test only for UI, or even UI and workers' compensation, have taken the first step toward recognizing that fairness is an obligation of any work contract. The next step follows so logically from the first that it should be easy for courts or legislatures to expand the ABC test to all work relationships.

2. Beyond California

States across the country are beginning to recognize that the growth of misclassification of employees as independent contractors is a significant social problem and an abuse of the law of contract. We have argued above that there is no contract right to disclaim any responsibility to the worker performing labor, so, in theory, adopting the ABC test could be—and is—the responsibility of state courts construing contract law. Those courts have opportunities to take on this responsibility. For instance, twice the Nevada Supreme Court could have adopted the ABC test when clarifying the relationship between the state's independent contractor definition and Nevada Constitution Article 15, Section 16, the state's Minimum Wage Amendment, but did not.[145] Still, it is worth noting that legislatures and state executive bodies are not waiting for state courts to act.

California's 2019 codification of *Dynamex* in A.B. 5 caught the attention of lawmakers in other states with Democratic legislative majorities. In Illinois, a Democratic state legislator told the *Washington Post* that he and his colleagues were keeping a close eye on the rollout of A.B. 5 because "when we're not the first state to act, we get to reflect on the lessons of other states."[146] While the Illinois legislature never proposed an A.B.-5-style bill, legislatures across the country moved quickly in an attempt to emulate California, albeit without legislative success up to this point. Democratic legislatures in Rhode Island and New York have been the most dogged, introducing multiple bills to adopt a full ABC test.[147] Rhode Island's most recent

145. S.B. 493, 80th Leg., Reg. Sess. (Nev. 2019) (enacted); *see* Doe Dancer I v. La Fuente, Inc., 481 P.3d 860, 873 (Nev. 2021) (holding that the definition of "employee" in the Minimum Wage Amendment constitutionally supersedes the independent contractor statute where S.B. 493 was codified); Myers v. Reno Cab Co., Inc., 492 P.3d 545, 550 (Nev. 2021) (holding the lower courts could not conclude a taxicab driver was "an independent contractor solely because" of language in his cab's lease).

146. Eli Rosenberg, *Gig Economy Bills Move Forward in Other Blue States, After California Clears the Way*, WASH. POST (Jan. 17, 2020, 6:00 AM), https://www.washingtonpost.com/business/2020/01/17/gig-economy-bills-move-forward-other-blue-states-after-california-clears-way [https://perma.cc/8KXJ-G5QJ].

147. In the wake of A.B. 5, legislators in Rhode Island introduced legislation on February 25, 2020, and again in 2022 and 2024. *See* S.B. 2576, 2020 Gen. Assemb., Reg. Sess. (R.I. 2020); S.B. 2861, 2022 Gen. Assemb., Reg. Sess. (R.I. 2022); S.B. 2470, 2024 Gen. Assemb., Reg. Sess. (R.I. 2024). In New York, legislation was introduced in 2019, 2021, and, most recently, in 2023. *See* S.B. 6699A, 242d Leg., Reg. Sess., (N.Y. 2019); A.B. 5774, 244th Leg., Reg. Sess. (N.Y. 2021); S.B. 2052, 246th Leg., Reg. Sess. (N.Y. 2023).

legislation is currently held for future study, while a Democratic New York lawmaker introduced a bill in the current legislative session to adopt the ABC test.[148] Legislatures in Oregon and New Jersey each proposed a bill similar to A.B. 5, which would have patched up their already strong classification tests. Oregon's bill would have added the "B" prong to its already existing A and C test.[149] New Jersey's bill, S.B. 863, would have emulated California's codification of *Dynamex* by similarly codifying *Hargrove v. Sleepy's, LLC*, a 2015 opinion from the Supreme Court of New Jersey approving the ABC test for wage and hour, wage payment, and wage collection laws.[150] Legislators in both Colorado and Nevada created employment misclassification task forces and increased fees or penalties for violations.[151] Lawmakers in Pennsylvania also proposed legislation after *Dynamex*'s codification to adopt a full ABC test within the state's Labor Relations Act.[152] Lawmakers in Minnesota did the same as to all worker classifications within the state in 2021, and while in 2024 the Minnesota legislature passed an omnibus bill that codified "Transportation Network Company" (i.e., Uber and Lyft) drivers as "drivers" outside the employee–independent contractor binary, the ABC test legislation was not reintroduced by its sponsor.[153]

Politicians in state executive branches also took note when California codified *Dynamex*. In response to A.B. 5, New York's then-Governor Andrew Cuomo said in a press conference that he didn't "want to lag California in anything" and argued for "more people [to] be considered employees."[154] In a recently negotiated settlement with Uber and Lyft, the Massachusetts Attorney General's office agreed it would classify those companies' drivers as independent contractors provided the drivers received greater employee-like benefits and protections; strikingly, the settlement also prohibited the companies from donating money toward a set of proposed 2024 Massachusetts ballot initiative petitions which seek to let voters determine whether rideshare drivers should be employees or independent contractors under state law.[155] Meanwhile in Hawaii, an appointed commission within the Department of Labor and Industrial Relations released a proposed amendment to the Hawaii Administrative Rules that redefines the word

148. *See* S.B. 2861, 2022 Gen. Assemb., Reg. Sess. (R.I. 2022); S.B. 2052, 246th Leg., Reg. Sess. (N.Y. 2023).

149. *See* H.B. 2498, 80th Leg., Reg. Sess. (Or. 2019).

150. *See* S.B. 863, 219th Leg., Reg. Sess. (N.J. 2020).

151. *See* S.B. 493, 80th Leg., Reg. Sess. (Nev. 2019) (enacted); S.B. 22-161, 73d Leg., 2d Reg. Sess. (Colo. 2022) (enacted).

152. *See* H.B. 2289, 203d Gen. Assemb., Reg. Sess. (Pa. 2019); H.B. 658, 204th Gen. Assemb., Reg. Sess. (Pa. 2021); H.B. 861, 205th Gen. Assemb., Reg. Sess. (Pa. 2023).

153. *See* H.F. 1897, 92d Leg., Reg. Sess. (Minn. 2021); H.F. 5247, 93d Leg., Reg. Sess. (Minn. 2023).

154. Annie McDonough, *Will New York Follow California on Gig Worker Protections?*, CITY & STATE N.Y. (Sept. 11, 2019), https://www.cityandstateny.com/policy/2019/09/will-new-york-follow-california-on-gig-worker-protections/176929 [https://perma.cc/B7TG-VLZW].

155. Settlement Agreement ¶¶ 5, 74, 82, Campbell v. Uber Techs., Inc., No. 2084CV01519-BLS1 (Mass. Super. Ct. filed June 27, 2024), *joint stipulation dismissed with prejudice* (Mass. Super. Ct. June 28, 2024).

"employment" to meet the ABC test.[156] Finally, additional states increased enforcement efforts to identify and more vigorously prosecute cases of misclassifications under existing law.[157]

So, the wind is blowing in the right direction. We hope that realizing that this direction is also an imperative of contract, properly conceived, would offer both encouragement and intellectual support to strengthen and broaden this trend.

3. Beyond Anti-Trickery

This brings us to the third, and last, dimension of the growth we anticipate for the ABC test as a pillar of liberal work contracts. As we've mentioned, the mission of the ABC test has been described as an enforcement tool to prevent companies from evading their payroll tax obligations or from tricking workers into thinking the low pay they get as independent contractors is just the price that must be paid for the freedom to work a flexible schedule. But the ABC test is also a substantive principle that the work relationship necessarily entails obligations of relational justice. That is, the work relationship requires the payment of minimum wages, premium pay for overtime work, protections against invidious discrimination and harassment, protections of the right to unionize to freedom of speech, and an array of obligations reflected in both statute and common law. The mission of this Article is to vindicate the latter understanding of the ABC test: it recognizes the fundamental obligations of relational justice that inhere in *all* work relationships. Therefore, this implies an expansive interpretation and generous application.

Both legislatures and courts have highlighted the profound significance of the ABC test in recognizing that the work relationship must be just. The California Supreme Court in *Dynamex* repeatedly noted the importance of worker protection, the role of law in protecting workers' health and welfare, and that a legal obligation to provide minimally decent wages and working conditions gives workers "a modicum of dignity and self-respect."[158] The New Jersey Supreme Court also expressed this perspective in the case that adopted the ABC test for its minimum wage and overtime law, as well as its laws requiring regular wage payment, in cash, to the employee's bank (preventing payment in scrip, or very infrequent payment) and prohibiting certain deductions from wages.[159] The most significant factor for its ruling, the Court wrote, was the purposes of the pertinent statutes "to protect an

156. HAW. DEP'T OF LAB. & INDUS. RELS, AMENDMENT AND COMPILATION OF CHAPTER 12-46 HAWAII ADMINISTRATIVE RULES 11 (July 17, 2024), https://labor.hawaii.gov/hcrc/files/2024/07/HCRC-admin-rules-proposed-changes-compiled-7.17.24.pdf [https://perma.cc/2QRR-RD6V].

157. Pennsylvania increased funding for labor compliance investigators in its 2023–2024 budget. GOV. JOSH SHAPIRO, EXECUTIVE BUDGET 2023–2024, I, A1-10 (2023), https://www.budget.pa.gov/Publications%20and%20Reports/CommonwealthBudget/Documents/2023-24%20Budget%20Documents/Budget%20Book%202023-24%20WEB%20V.5.04182023.pdf [https://perma.cc/FK8E-UGHD]. And Virginia created a private right of action for workers who lost wages due to misclassification. VA. CODE ANN. § 40.1-28.7:7 (2020).

158. Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 32 (Cal. 2018).

159. Hargrove v. Sleepy's, L.L.C., 106 A.3d 449, 463–64 (N.J. 2015) (holding that delivery drivers are employees for purposes of wage payment and wage and hour laws, notwithstanding that they contracted as independent contractors).

employee's wages and to assure timely and predictable payment" and "to protect employees from unfair wages and excessive hours."[160] Moreover, by presuming a work relationship is an employment relationship covered by this protective legislation, "the 'ABC' test fosters the provision of greater income security for workers."[161]

CONCLUDING REMARKS

Many states, notably California, have adopted the ABC test to determine whether work relationships are employment subject to minimum labor standards. Businesses that classify their workforce as independent contractors argue that the adoption of the ABC test violates the freedom to contract on any terms the parties choose. The ABC test, we have argued, is not an *infringement* of contract rights; rather, it aligns the definition of employee with the relational justice principles inherent in a liberal conception of contract. A genuinely liberal conception of contract requires that contracts for the provision of labor or services for remuneration be subject to minimum terms like those mandated by New Deal and Civil Rights Era legislation. Put differently, rather than an antidote to the ills of contract, the ABC model is, by and large, an entailment of liberal contract. Jurisdictions that adopt the ABC model have not affected a rupture from contract; quite the contrary, they prevent abusing the idea of contract for a purpose that contravenes the telos of liberal contract.

The ABC test is most well-known for preventing hiring entities' use of a spurious version of contract law *to opt out of the minimum labor standards laws* that legislatures have deemed necessary to protect workers, their families and communities, and the economy. In doing so, it prevents abuse of contract law. More profoundly, the principle of relational justice reflected in the ABC test informs the analysis of the contractual relationship between hiring entities and their workforce *even if the workers are properly deemed independent contractors*.[162] Contract, in other words, need not be the enemy of the effort to establish minimum labor standards. Because the ABC test aligns the law governing work agreements with the principles animating modern contract law writ large, the test should be proudly defended, expansively interpreted, and broadly followed.

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160. *Id.* at 463.

161. *Id.*

162. More broadly, the view of liberal contract we espouse here, and hope will be bolstered by the ABC test, also implies that the prevailing default of authoritarian workplace relations should be replaced by a cooperative one. *Cf.* Sabine Tsuruda, *A Cooperative Paradigm of Employment*, *in* WORKING AS EQUALS 153, 155 (Julian Jonker & Grant Rozeboom eds., 2023).

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