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Volume 19 | Issue 3

Article 2

5-1-2018

Independent Employees: A New Category of Workers for the Gig Economy

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**INDEPENDENT EMPLOYEES: A NEW CATEGORY OF WORKERS
FOR THE GIG ECONOMY**

Michael L. Nadler*

Many companies, particularly in the Gig Economy, have been the target of lawsuits alleging that they have misclassified workers as independent contractors rather than employees. These issues often present bet-the-company litigation, with billions of dollars and the companies' very business models at stake. Although there is near-universal recognition that the division of workers into two rigid categories creates a host of problems because it is based on antiquated notions that fail to map cleanly onto the modern economy, legal scholarship to date has failed to adequately grapple with the existing employment case-law to propose a new way forward. This Article does so by exploring the history of both the Gig Economy and the contractor-employee bifurcation, drawing on insights from their intersection to propose a new test for properly categorizing workers. In doing so, it outlines the contours of an intermediate category of worker, the "independent employee." Although many have suggested that a new category of worker would be beneficial, they have generally failed to explain what such a category would look like in practice. This Article fills that void by providing a functional framework for both how to identify independent employees and determining the legal protections and benefits that they should be granted.

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I. INTRODUCTION

“Unicorns are now ubiquitous.”¹ Indeed, it has become cliché to note the once-astonishing success of nascent technology companies that are creating new opportunities for individuals to offer goods and services directly to others on a previously unimaginable scale. One of the defining characteristics of these companies is that they operate in interstitial areas of the law because they present new and unique challenges that were not foreseen—and are not accounted for—by existing laws and regulations.² And like moths to a flame, a spate of lawsuits has followed their success in light of the legal ambiguities these companies present, some of which may have the capacity to permanently derail or destroy their burgeoning business models.³

¹ Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 587 (2016) (defining “unicorns” as companies with billion-dollar valuations and noting “the increasing pace at which unicorns are anointed” in recent years).

² Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 104 (2015).

³ See, e.g., Sarah Kessler, *The Gig Economy Won’t Last Because It’s Being Sued to Death*, FAST CO. (Feb. 17, 2015), <https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> (describing employment lawsuits as “a huge threat to the gig economy” and

In particular, this Article discusses complaints lodged against several companies that operate in the Gig Economy,⁴ alleging that

arguing that if gig economy companies cannot classify workers as independent contractors, “you lose the gig economy.”)

⁴ This Article uses the term “Gig Economy” specifically because many of the terms used to encompass these various technology companies mask important distinctions among their business models. Because they share “common core ideas that explain the[ir] overlap” but have fundamentally different meanings, discussions that fail to define their terms quickly get muddy as the varying definitions are “bent out of shape to suit different purposes.” Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST CO. (Nov. 21, 2013), <https://www.fastcompany.com/3022028/the-sharing-economy-lacks-a-shared-definition>; see also Ian Brinkley, *Ditch Your Assumptions About Uber and Airbnb: the ‘Gig Economy’ is No Game Changer*, GUARDIAN (Aug. 19, 2015, 5:37 EDT), <https://www.theguardian.com/sustainable-business/2015/aug/19/gig-economy-no-game-changer-impact-uber-airbnb>; Denise Fung Cheng, Reading Between the Lines: Blueprints for a Worker Support Infrastructure in the Peer Economy (June 2014) (unpublished M.S. thesis, Massachusetts Institute of Technology), <http://cmsw.mit.edu/wp/wp-content/uploads/2016/06/232902196-Denise-Cheng-Reading-Between-the-Lines-Blueprints-for-a-Worker-Support-Infrastructure-in-the-Peer-Economy.pdf>. Some companies, such as Airbnb or ZipCar, can be described as belonging to a new Sharing Economy, which enables the collaborative consumption of physical assets, such as homes and automobiles, that are expensive to purchase but often sit idle and underutilized by their owners. In other words, their business model relies on the sharing of physical assets’ unused capacity. See John J. Horton & Richard J. Zeckhauser, *Ownning, Using and Renting: Some Simple Economics of the “Sharing Economy”* (Nat’l Bureau of Econ. Research, Working Paper No. 22029, 2016), <http://john-joseph-horton.com/papers/sharing.pdf>. Other companies, such as TaskRabbit or KitchenSurfing, are better classified as belonging to a new Gig Economy, in which professionals primarily offer their available time and labor to perform a variety of services. See Rachel Botsman, *The Sharing Economy: Dictionary of Commonly Used Terms*, MEDIUM (Oct. 19, 2015), <https://medium.com/@rachelbotsman/the-sharing-economy-dictionary-of-commonly-used-terms-d1a696691d12> (defining “Gig Economy” as embracing “[s]ystems that break up a traditional company ‘job’ into individual ‘gigs’ that independent workers are paid to do for a defined time.”). As one commentator has acerbically but astutely explained, if Gig Economy workers were to be classified as part of the Sharing Economy, then the same would necessarily be true for all other workers because the companies’ business models “don’t involve ‘sharing’ anything other than labor.” Christopher Mims, *How Everyone Gets the ‘Sharing’ Economy Wrong*, WALL ST. J. (May 24, 2015, 3:32 PM ET), <https://www.wsj.com/articles/how-everyone-gets-the-sharing-economy-wrong-1432495921>; see also, e.g., Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1407 (2016)

these companies have misappropriated vast sums of money from their workers by improperly classifying them as independent contractors, rather than as employees.⁵ Claims of worker misclassification have plagued the Gig Economy because they call into question the very nature of the services provided by, and to, its participants. These matters bring to the forefront a core issue at the heart of the Gig Economy's identity: Do these companies truly create more efficient markets by functioning as platforms for matchmaking among independent commercial actors,⁶ or do they instead engage in regulatory arbitrage to obtain a competitive advantage while actually functioning no differently than traditional employers?⁷

("In fact, 'sharing' and kindred designations are misnomers. Even if there are some altruistic or communal motives . . . , the heart of the industry is financial gain Consumers pay for the services and goods, and providers enjoy an additional, or main, source of income. All types of transactions are monetized.").

⁵ See, e.g., *Singer v. Postmates, Inc.*, No. 15 Civ. 1284 (N.D. Cal. Sep. 1, 2017); *Cotter v. Lyft, Inc.*, No. 13 Civ. 4065 (N.D. Cal. Apr. 7, 2016); *O'Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826 (N.D. Cal. Dec. 9, 2015); *Levin v. Caviar, Inc.*, No. 15 Civ. 1285 (N.D. Cal. Nov. 16, 2015); *Cobarruviaz v. Maplebear Inc.*, No. 15 Civ. 697 (N.D. Cal. Nov. 3, 2015); *Iglecias v. Homejoy*, No. 15 Civ. 1286 (N.D. Cal. Sep. 29, 2015); *Otey v. Crowdfunder, Inc.*, No. 12 Civ. 5524 (N.D. Cal. Jul. 2, 2015); *Taranto v. Washio, Inc.*, No. CGC-15-546584 (Cal. Super. Ct. June 29, 2015); *Yucesoy v. Uber Techs. Inc.*, No. 15 Civ. 262 (N.D. Cal. June 12, 2015).

⁶ See, e.g., Abbey Stemler, *Between and Between: Regulating the Shared Economy*, 43 *FORDHAM URB. L.J.* 31, 32 (2016) ("The platforms in the sharing economy use technology to connect people who have private excess capacity to those who want to purchase it."); Julia Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 *HOFSTRA LAB. & EMP. L.J.* 1, 14–15 (2016) (defining the "Uber narrative" as the assertion that it "use[s] technology to facilitate a market between independent sellers and buyers").

⁷ Noah D. Zatz, *Does Work Law Have a Future if the Labor Market Does Not?*, 91 *CHI. KENT. L. REV.* 1081, 1093 (2016); see also Benjamin Means & Joseph Steiner, *Navigating the Uber Economy*, 49 *U.C. DAVIS L. REV.* 1511, 1514 n.7 (2016) ("[I]f companies like Uber gain a competitive advantage in the marketplace by shirking their obligations to workers, then their perceived luster might owe something to regulatory arbitrage rather than useful innovation."). An argument can also be made that a better analogy is that the platforms function like electronic hiring halls. See Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 *BERKELEY J. EMP. & LAB. L.* 233, 252 (2017) ("Uber purports to perform exactly the same functions as a hiring hall:

To be clear, worker misclassification problems are by no means limited to the Gig Economy.⁸ This Article focuses on the Gig Economy because it exemplifies broader problems that have long been apparent throughout contemporary labor markets. Indeed, our traditional tests for determining employment status are notoriously indecisive in many contexts. The current legal regime offers a way to think about the nature of employment by identifying pertinent considerations, but it often fails to provide clear resolution for particular conflicts because it does not dictate how myriad factors are to be added up and weighed against one another. As Judge Frank Easterbrook of the Seventh Circuit Court of Appeals has explained, “[a] score of 5 to 3 decides a baseball game, but [employment] regulation does not work that way.”⁹ Accordingly, companies both new and old struggle to apply imprecise and outdated tests that do not fit the modern workforce, with little ability to anticipate whether courts will ratify their decisions or find fundamental flaws with their business models.

One oft-mentioned solution to this dilemma is to create a third category of workers that would be more suitable for participants in the modern economy, but there are few models for what such an outcome might look like. As a result, “[w]hile a third classification sounds progressive, nobody’s really sure what it would mean in practice.”¹⁰ This Article is the first to engage with the existing worker-misclassification case-law to outline a new category, the “independent employee,” which would resolve many of the flaws inherent in our binary division of workers as either employees or independent contractors. As set forth below, the recognition of independent employees would offer significant advantages over the status quo to both companies and workers alike. Moreover, by

it brings together buyers and sellers in time and space, and it also sets the price of the ride. Just as importantly, it insists that it *does nothing else*: it does not hire the driver itself, and it does not sell rides.” (emphasis in original)).

⁸ Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 135–36 (2016).

⁹ *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 407 (7th Cir. 2007).

¹⁰ Caroline O’Donovan, *What a New Class of Worker Could Mean for the Future of Labor*, BUZZFEED (June 18, 2015, 5:01 PM), <https://www.buzzfeed.com/carolineodonovan/meet-the-new-worker-same-as-the-old-worker>.

eschewing the proliferation of multi-factor tests that frequently provide minimal guidance as to how any particular misclassification dispute will or should be resolved, this Article offers a system that would provide greater clarity and uniformity for deciding a wide array of employment litigation.¹¹

The remainder of this Article will proceed in four parts. Part II will discuss the rise of the Gig Economy. Part III will describe the current legal regime, which problematically forces workers to be classified as either employees or independent contractors. Part IV will examine several worker misclassification cases involving the Gig Economy, which highlight many of the issues faced by companies whose workers straddle the traditional divide between employees and independent contractors. Lastly, Part V will propose a legislative solution to the current legal regime's inability to predictably and clearly categorize Gig Economy workers.

II. THE RISE OF THE GIG ECONOMY

During the Industrial Revolution, entrepreneurs discovered that it was often cheaper and more efficient to bring large numbers of workers together in firms in order to produce ever-increasing quantities of identical goods by dividing labor into manageable units arranged around uniform systems and processes.¹² While this may have limited the number of bespoke and artisanal products offered, mass-production provided a windfall to consumers seeking consistent and affordable goods and services.¹³ For workers, meanwhile, the rise of firms would eventually provide stable and

¹¹ The term “employment” and references to “employment law” throughout are meant to refer to the traditional distinction drawn between “employment law, which offers ‘rights and protections to employees on an individual—and individually enforceable—basis,’” as opposed to “labor law, which aims to protect collective action among workers.” Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 37 (2016) (quoting James Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 *TEX. L. REV.* 1563, 1570 (1996)). They are not meant to suggest that Gig Economy workers are properly classified as employees.

¹² See *There's an App for That*, *ECONOMIST* (Dec. 30, 2014), <https://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and>.

¹³ See *id.*

dependable sources of income upon which they could rely.¹⁴ Thus was born the ideal of “organization men,” employees who would remain loyal to a single long-term employer over the course of their careers, a concept around which many twentieth-century government programs and social welfare policies were based.¹⁵

For decades, this arrangement proved mutually beneficial. “Organization men exchanged years of service for defined benefits: steady pay, a pension, health benefits, guaranteed safety conditions and more. Underpinning these organization men’s allegiance was the belief that their firm would take care of them.”¹⁶ Indeed, many scholars have argued that the high degree to which employees identified with their employers and adopted their employers’ goals as their own were among the primary factors in the United States’ post-World War II economic growth because this alignment produced several beneficial effects: (1) loyal workers did not demand excessive compensation; (2) they were unlikely to game their employer’s internal structures and processes to advance their own interests at their employers’ expense; and (3) they could be counted on to make discretionary judgments that benefitted the company rather than just themselves.¹⁷ Decades before business executives learned to rely on the mantras of “other people’s

¹⁴ *See id.*

¹⁵ *See id.* *See generally* WILLIAM H. WHYTE, *THE ORGANIZATION MAN* (1956).

¹⁶ Cheng, *supra* note 4, at 17; *see also, e.g.*, RICK WARTZMAN, *THE END OF LOYALTY* 263 (2017) (paraphrasing the president of Coca-Cola’s speech in 1959 as stating that “a corporation has to serve four constituencies: the stockholder, the community, the customer, and the employee.”); DON HELLRIEGEL & JOHN SLOCUM, JR., *ORGANIZATIONAL BEHAVIOR* 82 (2d ed. 1979) (explaining that in the 1950s General Electric’s stated goals included “provid[ing] good jobs, wages, working conditions, work satisfactions, stability of employment, and opportunities for advancement for employees, in return for their loyalty, initiative, skill, care, effort, attendance and teamwork”).

¹⁷ *See* June Carbone & Nancy Levit, *The Death of the Firm*, 101 *MINN. L. REV.* 963, 975–81 (2017) (summarizing scholarship regarding the advantages of the firm); *see also id.* at 990 (“corporate managers embraced the corporate brand and saw their role as one of stewardship of the institution The individual gained personal status through identification with the firm and saw the firm’s well-being as intimately linked with personal advancement.”).

money”¹⁸ and “I’ll be gone, you’ll be gone,”¹⁹ the prospect of a lengthy career with a single employer allowed corporate officers to link their personal success and self-esteem more closely with the health and prestige of their employer rather than with their individual salary or net worth.²⁰

In retrospect, cracks in this façade began appearing as early as the 1970s. In that era, companies began heeding the advice of investors and management experts instructing them to cut costs and focus on their core competencies, selling off secondary or tertiary business lines and outsourcing back-office responsibilities.²¹ Scholars in a variety of fields concurrently offered theoretical justification for these practices as necessary in order to provide maximum value to companies’ shareholders at the expense of the

¹⁸ See, e.g., Louis Nelson, *Trump: ‘There’s Nothing Like Doing Things with Other People’s Money’*, POLITICO (Sept. 20, 2016, 6:04 PM), <http://www.politico.com/story/2016/09/donald-trump-other-peoples-money-228434> (“It’s called OPM. I do that all the time in business. It’s called other people’s money. There’s nothing like doing things with other people’s money.”); William D. Cohan, *When Bankers Started Playing with Other People’s Money*, ATLANTIC, (Feb. 28, 2017), <https://www.theatlantic.com/business/archive/2017/02/how-wall-street-went-public/517419> (Starting in the 1970s, “bankers and traders were being rewarded to take outsized risks with *other* people’s money and with very little financial accountability when things went wrong. . . .” (emphasis in original)).

¹⁹ See, e.g., James Surowiecki, *Punish the Executives, Not Just the Banks*, NEW YORKER (July 15, 2014), <http://www.newyorker.com/business/currency/punish-the-executives-not-just-the-banks> (discussing “the basic logic behind what they called ‘I’ll be gone, you’ll be gone’” in which “people were willing to do deals that they knew were likely to blow up, because they figured that by time the deals went bad, they themselves would have moved on (while pocketing hefty bonuses in the meantime)”; Lynn Stuart Parramore, *Big Finance Is Strangling Innovation*, SALON (July 27, 2013, 9:00 AM), http://www.salon.com/2013/07/27/big_finance_is_sucking_the_life_out_of_our_economy_partner/ (summarizing this motto to mean that “[a]s long as you’re making money right now, what happens tomorrow is not your problem”).

²⁰ See Carbone & Levit, *supra* note 17, at 980.

²¹ See Noam Scheiber, *Growth in the ‘Gig Economy’ Fuels Work Force Anxieties*, N.Y. TIMES (July 12, 2015), <https://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html>.

companies' other stakeholders, including their employees.²² This process accelerated drastically in subsequent decades, as technological innovations made it far easier for companies to contract with external vendors for many services and discrete projects, turning streamlined efficiency and profit-maximization into familiar and well-worn ideals pursued throughout corporate America.²³ These trends soon dovetailed with the cultural focus on individual responsibility and accountability that accompanied the "Reagan Revolution."²⁴ The dominant sentiment of this era was succinctly expressed by a General Electric human resources executive who exhorted employees to "do good work, work hard, and always have a copy of your resume ready" because, "as a society, we're going to be moving away from the things that tie people to a company for thirty years."²⁵ Put another way by the same company's legendary CEO, "Neutron Jack" Welch, "Only satisfied customers can give people job security. Not companies."²⁶

The long-lasting impact of these cultural shifts is still being felt today. The continued focus on maximizing shareholder profit, to the

²² See, e.g., Milton Friedman, *The Social Responsibility of Business Is to Increase Profits*, N.Y. TIMES MAG., Sept. 13, 1970, (describing arguments that businesses have a "responsibilit[y] for providing employment" as "pure and unadulterated socialism" because "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits"). See generally Carbone & Levit, *supra* note 17, at 995–99 (describing advocacy for companies to "bring back the price mechanism" and "reduce the entity to no more than a vehicle to facilitate market exchanges" as academia's "assault on the firm").

²³ See Charles Lawton, *The 1980s Decimated Stable U.S. Corporate Model and Workers Must Deal with Fallout*, PORTLAND PRESS HERALD (Jan. 19, 2016), <http://www.pressherald.com/2016/01/19/charles-lawton-the-1980s-decimated-the-stable-u-s-corporate-model>; Scheiber, *supra* note 22; Cheng, *supra* note 4, at 19.

²⁴ See, e.g., Andrias, *supra* note 11, at 22–23 (referencing President Reagan's fight against air traffic controllers as a factor in restructuring the American economy into a form "almost unrecognizable from the one that defined the New Deal").

²⁵ WARTZMAN, *supra* note 16, at 248–49.

²⁶ *Id.* at 242. The media referred to Welch as "Neutron Jack," a sobriquet to which he took offense, because it conveyed that his management policies were like a neutron bomb: they left buildings and machinery intact but eliminated the employees. *Id.* at 241.

exclusion of all other interests, was amply demonstrated by Wall Street's outrage at American Airlines' recent agreement to raise wages, prompting financial analysts to complain that the company was prioritizing employees over shareholders.²⁷ Although "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else,"²⁸ the notion that companies might act in their employees' interests rather than that of their shareholders—or that shareholders might even benefit from improving corporate morale and attracting higher-quality employees through increased wages—was scarcely heard.²⁹

Of course, loyalty in employment relationships is reciprocal. Employees' allegiance to their employers was premised on the companies' commitments to them in the form of benefits, training, opportunities for promotion, and a secure tenure with the firm.³⁰ The predictable reaction to employers renouncing the notion that they owed any non-contractual duties to their employees was a concomitant desire by many employees to leave behind stultifying corporate environs for more flexible and personally rewarding approaches to work through combinations of entrepreneurship, self-employment, and freelancing.³¹ Indeed, a recent survey of Uber

²⁷ See, e.g., *American Airlines Announces Pay Raises, and Investors Balk*, L.A. TIMES (Apr. 27, 2017, 1:45 PM), <http://www.latimes.com/business/la-fi-american-airlines-raises-20170427-story.html> (quoting analyst: "This is frustrating. Labor is being paid first again. Shareholders get leftovers."); Tomi Kilgore, *American Airlines Downgraded as Pay Raises Set 'Worrying Precedent'*, FOX BUS. (Apr. 27, 2017), <http://www.foxbusiness.com/markets/2017/04/27/american-airlines-downgraded-as-pay-raises-set-worrying-precedent.html> (quoting analyst: "We are troubled by [American Airlines'] wealth transfer of nearly \$1 billion to its labor groups.").

²⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014).

²⁹ Cf. Dieter Sadowski, Joachim Junkes & Sabine Lindenthal, *The German Model of Corporate and Labor Governance*, 22 COMP. LAB. L. & POL'Y J. 33, 37 (2000) (discussing the German Co-Determination Act of 1976, which required that German stock corporations' and limited liability companies' supervisory boards have "quasi-parity representation of shareholders and employees," in which the employees' board representation "must include at least one blue- and one white-collar worker, one managerial employee and two trade unionists").

³⁰ Carbone & Levit, *supra* note 17, at 990–91.

³¹ Tim Barker, *Piecing Together a Living Through the Gig Economy*, ST. LOUIS POST-DISPATCH: BUS. (Sept. 6, 2015),

drivers reflects the deterioration of the employer-employee social contract over the course of several decades: when asked if they would prefer “a steady 9-to-5 job with some benefits and a set salary or a job where you choose your own schedule and be your own boss,” 73% of Uber drivers rejected the “steady 9-to-5 job” in favor of striking out on their own.³²

As Professors June Carbone and Nancy Levit have persuasively argued, the result of these trends has been the death of the business models that dominated the post-war era.³³ Modern companies prize efficiency and flexibility, organizing themselves around specialized business functions that are often supported by a rotating cast of service-sector firms and independent contractors, such that today’s large companies no longer need labor forces as large as those of their predecessors.³⁴ On the other hand, modern-day workers have minimal loyalty to their employers, “nor should they,” Carbone and Levit argue, “when they have become fungible commodities and their employers have become transitory.”³⁵ The result is that the employment relationship itself has entered into a self-sustaining cycle of decay. Firms invest less in their workers, providing fewer benefits and offering less job security, because they can no longer rely on their workers’ loyalty, reducing their returns on any such investments.³⁶ In turn, even highly trained workers whose skills are in great demand increasingly view their career trajectory less in terms of climbing the corporate ladder within a given company and more in terms of maximizing their human capital, making themselves more marketable throughout their industry or profession by acquiring desirable skills and experiences.³⁷ As for less skilled

together-a-living-through-the-gig-economy/article_e8d13d97-333d-561a-97f7-0233afcb01f2.html; Scheiber, *supra* note 21.

³² Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States* 11 (Princeton Univ., Working Paper No. 587, 2015), <https://irs.princeton.edu/sites/irs/files/An%20Analysis%20of%20the%20Labor%20Market%20for%20Uber’s%20Driver-Partners%20in%20the%20United%20States%20587.pdf>.

³³ See generally Carbone & Levit, *supra* note 17, at 1007–15.

³⁴ *Id.* at 1008.

³⁵ *Id.* at 1009.

³⁶ *Id.* at 1010.

³⁷ *Id.* at 1014.

workers, companies appear to have concluded that the services they provide can be easily obtained on the open market.³⁸

The genius of the Gig Economy was to take advantage of these long-term trends and tie them to recent technological advances, including, in particular, the surging popularity of smart-phone applications.³⁹ The advent of pocket-sized computers with GPS, wireless Internet access, and the ability to run complex algorithms connecting individual users to one another has enabled a new breed of companies that serve as intermediaries between their users, offering “platforms” or “virtual marketplaces” that connect those in need of specific services with those offering them.⁴⁰ In addition to connecting service-consumers and service-providers, many of these platform companies also provide two key features: payment processing and dynamic reputational ratings systems.⁴¹ By doing so, platforms help provide the security and information necessary to allow complete strangers to conduct business with one another “sight unseen.”⁴² Although imperfect, the widespread embrace of dynamic reputational ratings demonstrates that they have proven an effective and popular means of policing the quality of internet-based transactions by minimizing problems of information asymmetry.⁴³

³⁸ See generally *id.* at 1011 (“If we compare skilled and unskilled workers, firms today contract out . . . to secure an increasing percentage of the unskilled labor they need.”).

³⁹ See Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 56 (2017) (arguing that “[t]he rise of the contingent workforce precedes the rise of the platform” and problems related thereto “are not unique to the digital platform”).

⁴⁰ Nestor Davidson & John Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215, 231 (2016) (noting that “peer-to-peer platforms . . . enable individuals to share goods and services by facilitating improved matching,” which works best where buyers and sellers are geographically close to one another and transact for homogenous goods or services).

⁴¹ Michele Finck & Sofia Ranchordas, *Sharing and the City*, 49 VAND. J. TRANSNAT’L L. 1299, 1311 (2016) (noting that these features “reduce the natural uncertainty and lack of trust that exist when two strangers interact”).

⁴² Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL’Y J. 1, 10 (2016).

⁴³ See Benjamin Edelman & Damien Geradin, *Efficiencies & Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19

To take the largest and most well-known Gig Economy company as an example, Uber does not provide a fleet of vehicles to transport goods or riders from Point A to Point B for prearranged trips.⁴⁴ Instead, in its own words, Uber provides a platform that enables individuals “to arrange and schedule transportation, logistics and/or delivery services . . . with third party providers of such services.”⁴⁵ While those seeking a ride via Uber’s platform would once have had to step into the street in the hopes of hailing a passing taxi or call a car-service to dispatch the next available driver from those on its roster, Uber allows both drivers and riders to locate one another in real-time via their phones and determine whether they would like to contract with one another based on their respective crowd-sourced ratings. For riders, this avoids the inconveniences of having to wait until a car-service driver is available or relying on their luck in attempting to flag down a passing taxi. Meanwhile, drivers avoid the delay of having to wait for their next incoming call from a dispatcher or missing out on fares because they happen to be on the wrong street at the wrong time. Uber’s rapid growth and commercial success are ample evidence of the utility this provides to both drivers and riders: it is likely the fastest-growing start-up in history, having achieved an eleven-figure valuation and expanded to more than one million active users in hundreds of cities around the

STAN. TECH. L. REV. 293, 316–17 (2016) (questioning “how well ratings actually work” but concluding “on the whole” that “ratings systems are probably more effective than a quality minimum with purported centralized enforcement”); Lobel, *supra* note 8, at 152–56 (arguing that rating systems are better at quality control than traditional forms of regulation); Stemler, *supra* note 6, at 37–38 (discussing the history of the “feedback loop system of ratings and reviews”).

⁴⁴ See, e.g., Hamish McRae, *Facebook, Airbnb, Uber, and the Unstoppable Rise of the Content Non-Generators*, INDEP. (May 5, 2015, 18:11 BST), <http://www.independent.co.uk/news/business/comment/hamish-mcrae/facebook-airbnb-uber-and-the-unstoppable-rise-of-the-content-non-generators-10227207.html>.

⁴⁵ *Terms and Conditions*, UBER, <https://www.uber.com/legal/usa/terms> (last updated Dec. 13, 2017); see also, e.g., *Terms of Service*, LYFT, <https://www.lyft.com/terms> (last updated Feb. 6, 2018) (“The Lyft Platform provides a marketplace where persons who seek transportation to certain destinations . . . can be matched up with persons driving to or through those destinations.”).

globe within five years of its founding.⁴⁶ Indeed, despite numerous run-ins with legislators and regulators, some argue that Uber's remarkable consumer popularity suggests that it has become "too big to ban" in light of the political price faced by government officials who have tried to slow or stop its growth.⁴⁷

Economists have long understood that companies exist because it is often more efficient for an employer to have employees perform certain services in order to avoid the transaction costs that the employer would otherwise incur if it were forced to repeatedly enter the market and negotiate arms-length agreements with third-parties offering those same services.⁴⁸ In other words, as Ronald Coase explained in his seminal work, *The Nature of the Firm*, "the operation of a market costs something and by forming an organization and allowing some authority . . . to direct the resources, certain marketing costs are saved."⁴⁹ According to Coase, the "dominant characteristic" that separates employees from independent contractors is the company's "right of control or interference," in that an employer is entitled to tell employees "when to work . . . and when not to work, and what work to do and how to do it."⁵⁰ By repeatedly returning to the same pool of employees with whom they already have a relationship, employers can avoid the costs involved in searching for and evaluating potential counterparties for every transaction, negotiating terms and coming to an agreement regarding the proposed transaction, and monitoring their counterparties to ensure that their agreement is carried out according to its terms.⁵¹

The converse of this central insight, however, is that hiring full-time employees may not always be the most efficient system for

⁴⁶ See Max Chafkin, *What Makes Uber Run*, FAST CO. (Sep. 8, 2015), <https://www.fastcompany.com/3050250/what-makes-uber-run>.

⁴⁷ Stemler, *supra* note 6, at 70 (quoting Marcus Wohlsen, *Uber's Brilliant Strategy to Make Itself Too Big to Ban*, WIRED (July 8, 2014, 6:30 AM), <https://www.wired.com/2014/07/ubers-brilliant-strategy-to-make-itself-too-big-to-ban>).

⁴⁸ See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 392 (1937).

⁴⁹ *Id.*

⁵⁰ *Id.* at 404.

⁵¹ Lobel, *supra* note 8, at 106.

arranging services. Rather, as Coase recognized, “a point may be reached where the costs of organizing an extra transaction within the firm are equal to the costs involved in carrying out the transaction in the open market.”⁵² Taken to its logical conclusion, this suggests companies will rely on unaffiliated third-parties to perform specific tasks when doing so is cheaper and more efficient than hiring employees.⁵³ By using modern technology to create virtual marketplaces that allow service-providers and service-consumers to connect directly with one another with minimal transaction costs, Gig Economy companies have unlocked a latent market for goods and services that could not have functioned in a world of higher transaction costs. Doing so has facilitated the outsourcing of work that previously might have been given to employees, demonstrating just how prescient Coase was. After all, how many micro-entrepreneurs would have gone into business for themselves absent the rise of platforms?⁵⁴

In addition to easing logistical burdens, Gig Economy companies provide several other benefits to their users. Among the most frequently cited reasons for embracing the Gig Economy is the flexibility it offers to service-providers, who are not generally required to work any set number of hours or according to a pre-determined schedule, allowing them to choose where and when they will work entirely of their own volition.⁵⁵ Indeed, a study of several hundred drivers who use Uber’s platform in cities throughout the United States found that 87% of drivers listed among their reasons for doing so the opportunity “to be [their] own boss and set [their] own schedule,” while 85% cited the opportunity “to have more flexibility in [their] schedule and balance [their] work with [their]

⁵² Coase, *supra* note 48, at 394; see also Jaclyn Kurin, *A Third Way for Applying U.S. Labor Laws to the Online Gig Economy: Using the Franchise Business Model to Regulate Gig Workers*, 12 J. BUS. & TECH. L. 193 (2017).

⁵³ See Coase, *supra* note 48, at 394.

⁵⁴ See Botsman, *The Sharing Economy: Dictionary of Commonly Used Terms*, *supra* note 4 (defining “Micro-entrepreneurs” as “[P]eople who are empowered to make or save money by offering their existing assets, or services to other people.”); Lobel, *supra* note 8, at 106–07.

⁵⁵ See Barker, *supra* note 31; Cheng, *supra* note 4, at 25; Hall & Krueger, *supra* note 32, at 2.

life and family.”⁵⁶ In addition, many Gig Economy workers believe that it allows them to make more money than they would otherwise earn in traditional jobs⁵⁷ while avoiding the perils of freelancing, such as customers who pay late or try to avoid paying at all.⁵⁸ Moreover, while it might be expected that the provision of services via Gig Economy companies would lead to an increase in consumer welfare, recent research suggests that, perhaps counter-intuitively, the majority of benefits accrue to lower-income consumers.⁵⁹ And from the government’s perspective, the rise of the Gig Economy promises to create accurate records of a vast array of economic activity that historically was often conducted in the shadows and off the books.⁶⁰ As will be discussed further below, however, the advent of the Gig Economy has not been without its difficulties.

III. THE EMPLOYEE-CONTRACTOR DIVIDE

Like all companies, members of the Gig Economy have been forced to choose whether to classify workers using their platforms as either employees or independent contractors. This distinction is far from academic, as the protections granted by a wide array of statutes apply only to employees. At the federal level, for example, independent contractors are not covered by the Fair Labor Standards Act’s wage guarantees, the National Labor Relations Act’s

⁵⁶ Hall & Krueger, *supra* note 32, at 11.

⁵⁷ *Id.*; Cheng, *supra* note 4, at 90.

⁵⁸ See *There’s an App for That*, *supra* note 12 (“Potential freelancers, for their part, do not want to have to deal with deadbeats: about 40% of freelancers are currently paid late.”); Lydia DePillis, *For Freelancers, Getting Stiffed Is Part of the Job. Some in New York City Want to Fix It.*, WASH. POST. WONKBLOG (Dec. 7, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/07/for-freelancers-getting-stiffed-is-part-of-the-job-some-in-new-york-city-want-to-fix-it>.

⁵⁹ See Samuel Fraiberger & Arun Sundarajan, *Peer-to-Peer Rental Markets in the Sharing Economy* (N.Y. Univ. Stern Sch. of Bus. 2015).

⁶⁰ Lobel, *supra* note 8, at 125 (“[P]latform companies can become regulatory facilitators using their technological capacities to collect, as well as provide audited evidence of compliance in the era of decentralized peer-to-peer transactions.”); Shu-Yi Oei & Diane Ring, *Can Sharing Be Taxed*, 93 WASH. U. L. REV. 989, 1053 (2016) (“[B]ecause many sharing workers may be relatively new to reporting business income and expenses, they . . . may ignore or understate income earned or track expenses inadequately.”).

protections for organizing and collective action, the Civil Rights Act's anti-discrimination provisions, the Family Medical Leave Act's guarantees of job-protected leave upon the occurrence of certain enumerated personal events, or the Occupational Safety and Health Act's rules concerning workplace safety.⁶¹ The burden of hiring an employee instead of an independent contractor is considerable, with estimates ranging as high as a 40% cost differential in light of the various benefits and protections afforded to employees.⁶²

It is no coincidence that much of the aforementioned legislation was enacted prior to the 1980s, when large corporations played a very different role in American society than they do today.⁶³ The employee-contractor divide is derived from nineteenth-century common law that sought to determine when a master should be held liable for the tortious injuries caused by his servant—vocabulary that itself demonstrates just how antiquated these concepts are.⁶⁴ Congress codified this distinction in the early twentieth-century as it sought to define the coverage of New Deal statutes meant to

⁶¹ See, e.g., Nicholas L. DeBruyne, *Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy*, 92 CHI.-KENT L. REV. 289, 290 (2017); Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. OF EMP. & LAB. L. 143, 170 (2011).

⁶² Catherine Clifford, *Why a \$14/Hour Employee Costs \$20*, CNN (Mar. 26, 2010, 9: 52 AM ET), http://money.cnn.com/2010/03/26/smallbusiness/employee_costs/ (explaining that an employee's "so-called 'loaded rate' includes fixed expenses—federal and state taxes, health insurance, workman's compensation, uniforms, and paid time off—along with soft costs like the time spent training a new hire," such that their "true cost" can be "about 40% more than base pay"); see also Robert Wood, *If 30% of Pay is Benefits, What About Independent Contractors*, FORBES, (Aug. 14, 2013, 2:20 AM), <https://www.forbes.com/sites/robertwood/2013/08/14/if-30-of-pay-is-benefits-what-about-independent-contractors/#7b278fc57931> ("Figures vary materially, but benefits in some cases can amount to a whopping 30% of pay.").

⁶³ See Carbone & Levit, *supra* note 17, at 1017; Caleb Holloway, *Keeping Freedom in Freelance: It's Time for Gig Firms and Gig Workers to Update Their Relationship Status*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 298, 308 (2016).

⁶⁴ See Holloway, *supra* note 63, at 307; Robert Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1029–30 (2016).

protect and provide rights to certain workers.⁶⁵ The historical justification for exempting independent contractors from the protections provided to employees is that independent contractors were thought to have greater bargaining power than employees, as they were typically highly skilled workers who commanded premium wages on the open market and could provide their services to many customers on a project-by-project basis, rather than being tied to a single employer.⁶⁶ Statutes that were subsequently drafted to benefit workers have dramatically increased the consequences of this categorization. Modern law places far more import on employment status than the common-law test from which the employee-contractor bifurcation was derived.⁶⁷

Unfortunately, federal statutes provide little clarity concerning how to classify any individual worker, as Congress chose to define the term “employee” in entirely circular terms and it did so inconsistently from statute to statute. For example, the National Labor Relations Act defines an “employee” as “any employee” that does not fall within a small number of enumerated exceptions,⁶⁸ while the Fair Labor Standards Act tautologically declares that “the term ‘employee’ means any individual employed by an employer,”⁶⁹ which itself is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁷⁰ State legislatures have hardly fared any better in defining these

⁶⁵ See Micah Prieb Stolfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act*, 68 WASH. & LEE L. REV. 311, 314 (2011).

⁶⁶ See, e.g., Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1684 (2016); Holloway, *supra* note 63, at 307.

⁶⁷ Redfearn, *supra* note 64, at 1031.

⁶⁸ 29 U.S.C. § 152(3) (2014) (“The term ‘employee’ shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employee as herein defined.”).

⁶⁹ 29 U.S.C. § 203(e)(1) (2014).

⁷⁰ *Id.* § 203(d).

amorphous concepts.⁷¹ As a result of this ambiguity, different agencies, courts, and states have come up with a wide variety of partially overlapping tests for determining whether a given worker is an employee or an independent contractor.⁷²

The Supreme Court long ago observed that these varying tests must be applied to “[m]yriad forms of service relationship[s], with infinite and subtle variations in the terms of employment,” the inevitable result of which is that while some workers can be easily categorized, many others nevertheless fall in between the two classifications as “the incidents of [their] employment partake in part of the one group, in part of the other, in varying proportions of weight.”⁷³ As a consequence, both companies and courts must decide how to classify workers “against a background of barely

⁷¹ See, e.g., N.Y. LAB. LAW § 2(5) (2011) (“‘Employee’ means a mechanic, workman or laborer working for another for hire.”).

⁷² Compare, e.g., FedEx Home Delivery, 361 N.L.R.B. No. 55, at *3 (Sept. 30, 2014) (“In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) The extent of control which, by the agreement, the master may exercise over the details of the work. (b) Whether or not the one employed is engaged in a distinct occupation or business. (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. (d) The skill required in the particular occupation. (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. (f) The length of time for which the person is employed. (g) The method of payment, whether by the time or by the job. (h) Whether or not the work is part of the regular business of the employer. (i) Whether or not the parties believe they are creating the relation of master and servant. (j) Whether the principal is or is not in the business.”), with Rev. Rul. 87-41, 1987-1 C.B. 296 at *4-7 (1987) (“twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship,” with the factors enumerated as: (1) instructions, (2) training, (3) integration, (4) services rendered personally, (5) hiring, supervising and paying assistants, (6) continuing relationship, (7) set hours of work, (8) full time required, (9) doing work on employer’s premises, (10) order or sequence set, (11) oral or written reports, (12) payment by hour, week, month, (13) payment of business and/or travelling expenses, (14) furnishing of tools and materials, (15) significant investment, (16) realization of profit or loss, (17) working for more than one firm at a time, (18) making service available to general public, (19) right to discharge, and (20) right to terminate).

⁷³ Nat’l Labor Relations Bd. v. Hearst Publ’ns, Inc., 322 U.S. 111, 126 (1944).

reconcilable precedents.”⁷⁴ This uncertainty is perhaps best demonstrated by a series of cases brought against FedEx in courts across the country, resulting in a number of inconsistent decisions regarding whether drivers performing the same tasks under the same terms and conditions for the same company should be classified as employees or independent contractors.⁷⁵ Due in part to the significant sums of money at stake and the risks that such inconsistent and unpredictable litigation outcomes pose to businesses, the number of worker-misclassification cases filed in federal courts has grown by more than 500% over the past two decades.⁷⁶

The Gig Economy was born amidst this rising tide of employment litigation. Although some prominent government officials have called for a “regulatory timeout” to provide Gig Economy companies with an opportunity to determine whether their workers are properly classified as employees or independent contractors—or whether they should be subject to some new legal regime entirely, as discussed further below—these nascent companies have nevertheless been forced to choose sides under existing law.⁷⁷ While the very existence of that wave of worker-

⁷⁴ *Local 814 Int’l Bhd. of Teamsters, Chauffeurs, & Warehousemen v. Nat’l Labor Relations Bd.*, 512 F.2d 564, 572 (D.C. Cir. 1975) (Bazelon, C.J., concurring in part and dissenting in part).

⁷⁵ See Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 A.B.A. J. OF LAB. & EMP. L. 53 (2015) (collecting and discussing several FedEx cases); cf. Blake Stafford, *Riding the Line Between “Employee” and “Independent Contractor” in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1232–33 (2016) (noting that national companies may have to classify workers differently depending on their location; that different federal statutes have different tests; and that different federal courts apply different tests for classification under federal statutes).

⁷⁶ ANDREW SHERRILL, DEPARTMENT OF LABOR NEEDS A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE 3 (2014); see also Aaron Vehling, *FLSA Class Actions to Hit Record High in 2016*, LAW360 (Jan. 12, 2016, 10:53 PM), <https://www.law360.com/articles/745603/flsa-class-actions-to-hit-record-high-in-2016>.

⁷⁷ Sara Ashley O’Brien, *Senator Warner: On-Demand Firms Need Regulatory Timeout*, CNN MONEY (Oct. 2, 2015 8:50 PM), <http://money.cnn.com/2015/10/01/technology/mark-warner-tapcon-on-demand/index.html>; see also, e.g., Tess Townsend, *Inside Hillary Clinton’s Secret Meeting with Silicon Valley Tech*

misclassification litigation demonstrates that the issues addressed herein are not unique to the Gig Economy, Part IV of this Article will discuss specific litigation that demonstrates how the business model of leading Gig Economy companies highlights the ambiguities and imprecision in modern employment law.

Many (though not all)⁷⁸ Gig Economy companies classify their service-providers as independent contractors, but several downsides of this blanket approach are apparent. Setting aside the question of whether that classification is correct as a matter of law, utilizing independent contractors entails real costs for both the workers and the companies involved. For example, several Gig Economy companies have expressed a desire to provide various benefits and training to workers they have classified as independent contractors but fear that doing so might provide further ammunition for plaintiffs bringing misclassification suits.⁷⁹ As explained by the leader of Peers, a membership organization comprised of Gig Economy workers, many companies in this sector “would probably love to give more training, if they could,” and “would probably like to give workers’ compensation,” but “if they do that, that’s a benefit.

Execs, INC. (Aug. 7, 2015), <https://www.inc.com/tess-townsend/silicon-valley-executives-want-clinton-as-sharing-economy-champion.html> (reporting on discussions with Secretary Clinton concerning “coming up with a third classification for a sharing economy worker”); Letter from Senators Al Franken & Robert Casey to Secretary of Labor Thomas Perez (July 14, 2015), [http://www.Franken.senate.gov/files/documents/150714OnDemandEconomyLetter.pdf](http://www Franken.senate.gov/files/documents/150714OnDemandEconomyLetter.pdf) (“We therefore ask that the Department of Labor provide clarification to current classification guidelines in order to help employers determine the appropriate designation of its workers within the on-demand economy.”).

⁷⁸ See, e.g., Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms*, 37 COMP. LAB. L. & POL’Y J. 653, 684–85 (2016) (discussing Gig Economy companies that classify workers as employees); Kessler, *supra* note 3 (discussing Gig Economy companies using both models).

⁷⁹ See generally Carolyn Said, *Employee vs. Freelancer? Choice Is Based on Outdated Laws*, S.F. CHRON. (Aug. 7, 2015), <http://www.sfchronicle.com/business/article/Employee-vs-freelancer-Choice-is-based-on-6431933.php>; Tracey Lien, *As They Grow, On-Demand Firms Adapt*, CHI. TRIB., Aug. 31, 2015.

Their workers start to look like an employee.”⁸⁰ Indeed, some of the companies in question have remarked that providing such benefits “is something [they] think is important but [they] can’t do it.”⁸¹ The perverse result is that laws and regulations intended to help workers are instead actively harming them by preventing companies from extending benefits to independent contractors that both the contractor and company would prefer they be given.

IV. GIG ECONOMY LITIGATION

Among the harms posed by this legal ambiguity is the spate of lawsuits that have been brought against Gig Economy companies, in which billions of dollars in damages are on the line and the legality of the companies’ very business models have been called into question.⁸² Of those, lawsuits brought in the Northern District of California against Uber, Lyft, and Grubhub have proceeded furthest and received the lion’s share of press coverage. Accordingly, this Article will focus on these cases as representative of the issues likely to arise as judges and juries confront the questions presented by Gig Economy employment litigation.

In discussing these cases, this Article endeavors not to endorse or critique the decisions reached to date. For present purposes, it is sufficient to summarize them because, regardless of whether or not they were correctly decided, they aptly demonstrate why many government officials have come to recognize the failings of current classifications and policies that “are still based on 20th century

⁸⁰ Ellen Huet, *Contractor or Employee? Silicon Valley’s Branding Dilemma*, FORBES (Nov. 18, 2014, 11:00 AM), <https://www.forbes.com/sites/ellenhuet/2014/11/18/contractor-or-employee-silicon-valleys-branding-dilemma>.

⁸¹ *Id.*

⁸² *See, e.g.*, *Singer v. Postmates, Inc.*, No. 15 Civ. 1284 (N.D. Cal. Sept. 1, 2017); *Cotter v. Lyft, Inc.*, No. 13 Civ. 4065 (N.D. Cal. Apr. 7, 2016); *O’Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826 (N.D. Cal. Dec. 9, 2015); *Levin v. Caviar, Inc.*, No. 15 Civ. 1285 (N.D. Cal. Nov. 16, 2015); *Cobarruviaz v. Maplebear Inc.*, No. 15 Civ. 697 (N.D. Cal. Nov. 3, 2015); *Iglesias v. Homejoy*, No. 15 Civ. 1286 (N.D. Cal. Sept. 29, 2015); *Otey v. Crowdfunder, Inc.*, No. 12 Civ. 5524 (N.D. Cal. July 2, 2015); *Taranto v. Washio, Inc.*, No. CGC-15-546584 (Cal. Super. Ct. June 29, 2015); *Yucesoy v. Uber Techs., Inc.*, No. 15 Civ. 262 (N.D. Cal. June 12, 2015).

perceptions about work and income,”⁸³ even as “the workplace and definitions of workers evolve away from traditional employment models.”⁸⁴ Moreover, they illustrate the utter uncertainty and inefficiency that results from relying on costly and protracted litigation to determine whether workers are employees or independent contractors. The decisions issued in these cases are significant precisely because they each offer little guidance as to how the merits of such cases might be resolved.

A. *The Allegations and Procedural Background*

Lyft and Uber operate similar electronic platforms that allow potential passengers to use their smartphones to hail available drivers, who may then accept, decline, or ignore the passenger’s request for a ride.⁸⁵ During the relevant time period, the companies’ business models were distinguishable based upon their payment mechanism: Lyft’s platform would recommend an amount for passengers to donate upon arrival at their destination, with 20% of the donation to be retained by Lyft as an administrative fee, but the passenger was ultimately free to pay any amount that they chose to the driver, or even nothing at all.⁸⁶ In contrast, Uber would charge the rider’s credit card a specific fee that it determined to be appropriate, similarly keeping a portion of that fare for itself while passing on the majority of the payment to the driver.⁸⁷

Grubhub, meanwhile, provides a different type of platform through which customers can place a food order for pick up or delivery. Drivers may sign up to deliver food using Grubhub’s platform by reserving particular assignment “blocks” that correspond to specific time periods and geographic areas, which Grubhub designates in advance. Only one driver can sign up for a

⁸³ Letter from Senator Mark Warner to Secretary of Commerce Penny Pritzker & Census Bureau Director John Thompson (Sept. 1, 2015).

⁸⁴ Letter from Franken & Casey to Perez, *supra* note 77.

⁸⁵ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015) [hereinafter *Lyft II*]; *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) [hereinafter *Uber II*].

⁸⁶ *Lyft II*, 60 F. Supp. 3d at 1070–71. Lyft subsequently changed this policy, now mandating that passengers pay a minimum fare for every ride. *Id.*

⁸⁷ *Uber II*, 82 F. Supp. 3d at 1135.

particular block, but drivers may also receive delivery orders by turning on Grubhub's app and making themselves available outside of their prearranged blocks. Drivers are expected to be available to accept delivery requests during their blocks and they are paid based on a formula taking into account the number of orders delivered and distance driven, with a guaranteed minimum average hourly wage if they meet certain thresholds during their blocks.⁸⁸

In the span of approximately two years, similar lawsuits were brought against Uber, Lyft, and Grubhub. First, on August 16, 2013, Douglas O'Connor and Thomas Colopy sued Uber in a putative class action alleging that Uber drivers had been misclassified as independent contractors rather than employees. O'Connor and Colopy alleged that Uber violated California law in several respects by doing so, including depriving drivers of expense reimbursements and improperly failing to remit to drivers all gratuities paid by riders.⁸⁹ Two weeks later, on September 3, 2013, Patrick Cotter brought a similar class action suit against Lyft, alleging that by misclassifying its drivers, Lyft violated several California statutes that provide for minimum wages, reimbursement for work-related expenses, and other protections that California grants to employees but not to independent contractors.⁹⁰ Lastly, a lawsuit was filed against Grubhub on September 23, 2015, which, after three complaints and two motions to dismiss, culminated in Grubhub facing allegations that, as a result of misclassifying its drivers as

⁸⁸ Lawson v. Grubhub, Inc., No. 15 Civ. 5128, 2017 WL 2951608, at *1–3 (N.D. Cal. July 10, 2017).

⁸⁹ See Class Action Complaint & Jury Demand, O'Connor v. Uber Techs., Inc., (No. 13 Civ. 3826) (N.D. Cal. Aug. 26, 2013); see also O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110, 1113–14 (N.D. Cal. 2016) [hereinafter *Uber IV*] (explaining that such claims “are predicated on drivers being employees rather than independent contractors” under Cal. Lab. Code §§ 351 and 2802). The *Uber* complaint was subsequently amended twice. See First Amended Class Action Complaint & Jury Demand, O'Connor v. Uber Techs., Inc., No. 13 Civ. 3826, (N.D. Cal. May 30, 2014), Dkt. No. 107; Second Amended Class Action Complaint & Jury Demand, O'Connor v. Uber Techs., Inc., No. 13 Civ. 3826 (N.D. Cal. Nov. 12, 2014), Dkt. No. 199.

⁹⁰ See Complaint, Cotter v. Lyft, Inc., No. 13 Civ. 4065 (N.D. Cal. Sept. 3, 2013), Dkt. No. 1; see also *Lyft II*, 60 F. Supp. 3d at 1074–75 (discussing the “many benefits and protections” that California affords to employees but not independent contractors).

independent contractors, it had violated several provisions of the California Labor Code by failing to reimburse drivers' business expenses, failing to pay minimum and overtime wages, and engaging in unlawful or unfair business practices.⁹¹

The plaintiffs in all three lawsuits were represented by Shannon Liss-Riordan, who appears to have brought the suits in California based on her belief that its state laws are particularly worker-friendly.⁹² Notably, the plaintiffs in both the *Uber* and *Lyft* litigation sought to have California law apply to all drivers who had used the companies' platforms nationwide. The attempt to do so against Lyft was denied on August 7, 2014, with the nationwide class claims stricken but permission granted by the court to plead a putative class action representing California-based drivers.⁹³ The *Uber* court initially reached the opposite result on December 5, 2013, holding that California employment law could apply to all drivers using Uber's platform in light of the wording of their contract, in which "the parties agreed that the conduct giving rise to [their] claims is to

⁹¹ See generally *Tan v. Grubhub, Inc.*, No. 15 Civ. 5128 (N.D. Cal. July 13, 2016), 2016 WL 3743365 (denying motion to dismiss second amended complaint); Second Amended Class Action and PAGA Complaint, *Tan v. Grubhub Holdings Inc.*, No. 15 Civ. 5128 (N.D. Cal. Apr. 12, 2016), Dkt. No. 41; *Tan v. Grubhub, Inc.*, 171 F. Supp. 3d 998 (N.D. Cal. 2016) (partially granting and partially denying motion to dismiss first amended complaint); First Amended Class Action and PAGA Complaint, *Tan v. Grubhub Holdings Inc.*, No. 15 Civ. 5128 (N.D. Cal. Dec. 15, 2015), Dkt. No. 15; Notice of Removal of Class Action by Defendant Grubhub, Inc., *Tan v. Grubhub, Inc.*, No. 15 Civ. 5128 (N.D. Cal. Nov. 9, 2015), Dkt. No. 1. The case against GrubHub was initially brought by Andrew Tan, with Raef Lawson being added as a named plaintiff upon amendment of the complaint. Tan voluntarily withdrew from the litigation after class certification was denied. Stipulation of Dismissal of Plaintiff Andrew Tan, *Tan v. GrubHub Holdings Inc.*, No. 15 Civ. 5128 (N.D. Cal. Nov. 4, 2016), Dkt. No. 78.

⁹² See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1061 (N.D. Cal. 2014) [hereinafter *Lyft I*] ("[T]he plaintiffs contend that . . . California's laws are more worker-protective than those of other states."). Indeed, Liss-Riordan brought so many misclassification cases in California, despite being admitted to the bar in Massachusetts, that she was eventually forced to seek admission to the California bar. Kia Kokalitcheva, *Judge to Lawyer Suing Uber: Stop Filing in California*, *FORTUNE* (Oct. 15, 2015), <http://fortune.com/2015/10/14/labor-lawyer-california-license>.

⁹³ *Lyft I*, 60 F. Supp. 3d at 1066.

be governed by California law.”⁹⁴ The class that was later certified in the *Uber* litigation nevertheless included only drivers who had used the platform in California.⁹⁵ Grubhub, on the other hand, successfully moved for an order denying class certification on the grounds that nearly all of its drivers were subject to an arbitration agreement. Although the named plaintiff, Raef Lawson, had opted out of the arbitration agreement, the case could not proceed as a class action because he was one of only two California drivers to have done so.⁹⁶ Accordingly, Lawson would continue to press his claims against Grubhub on an individual basis under California law.⁹⁷

B. *The Merits of the Misclassification Claims*

At least one party in each of the three cases moved to have the courts determine as a matter of law whether the drivers had been misclassified as independent contractors, rather than employees. And, in each case, the judges found that they could not do so. Rather, their decisions made clear that California’s employment classification test was a poor fit for these Gig Economy companies because both the plaintiffs and defendants in each of the cases could cite myriad factors supporting either classification.

Before they turned to the merits of the drivers’ classification, both Uber and Lyft first argued that the drivers did not work for them at all. That argument was flatly rejected in a pair of decisions issued on March 11, 2015.⁹⁸ According to the *Lyft* court, “the

⁹⁴ O’Connor v. Uber Techs., Inc., No. 13 Civ. 3823 (N.D. Cal. Dec. 5, 2013) 2013 WL 6354534, at *6 [hereinafter *Uber I*].

⁹⁵ O’Connor v. Uber Techs., Inc., No. 13 Civ. 3826 (N.D. Cal. Sept. 1, 2015) 2015 WL 5138097 [hereinafter *Uber III*]; see also O’Connor v. Uber Techs., Inc., 311 F.R.D. 547 (N.D. Cal. 2015) (granting in part plaintiff’s supplemental motion for class certification on grounds not relevant to this Article).

⁹⁶ Tan v. Grubhub, Inc., No. 15 Civ. 5128 (N.D. Cal. July 19, 2016) 2016 WL 4721439.

⁹⁷ See *id.*

⁹⁸ It bears noting that judges have long been skeptical of such arguments—Judge Learned Hand rejected a similar theory over one hundred years ago, explaining that it was “absurd” to classify a coal company’s miners as independent contractors “given that miners alone ‘carr[y] on the company’s only business.”” Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig Economy*, 22 MICH. TELECOMM. & TECH. L.

argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one” given that Lyft “markets itself to customers as an on-demand ride service,” “it gives drivers detailed instructions about how to conduct themselves,” and “Lyft’s own drivers’ guide and FAQs state that drivers are ‘driving for Lyft.’”⁹⁹ On the very same day, the *Uber* court similarly determined that the company’s assertion that it is “merely a technological intermediary between potential riders and potential drivers . . . is fatally flawed in numerous respects.”¹⁰⁰ The court explained that “Uber is most certainly a transportation company, albeit a technologically sophisticated one,” because it “does not simply sell software; it sells rides.”¹⁰¹ As in the *Lyft* litigation, the *Uber* decision also relied on the company’s marketing materials, which refer to Uber as “Everyone’s Private Driver” and describe the company as a “transportation system” and the “best transportation service in San Francisco.”¹⁰² But, “more fundamentally,” the court noted that “Uber simply would not be a viable business entity without its drivers” because “Uber *only* makes money if its drivers actually transport passengers,” as “Uber’s revenues do not depend on the distribution of its software, but on the generation of rides by its drivers.”¹⁰³

Across the *Grubhub*, *Lyft*, and *Uber* litigation, the courts found that several of the same factors could point towards an employment relationship. For example, each of the Gig Economy defendants retained the right to terminate their relationship with the drivers at

REV. 341, 342-43 (2016) (quoting *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914)). *Contra* Tomassetti, *supra* note 6, at 68 (describing such arguments in the Gig Economy context as “exceptional” and “noteworthy for shifting the discursive frontier” of employment litigation); *but see* Vasto v. Credico (USA) LLC, No. 15 Civ. 9298 (S.D.N.Y. Oct. 27, 2017) 2017 WL 4877424, at *16 (granting summary judgment in favor of defendant because it was not considered plaintiffs’ “employer” as it “neither formally nor functionally controlled” plaintiffs).

⁹⁹ *Lyft II*, 60 F. Supp. 3d at 1078.

¹⁰⁰ *Uber II*, 82 F. Supp. 3d at 1141.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1141–42.

¹⁰³ *Id.* at 1142 (emphasis in original).

will;¹⁰⁴ they provided detailed suggestions (or, according to the plaintiffs, requirements) regarding how to carry out the drivers' duties and used feedback systems to monitor the quality of the drivers' performance;¹⁰⁵ they set the terms of the drivers' compensation;¹⁰⁶ and the drivers were "wholly integrated,"¹⁰⁷ "central,"¹⁰⁸ and "indispensable"¹⁰⁹ to the services they offered.

Nevertheless, several similar factors in each case could equally support a determination that the plaintiffs were properly classified as independent contractors. Among the factors supporting the Gig Economy defendants' position were that the drivers retained control over where, when, and (arguably) how they performed their tasks;¹¹⁰ they were not supplied with vehicles, uniforms, or standards of appearance by their alleged employers;¹¹¹ they retained the ability to simultaneously work for other companies and clients;¹¹² and they agreed to be independent contractors and recognized their status as such.¹¹³ In addition, in the *Lyft* and *Uber* cases (but not the *Grubhub* case), the drivers were compensated based on the particular tasks they completed, rather than on a salaried basis.¹¹⁴

¹⁰⁴ *Lyft II*, 60 F. Supp. 3d at 1079; *Uber II*, 82 F. Supp. 3d at 1149; *Lawson v. Grubhub*, 2017 WL 2951608 at *4 (N.D. Cal. 2017); *Uber III*, 2015 WL 5138097, at *19–22.

¹⁰⁵ *Lyft II*, 60 F. Supp. 3d at 1078–79; *Uber II*, 82 F. Supp. 3d at 1149–52; *Grubhub*, 2017 WL 2951608, at *4, *5; *Uber III*, 2015 WL 5138097, at *19.

¹⁰⁶ *Lyft II*, 60 F. Supp. 3d at 1080; *Grubhub*, 2017 WL 2951608, at *6; *Uber III*, 2015 WL 5138097, at *17–18.

¹⁰⁷ *Lyft II*, 60 F. Supp. 3d at 1079.

¹⁰⁸ *Grubhub*, 2017 WL 2951608, at *6.

¹⁰⁹ *Uber III*, 2015 WL 5138097, at *30.

¹¹⁰ *Lyft II*, 60 F. Supp. 3d at 1078–79, 1081; *Uber II*, 82 F. Supp. 3d at 1149–52; *Grubhub*, 2017 WL 2951608, at *2, *5, *6; *Uber III*, 2015 WL 5138097, at *17, *19.

¹¹¹ *Lyft II*, 60 F. Supp. 3d at 1080, 1081; *Uber II*, 82 F. Supp. 3d at 1153; *Grubhub*, 2017 WL 2951608, at *6; *Uber III*, 2015 WL 5138097, at *25, *29.

¹¹² *Lyft II*, 60 F. Supp. 3d at 1081; *Grubhub*, 2017 WL 2951608, at *6; *Uber III*, 2015 WL 5138097, at *18.

¹¹³ *Lyft II*, 60 F. Supp. 3d at 1079; *Uber II*, 82 F. Supp. 3d at 1153; *Grubhub*, 2017 WL 2951608, at *6; *Uber III*, 2015 WL 5138097, at *27–28.

¹¹⁴ *Compare Lyft II*, 60 F. Supp. 3d at 1080, *and Uber III*, 2015 WL 5138097, at *27, *with Grubhub*, 2017 WL 2951608, at *6.

As a result of the various factors working at cross-purposes, summary judgment was denied in all three cases.¹¹⁵ While the *Grubhub* court did not comment on the merits of California employment law, the judges overseeing the *Uber* and *Lyft* litigation both discussed how poorly the outmoded employee-contractor dichotomy fit the Gig Economy. The *Uber* court resigned itself to applying California’s multifactor test while nonetheless suggesting that it might be preferable for “the legislature or appellate courts [to] eventually refine or revise that test in the context of the new economy” because “[t]he application of the traditional test of employment—a test which evolved under an economic model very different from the new ‘sharing economy’—to Uber’s business model creates significant challenges” as “many of the factors . . . appear outmoded in this context.”¹¹⁶ Similarly, the *Lyft* court called for “legislative intervention” because “[t]he test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem,” noting the possibility that “perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections” than either employees or independent contractors.¹¹⁷ Making its frustration evident, the *Lyft* court further concluded that a jury would “be handed a square peg and asked to choose between two round holes,” as “California’s outmoded test for classifying workers . . . provides nothing remotely close to a clear answer” for how to treat Gig Economy workers.¹¹⁸

C. *Resolving the Litigation*

Following the denials of summary judgment, the parties soon sought to settle the *Uber* and *Lyft* litigation rather than risk trial. In both cases, the companies offered class members financial and non-monetary concessions but the courts rejected the proposed settlements, finding the pecuniary compensation insufficient and the

¹¹⁵ *Lyft II*, 60 F. Supp. 3d at 1069–70; *Uber II*, 82 F. Supp. 3d at 1134; *Grubhub*, 2017 WL 2951608, at *6.

¹¹⁶ *Uber II*, 82 F. Supp. 3d at 1153.

¹¹⁷ *Lyft II*, 60 F. Supp. 3d at 1081–82.

¹¹⁸ *Id.*

non-financial terms to be of questionable value, at best.¹¹⁹ Although the terms of the settlements varied,¹²⁰ neither would have decisively resolved the question as to how the drivers should have been classified.¹²¹ Rather, the settlements would have barred class members from further litigation concerning their employment status without addressing the proper categorization of drivers who were not part of the settling class.¹²² A settlement was subsequently approved in the *Lyft* litigation after Lyft significantly increased the monetary relief and granted additional non-monetary concessions.¹²³ At the time of this Article's submission, the *Uber* case was stayed pending the resolution of several appeals that were expected to significantly impact how the case would move forward.¹²⁴ Lastly, there was not yet a decision following the *Grubhub* bench trial, which concluded in October 2017.¹²⁵

Many in the media have suggested that *Grubhub*, as the first such case to go to trial, could foreshadow the resolution of similar

¹¹⁹ *Uber IV*, 201 F. Supp. 3d at 1135 (describing compensation as “relatively modest when compared to the [potential] verdict value” and “the non-monetary relief [as] of little benefit to the class”); *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 932, 938 (N.D. Cal. 2016) [hereinafter *Lyft III*] (finding proposed settlement “shortchanged” the drivers financially, “[t]he modest nonmonetary relief . . . does not come close to making up for the[] serious defects in the monetary aspect[s] of the settlement,” and that “[i]t is difficult to tell . . . just how significant” the non-monetary concessions would be).

¹²⁰ *Compare Uber IV*, 201 F. Supp. 3d at 1117–20, with *Lyft III*, 176 F. Supp. 3d at 933–34.

¹²¹ *Uber IV*, 201 F. Supp. 3d at 1135 (“[T]he settlement does nothing to clarify the status of drivers as employees versus independent contractors. . . .”); *Lyft III*, 176 F. Supp. 3d at 936–37 (rejecting objection that “any settlement that doesn’t confer employee status on Lyft drivers going forward” should be denied).

¹²² *Uber IV*, 201 F. Supp. 3d at 1119–20; *Lyft III*, 176 F. Supp. 3d at 934.

¹²³ *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 & n. #2 (N.D. Cal. 2016) (granting preliminary approval of settlement); see also *Cotter v. Lyft, Inc.*, No. 13 Civ. 4065, 2017 WL 1033527 (N.D. Cal. Mar. 16, 2017) (granting final approval of settlement).

¹²⁴ See Transcript of Hearing at 38–40, *O’Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826 (N.D. Cal. Nov. 18, 2016).

¹²⁵ See, e.g., Joe Mullin, *GrubHub ‘Gig Economy’ Trial Ends with Judge Calling Out Plaintiff’s Lies*, ARS TECHNICA (Oct. 30, 2017, 8:50 PM), <https://arstechnica.com/tech-policy/2017/10/grubhub-gig-economy-trial-ends-with-judge-calling-out-plaintiffs-lies/>.

worker-misclassification cases involving the Gig Economy.¹²⁶ It seems likely, however, that this theory reflects public relations efforts by Shannon Liss-Riordan, the attorney who represents the plaintiffs in the *Grubhub*, *Lyft*, and *Uber* litigation, as well as other Gig Economy cases.¹²⁷ In light of the minuscule financial stakes in the *Grubhub* litigation resulting from the denial of class certification, the incentive to proceed to trial rather than settle may have come from Ms. Liss-Riordan's hope that she could use *Grubhub* as proof of concept to leverage larger settlements in her other cases.¹²⁸ There is no reason to expect that the *Grubhub* case is

¹²⁶ See Dara Kerr, *What Does the Grubhub Trial Mean for the Gig Economy?*, CNET (Sept. 8, 2017, 12:38 PM PDT), <https://www.cnet.com/news/what-does-the-grubhub-trial-mean-for-the-gig-economy-uber-lyft-postmates-taskrabbit/>; see also Megan Dickey, *GrubHub Trial Could Have Major Implications for the Gig Economy*, TECHCRUNCH (Sept. 2, 2017), <https://techcrunch.com/2017/09/02/grubhub-trial-could-have-major-implications-for-the-gig-economy/>; David Morris, *Labor Lawsuit Against Grubhub May Be a Stumbling Block for the Gig Economy*, FORTUNE (Aug. 25, 2017), <http://fortune.com/2017/08/25/grubhub-case-employee-contractor/>; Cyrus Farivar, *Grubhub Trial May Finally Answer Contractor vs. Employee Quandary*, ARS TECHNICA (June 30, 2017, 4:00 AM), <https://arstechnica.com/tech-policy/2017/06/grubhub-trial-may-finally-answer-contractor-vs-employee-quandary>.

¹²⁷ See Megan Dickey, *Ex-GrubHub Driver Testifies on 'Ghost Orders' and the Acceptance Rate Hustle*, TECHCRUNCH (Sept. 6, 2017), <https://techcrunch.com/2017/09/06/grubhub-ex-driver-lawson-testify/> (“[A]s Liss-Riordan explained yesterday, she hopes a win could be a step in the right direction for ultimately forcing on-demand companies to classify [their] delivery workers as W-2 employees.”). A small sample of the copious media attention that Ms. Liss-Riordan has courted includes the following articles: Tracey Lien, *Meet the Attorney Suing Uber, Lyft, GrubHub and a Dozen California Tech Firms*, L.A. TIMES (Jan. 24, 2016, 10:19 AM), <http://www.latimes.com/business/technology/la-fi-class-action-lawyer-20160124-story.html>; Lauren Weber & Rachel Silverman, *Meet the Boston Lawyer Who's Putting Uber on Trial*, WALL ST. J. (Nov. 4, 2015, 11:47 AM), <https://www.wsj.com/articles/meet-the-boston-lawyer-whos-putting-uber-on-trial-1446596980>; Annie Lowrey, *How One Woman Could Destroy Uber's Business Model—and Take the Entire 'On Demand' Economy Down with It*, N.Y. MAG. (Apr. 30, 2015, 7:30 AM), <http://nymag.com/daily/intelligencer/2015/04/meet-the-lawyer-fighting-ubers-business-model.html>.

¹²⁸ See Plaintiff's Pre-Trial Brief & Proposed Findings of Fact & Conclusions of Law at 26-29, *Lawson v. Grubhub Inc.*, No. 15 Civ. 5128 (N.D. Cal. Aug. 18, 2017), Dkt. No. 180 (calculating Lawson's damages as “at least \$286.10 in unreimbursed mileage expenses” and “approximately \$273.62 of minimum wage

capable of answering the broader question of whether other Gig Economy workers are properly classified as independent contractors or employees. That is because the decision in a single case involving one Grubhub driver will not bind and may not predict how other judges, juries, regulators or arbitrators might resolve the question of how other Grubhub drivers should be classified in light of the factors pointing in each direction, particularly if such disputes are not decided under California law.¹²⁹ Moreover, the forthcoming decision regarding Grubhub will shine minimal light on other companies' distinguishable employment practices in light of Grubhub's distinctive assignment blocking system. To avoid the uncertainties and expense of litigation going forward, a new system is needed.

V. A NEW CLASSIFICATION FOR WORKERS

A. *The Need for an Intermediate Category*

Courts and commentators alike have struggled to determine the optimal treatment for Gig Economy workers. Several potential approaches have been proposed, but each suffers from various maladies. First, some scholars have suggested that there is no problem to be solved because Gig Economy workers are properly classified as employees under the current legal regime.¹³⁰ As

damages"). Because the case was properly removed to federal court pursuant to the Class Action Fairness Act, *Tan v. Grubhub, Inc.*, 171 F. Supp. 3d 998, 1003 (2016), the "district court's subsequent denial of Rule 23 class certification [did] not divest the court of jurisdiction," *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1092 (9th Cir. 2010). *But see* Kevin Lampone, *Class Certification as a Prerequisite for CAFA Jurisdiction*, 96 MINN. L. REV. 1151, 1154 (2012) (arguing that "[w]hen federal courts deny certification to a putative class, [the Class Action Fairness Act] requires that cases initially filed in state court be remanded.").

¹²⁹ *Cf. Res Judicata*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *res judicata* as an "affirmative defense barring *the same parties* from litigating a second lawsuit on the same claim" (emphasis added)).

¹³⁰ *See, e.g.*, Pinsof, *supra* note 98, at 355 ("Unless and until legal reform occurs, courts should classify Uber drivers and similarly situated workers in the gig-economy as employees."); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 513 (2016) (arguing that "Uber is not a hard case" such that "a court . . . could find Uber drivers to be employees *as a matter of law*" (emphasis in original)); Alyssa Stokes, *Driving Courts Crazy: A Look at How Labor and Employment Laws Do*

demonstrated by the *Grubhub*, *Lyft*, and *Uber* cases, however, the federal judiciary has made clear that the traditional tests for worker classification do not cleanly map onto the Gig Economy.¹³¹

Second, certain commentators have argued that the employee-contractor dichotomy should be maintained, but that the law should be changed in some manner such that all Gig Economy workers would be considered employees.¹³² Yet that approach risks cannibalizing the business model of many Gig Economy companies by drastically increasing their cost structure, likely leading to a decrease in consumer welfare as those costs are passed on to the platforms' users.¹³³ Far more importantly, it would likely be a pyrrhic victory for Gig Economy workers because it would also endanger the very flexibility that has drawn many of them to the Gig Economy in the first place, as their putative employers would have every incentive to exert the maximum level of control for which they would be paying. Put another way, if a company is "made to give its workers all the benefits, protections, and entitlements of employment, then that company will expect the worker to behave like an employee."¹³⁴ While this trade-off might seem attractive to some labor scholars,¹³⁵ survey data strongly suggests that it is not

Not Coincide with Ride Platforms in the Sharing Economy, 95 NEB. L. REV. 853, 871 (2017) ("Drivers of ride platforms in the sharing economy are likely to be classified as employees under California law It is probable the same result follows under the FLSA").

¹³¹ See *supra* Part IV (discussing *Lawson v. Grubhub, Inc.*, No. 15 Civ. 5128 (N.D. Cal.), *Cotter v. Lyft, Inc.*, No. 13 Civ. 4065 (N.D. Cal.), and *O'Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826 (N.D. Cal.)).

¹³² See, e.g., Miriam Cherry & Antonio Aloisi, "Dependent Contractors" in the *Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 683 (2017) (arguing for a presumption under which "the default classification would be an employment relationship"); Rogers, *supra* note 130, at 505 ("Uber should owe employment duties to its drivers").

¹³³ See, e.g., Stafford, *supra* note 75, at 1251 ("If the distinction is collapsed in favor of more protection for all workers, the associated costs of compliance would severely erode one of the core pillars of the sharing economy business model—low transaction costs.").

¹³⁴ Holloway, *supra* note 63, at 317.

¹³⁵ See, e.g., Rogers, *supra* note 130, at 509–10 ("If the problem is that drivers now engage in personal business while on work hours, Uber could prohibit them

what the vast majority of Gig Economy workers actually want: 74% reported that Uber made their lives better by allowing them to control their schedule, while 73% stated that they would prefer a job in which they choose their schedule and act as their own boss over “a steady 9-to-5 job with some benefits and a set salary.”¹³⁶ Although there is surely some combination of benefits and salary that most Gig Economy workers would accept in exchange for a more traditional form of employment in which they exercised less autonomy, the polling data supports the proposition that it is precisely “those who value flexibility most” that “are the most likely to seek opportunities” in the Gig Economy.¹³⁷

Third, Senator John Thune recently introduced the New Economy Works to Guarantee Independence and Growth (“NEW GIG”) Act of 2017, which would take the opposite tact by “preserv[ing] the common law rules for worker classification” while creating a safe harbor under which service-providers would be treated as independent contractors and platforms would not be treated as their employer.¹³⁸ Qualification for the legislation’s safe harbor would depend on what Senator Thune describes as “three areas that are intended to demonstrate the independence of the service provider . . . based on objective criteria,” but a cursory review of the three areas makes clear that enactment of the NEW GIG Act would not accomplish Senator Thune’s goal of moving away from “a subjective facts-and-circumstances analysis.”¹³⁹ Each of the NEW GIG Act’s three factors has three sub-factors, creating a new nine-factor test that provides no clear basis for classification

from doing so If the problem is that drivers use multiple platforms, Uber could require drivers to use its platform exclusively”).

¹³⁶ See Hall & Krueger, *supra* note 32, at 11–12.

¹³⁷ *Id.* at 11.

¹³⁸ Press Release, Sen. John Thune, Thune Introduces Bill to Add Certainty to Worker Classification Rules (July 13, 2017), <https://www.thune.senate.gov/public/index.cfm/press-releases?id=c91d4e97-ccdc-4abf-bebd-ed72c02a8752>.

¹³⁹ Sen. John Thune, NEW GIG Act of 2017 Summary of Provisions (July 13, 2017), https://www.thune.senate.gov/public/_cache/files/140b9d0a-eddd-44ad-82e5-cc45e0218db9/235D993AF71C5ED8FA62BD8BFF3F3D7E.bill-summary-final-7-13-17.pdf.

when the different factors fail to point in the same direction.¹⁴⁰ Accordingly, the NEW GIG Act would do little to clarify any given misclassification dispute or move away from the flaws of our current system.

Fourth, some commentators have suggested doing away with the independent contractor-employee distinction entirely, instead proposing that “a basic set of benefits and labor standards must be universal across all employers and all forms of employment” that would “put all employees and employers alike on an equal footing.”¹⁴¹ Yet to the extent that this would allow employers to exert greater control over workers currently classified as independent contractors in exchange for the greater benefits to be provided and liabilities imposed, such an approach suffers from the same infirmities as previously discussed with regard to proposals to broaden the employee categorization.¹⁴² Moreover, such proposals elide the fundamental problem of how to define employment, rather than proposing ways to solve it. Even if workers are not divided between employees and independent contractors, some test would still be necessary to distinguish between workers and non-workers, and, with respect to workers, how to determine for whom one is working. It is too facile to declare that “if you work for someone

¹⁴⁰ *Id.* (listing as factors “(1) the relationship between the parties (e.g., job-by-job arrangement, the service provider incurs his or her own business expenses, the service provider is not tied to a single service recipient); (2) the location of the services or the means by which the services are provided (e.g., the service provider has his or her own place of business, does not work exclusively at the service recipient’s place of business, provides his or her own tools and supplies); and (3) a written contract with specific requirements (e.g., stating the independent-contractor relationship, acknowledging that the service provider is responsible for his or her own taxes, providing the service recipient’s reporting and withholding obligations).”).

¹⁴¹ Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, 37 DEMOCRACY J. (Summer 2015), <http://democracyjournal.org/magazine/37/shared-security-shared-growth>.

¹⁴² Notably, prominent proponents of this approach have focused primarily on what benefits would accrue to employees without reference to what added duties or burdens might be imposed on them. *See generally id.*

else, you're an employee,"¹⁴³ a test that provides no more objective guidance for making future decisions as to when one works for someone else, or determining for whom one works, than "I know it when I see it."¹⁴⁴

Fifth, still others have argued that blanket classifications for Gig Economy workers are "inappropriate" and therefore workers "should be classified individually."¹⁴⁵ As an initial matter, it is not clear why workers for any given company would generally be so differently positioned from others working for the same company with respect to the factors determining employment status that individual classification would be a sensible approach. Indeed, that very argument was rejected in the *Uber* litigation.¹⁴⁶ But even if there were sufficient differences across a given company's workforce, such an approach would be both impractical and counterproductive. By definition, it would not operate at scale. To return to our familiar example, there is no feasible way for Uber to reach a considered individual determination as to the proper classification of each of its several hundred thousand drivers. Putting that Herculean (or possibly Sisyphean) task into perspective, Uber operates with a headcount comparable to the largest of the Fortune 500 companies.¹⁴⁷ A veritable army of human resources

¹⁴³ Nathan Heller, *Is the Gig Economy Working?*, NEW YORKER, May 15, 2017, <https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working> (quoting political scientist Jacob Hacker).

¹⁴⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); cf. Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now*, N.Y. TIMES (Sept. 3, 2017), <https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html> (noting that "major companies have . . . chosen to bifurcate their work force, contracting out much of the labor that goes into their products to other companies" whereas "a generation ago, big companies . . . more often directly employed people" and discussing the reduced benefits to workers who are hired indirectly).

¹⁴⁵ Redfearn, *supra* note 64, at 1054; see also Means & Steiner, *supra* note 7, at 1539 (arguing for a test that would "avoid[] sweeping all workers in the on-demand economy into one category or the other" because their circumstances "may vary greatly . . . even for workers who operate within a single company").

¹⁴⁶ See *Uber III*, 2015 WL 5138097 at *2.

¹⁴⁷ Compare Biz Carson, *Why There's a Good Chance Your Uber Driver Is New*, BUS. INSIDER (Oct. 24, 2015, 11:34 AM), <http://www.businessinsider.com>

managers would be required simply to administer the process of making individualized decisions for the tens of thousands of new Uber drivers enlisting every week,¹⁴⁸ yet Uber would also have the additional burden of regularly updating all of its individual decisions regarding its preexisting drivers' designations as their usage of Uber's platform changes over time.¹⁴⁹ Even more importantly, requiring individualized decisions would not provide any additional clarity as to how a given worker should be classified. Instead, it would exponentially increase the confusion and uncertainty faced by both workers and businesses. Encouraging individualized classification decisions would also risk introducing significant new opportunities for gamesmanship by companies seeking to induce particular behavior by individual workers in order to achieve a desired classification.¹⁵⁰

Lastly, many have noted the possibility of creating a third classification for workers, but generally they have been vague about what such a classification might look like.¹⁵¹ And though other

/uber-doubles-its-drivers-in-2015-2015-10 (Uber had 327,000 active drivers in the United States as of September 2015), with Claire Zillman & Stacy Jones, *Fortune 500 Companies with the Most Employees*, FORTUNE (June 13, 2015), <http://fortune.com/2015/06/13/fortune-500-most-employees/> (stating that UPS, the eighth largest employer among the Fortune 500, had 336,150 employees in 2015).

¹⁴⁸ See Carson, *supra* note 147 ("Each week, tens of thousands of drivers across the U.S. begin using the Uber app.").

¹⁴⁹ See Hall & Krueger, *supra* note 32, at 20 ("In any given week, well more than half (65 percent) of [Uber's] driver-partners drive more than 25 percent, or less than 25 percent, than the amount they drove in the previous week. Only 17 percent of driver-partners tend to drive within 10 percent of the amount of time that they drove in the previous week.").

¹⁵⁰ See Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. TIMES (Apr. 2, 2017) (describing the use of "psychological inducements and other techniques unearthed by social science to influence when, where and how long drivers work").

¹⁵¹ See, e.g., James Surowiecki, *Gigs With Benefits*, NEW YORKER (July 6, 2015), <https://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>; Lauren Weber, *What If There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM ET), <https://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>; see also Mirit Eyal-Cohen, *Through the Lens of Innovation*, 43 FLA. ST. U. L. REV. 951, 987–88 (2016) (using the *Uber*

countries have experimented with intermediate classifications, it is not clear how much the United States can learn from their experiences.¹⁵² This Article attempts to help fill that void by outlining one such possible classification that could be implemented through federal legislation to strike a balance between competing principles of freedom of contract, fairness, and the need to protect workers who lack sufficient bargaining power to protect themselves.¹⁵³

B. *The Independent Employee*

1. *Identifying Independent Employees*

While some have suggested the term “dependent contractor” for a hybrid classification between employees and independent

litigation as an example of how, “instead of applying existing classifications from old laws that fail to account for challenges presented by the new sharing economy, the law can be better designed” by new legislation and regulations that “allow more flexibility”); Holloway, *supra* note 63, at 326 (“Instead of further manipulating these already overwrought tests for employment, it should be acknowledged that gig work is not just a new name for something old. A different kind of work has emerged, and new rules need to be developed.”); Stemler, *supra* note 6, at 61–62 (“Instead of classifying Uber drivers and other supply-side users in the sharing economy as either employees or independent contractors, regulators should create a new classification” that “would enable regulators to think differently about how to fill regulatory gaps.”); Stokes, *supra* note 130, at 882–83 (“[O]ur labor laws should change—providing a new classification for employees in the sharing economy” that “would provide some of the protections these workers desire, without hindering innovation.”).

¹⁵² See generally Cherry & Aloisi, *supra* note 132 (discussing Canada’s intermediate category, which would exclude Gig Economy workers because it applies to workers who are economically dependent on a single company, and intermediate categories as introduced in Italy and Spain, both of which the authors find to have been problematic).

¹⁵³ See SETH HARRIS & ALAN KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST CENTURY WORK: THE ‘INDEPENDENT WORKER’ 15 (2015) (explaining that federal legislation must be used because neither state legislatures, courts, nor regulators are empowered to address the complete set of issues faced by independent employees); see also Rogers, *supra* note 130, at 496–500 (arguing that the notion of employment is inherently a “value-laden question” that necessarily rests upon policy considerations because “legal duties are not discoverable facts of nature” (quoting *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976))).

contractors,¹⁵⁴ this name is inapt because there is good reason to believe that the majority of Gig Economy workers are not dependent on the platforms for which they work.¹⁵⁵ Indeed, the vast majority of Uber drivers have other sources of income, with a plurality of Uber drivers describing their earnings from Uber as “a supplement to their income but not a significant source.”¹⁵⁶ Moreover, suggesting that these workers are dependent fails to account for the most important and valued characteristics of Gig Economy work: the flexibility and autonomy that such work provides.¹⁵⁷ Accordingly, workers in this hybrid category should instead be referred to as “independent employees.”

In an oft-cited concurrence discussing the difficulty of distinguishing between employees and independent contractors, Judge Easterbrook noted the traditional tests’ failure to adhere to a bedrock legal principle: “People are entitled to know the legal rules before they act.”¹⁵⁸ Because litigation “is costly and introduces risk into any endeavor,” legal rules should “struggle to eliminate the risk and help people save the costs” rather than rely on approaches “under which no one can know where he stands until litigation has been completed.”¹⁵⁹ After all, there is no social benefit to keeping both companies and workers in the dark about the proper legal classification of their agreed-upon relationship with one another. Companies suffer because they face uncertain costs; workers cannot predict what benefits they qualify for and will ultimately receive; and both recognize that the only way to resolve these issues is through expensive, protracted, and entirely unpredictable litigation. Moreover, because each set of facts is unique, as is each fact-finder, prior decisions provide little guidance as to how any given case will

¹⁵⁴ See *St. Joseph News-Press & Teamsters Union Local 460*, 345 N.L.R.B. 474, 484 (2005) (Liebman, dissenting); Jost, *supra* note 65, at 337.

¹⁵⁵ See Hall & Krueger, *supra* note 32, at 11.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.*

¹⁵⁸ *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987). Notably, Judge Easterbrook’s *Lauritzen* concurrence was referenced in both the *Uber* and *Lyft* cases. See *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1147 (N.D. Cal. 2015) (*Uber II*); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1077 (N.D. Cal. 2015) (*Lyft II*).

¹⁵⁹ *Lauritzen*, 835 F.2d at 1539.

be decided on the merits under the myriad multifactor tests that courts now apply.¹⁶⁰

It should therefore be taken as a first principle that one of the primary goals of the “independent employee” classification must be predictability: the parties to an agreement should have confidence concerning how disputes regarding their relationship are likely to be resolved. Specifically, there should be a rebuttable presumption that workers are properly classified as “independent employees” where companies and workers enter into an agreement expressly stating that such a classification applies. Although the parties’ subjective understanding of their relationship is among the factors that courts look to in evaluating employment claims, judges often view the parties’ meeting of the minds as being entitled little weight.¹⁶¹ To the contrary, it should be presumed that the parties’ agreement as to their relationship is correct. While this admits of some danger that the party with more bargaining power (which will typically be the employer) will choose the classification that best suits its own interests,¹⁶² there is no way to avoid unequal bargaining power in capitalist economies such that its presence cannot provide the basis for a bright-line test as to whether a contractual agreement will be honored.¹⁶³ Moreover, it is clear that the current system, in which the parties’ agreement is accorded minimal deference, does not work well for anyone involved. Instead, it leads only to ambiguity that encourages conduct testing the limits of the current classification

¹⁶⁰ See Cunningham-Parmeter, *supra* note 66, at 1704–05 (“because of the permeable nature of the courts’ non-exhaustive lists, [existing] multi-factored approaches to employment determinations have their own problems” such that “businesses and workers can do little more than guess at the legal significance of their relationships to one another.”).

¹⁶¹ See, e.g., O’Connor v. Uber Techs., Inc., No. 13 Civ. 3826 (N.D. Cal. Sept. 1, 2015) 2015 WL 5138097, at *6, *28 (*Uber III*) (holding that “the label placed by parties on their relationship is not dispositive” and “is typically not entitled to significant weight” (quoting Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989 (9th Cir. 2014))).

¹⁶² See Means & Steiner, *supra* note 7, at 1519–21 (arguing that “substantial inequality of economic power distorts the actual structure of labor markets” where “workers lack the leverage to demand better terms”).

¹⁶³ See Rogers, *supra* note 130, at 495.

regime, harming both companies and workers.¹⁶⁴ A result worse than the status quo is difficult to envision.

In situations in which there is good reason to believe that workers have been misclassified, litigation would, of course, remain an option. In order to determine whether the presumption had been applied in error and should be found to have been rebutted, courts should eschew the complex and convoluted multi-factor tests developed to distinguish employees from independent contractors. As Professor Orly Lobel has derisively explained, these tests may make for “a good law school hypothetical” because they allow for “cluttered” arguments as to how each individual fact may point in a different direction, but their “notoriously messy” nature precludes confident prediction as to how any given case will or should be resolved.¹⁶⁵ Put another way by Judge Easterbrook, a “legal approach calling upon judges to examine all of the facts, and balance them, avoids formulating a rule of decision.”¹⁶⁶ After all, “unless we have a legal rule with which to sift the material from the immaterial,” courts cannot uniformly apply the law because there is no universal agreement as to “[w]hich facts matter, and why.”¹⁶⁷

Instead of the nineteen factors discussed in the *Uber* litigation,¹⁶⁸ for example, courts should go back to basics and require the party challenging the presumptive classification to prove the classification is wrong based solely upon the simple, traditional common-law test of agency, which asks whether a putative employer controls or has the right to control a putative employee’s performance of work, without requiring the application of multi-factor tests under which no factor is dispositive.¹⁶⁹ Focusing on control would also reflect

¹⁶⁴ See Stafford, *supra* note 75, at 1242–43; see also Lobel, *supra* note 39, at 68 (arguing that the absence of an intermediate category harms workers by incentivizing companies to recategorize employees as contractors).

¹⁶⁵ Lobel, *supra* note 39, at 59.

¹⁶⁶ Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987).

¹⁶⁷ *Id.*

¹⁶⁸ O’Connor v. Uber Techs., Inc., No. 13 Civ. 3826 (N.D. Cal. Sept. 1, 2015) 2015 WL 5138097 *17–30.

¹⁶⁹ Compare RESTATEMENT (FIRST) OF AGENCY § 2(3) (AM. LAW INST. 1933) (“An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the

Coase's insight that the "dominant characteristic" distinguishing between different types of workers is the extent to which they are subject to an employer empowered to dictate their terms of employment.¹⁷⁰ The control test can be utilized in the employment law context to develop a body of case-law as to where a worker must fall on the control spectrum to qualify as an employee, independent employee, or independent contractor, without resorting to the rigid examination of every imaginable factor under the sun. And because the hallmarks of the Gig Economy include providing workers with significant (but not complete) control over if, when, and how to perform the services they provide, the amount of control exerted by the putative employer is an appropriate test for whether or not a Gig Economy worker is truly an independent employee rather than a traditional employee or independent contractor.¹⁷¹ This sliding scale would allow businesses to determine precisely what their brand should signify, granting them a choice between exercising significant control in order to supply consumers with a more uniform product or service provided by employees, relinquishing all control over how the product or service is delivered by independent contractors, or seeking a middle ground through the use of independent employees.¹⁷²

There are a multitude of variations as to precisely how such a system could be formalized. By way of example, one version might incorporate Coase's description of the "right to control" an employee as the power to dictate "when to work . . . and when not

undertaking."), and RESTATEMENT (SECOND) OF AGENCY § 2(3) (AM. LAW INST. 1958) (same), with RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work.").

¹⁷⁰ Coase, *supra* note 48, at 404.

¹⁷¹ *Cf.* Cunningham-Parmeter, *supra* note 66, at 1717–23 (discussing how a control-based analysis applies to Gig Economy companies); Holloway, *supra* note 63, at 309–11 (same).

¹⁷² *See* Cunningham-Parmeter, *supra* note 66, at 1726 (explaining that "firms that expect independent contractors . . . to produce particularized outcomes often provide detailed instructions about how contractors must produce those outcomes" but arguing that if "end-user firms truly wish to avoid the obligations that come with employer status, then they must fully relinquish their control over decisions that directly affect working conditions").

to work, and . . . how to do it”¹⁷³ by focusing on those powers while recognizing that control over the time and place of work can be considered more oppressive than control over how work is performed. To see how this could work in practice, consider once again Grubhub, Lyft, and Uber. Under such a system, Grubhub’s drivers could be classified as employees in light of the considerable control that the company’s assignment blocking system exercises over them, as it allows Grubhub to dictate when and where drivers are expected to be available for deliveries. Meanwhile, if Lyft were to institute rules regarding how drivers must behave while completing assignments obtained via its platform without placing any restrictions on when and where such assignments must be accepted, that lesser exercise of control could suffice to have Lyft drivers qualify as independent employees. Lastly, if Uber were to allow drivers discretion over where, when, *and* how to complete their assignments, as it claims to do now, the drivers’ unfettered authority over their own work would render them independent contractors.

While arguing that the Gig Economy offers little beyond exploitation of new technologies to engage in regulatory arbitrage, Professor Julia Tomassetti poses the question of why “we more readily accept that Uber intermediates between buyers and sellers, but that a restaurant does not intermediate a market between buyers of hospitality services (diners) and sellers (waiters)?”¹⁷⁴ That question is easily answered when viewed through the lens of a control-based test and provides an apt example of why such a test would work well. Restaurants employ a variety of staff in addition to waiters, such as hosts, chefs of various types, bartenders, busboys, dishwashers, and administrators to oversee their day-to-day operations. Indeed, the very purpose of hiring management at restaurants is to exercise control over the restaurant’s staff to ensure that they perform their respective tasks in a coordinated manner in order to provide a seamless experience to diners. A restaurant could hardly operate without exercising control over its employees—how else might it meet consumer demand by ensuring that it had the

¹⁷³ Coase, *supra* note 48, at 404.

¹⁷⁴ Tomassetti, *supra* note 6, at 77.

proper number of staff at each position at the proper time, all of whom must work together for the restaurant to run smoothly? No restaurant would stay in business long if it could not ensure that it had the requisite number of cooks in the kitchen or that it might not have enough clean plates and silverware because the dishwashing staff had not shown up to work when they were expected to do so. Even most seemingly simple businesses require coordination, which in turn requires either control over employees or the imposition of significant transaction costs involved in repeatedly hiring independent contractors on an *ad hoc* basis.

Moreover, Gig Economy companies are not analogous to an individual restaurant because they are not limited to a single market. To the extent Professor Tomasetti's analogy holds, the better comparison for a Gig Economy company would be a national or global chain of restaurants operating across numerous markets. Yet such chains require exponentially more coordination, and therefore control, to ensure that they provide a uniform product across their branches. Even a chain of coffee shops could not function if it did not know whether or when their baristas would show up to work, or at which location they would choose to do so on any given day. For this very reason, large companies have already begun to use "state-of-the-art software that forecasts store traffic and helps managers set staff levels accordingly."¹⁷⁵

Contrary to Professor Tomassetti's implication, Uber is different than typical employers because it does not guarantee a driver for all passengers at all times and locations, nor does it promise a passenger for all drivers. Rather, it provides a lightly regulated platform through which available drivers and passengers can find one

¹⁷⁵ Noam Scheiber, *Starbucks Falls Short After Pledging Better Labor Practices*, N.Y. TIMES (Sept. 23, 2015), <https://www.nytimes.com/2015/09/24/business/starbucks-falls-short-after-pledging-better-labor-practices.html>; see also, e.g., Jodi Kantor, *Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents with Hours of Chaos*, N.Y. TIMES (Aug. 13, 2014), <https://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html> ("Along with virtually every major retail and restaurant chain, Starbucks relies on software that choreographs workers in precise, intricate ballets, using sales patterns and other data to determine which of its 130,000 baristas are needed in its thousands of locations and exactly when.").

another. Precisely because it does not need to coordinate different functions and does not endeavor to provide a uniform service each time a user logs on to the platform, it has no need to control workers in the same manner as traditional employers.

As compared to Professor Tomasetti's hypothetical restaurant, the Gig Economy embraces "a radically different mode of production" that does not employ a similar level of control.¹⁷⁶ And those companies which assert the least control over users of their platform could most plausibly argue that their users are neither independent nor traditional employees but true third-party independent contractors. It nevertheless remains the case that for many companies, such as the restaurants discussed above, cutting costs by classifying workers as either independent employees or independent contractors likely would not be worth the trade-off involved in ceding control over whether, when, where, and how those workers do their jobs.

2. *Legal Protections Afforded to Independent Employees*

Having defined how to determine if a worker qualifies as an independent employee, this Article next turns to the benefits that would accrue to those falling within this category. First, the various civil rights protections provided to employees should be expanded to cover independent employees as well. For example, companies should not be allowed to discriminate against independent employees based on various personal traits, such as their sex, race, color, national origin, religion, age, or disabilities—just as they are prohibited from discriminating against employees based on such characteristics.¹⁷⁷ These protections constitute the low-hanging fruit of independent employee protections. Simply stated, there is no social benefit promoted by allowing employer discrimination, regardless of whether it targets employees, independent contractors, or independent employees.¹⁷⁸ Indeed, Congress has already begun

¹⁷⁶ Michal S. Gal & Niva Elkin-Koren, *Algorithmic Consumers*, 30 HARV. J.L. & TECH. 309, 348 (2017).

¹⁷⁷ See, e.g., 29 U.S.C. § 621, *et seq.* (1967); 42 U.S.C. § 2000e(b) (1964).

¹⁷⁸ Cf. Danielle Tarantolo, *From Unemployment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J.

the process of extending certain protections to all workers where there is only limited benefit, if any, to withholding those protections from non-employees.¹⁷⁹

Second, the National Labor Relations Act and federal antitrust statutes should be amended to allow independent employees to unionize and collectively bargain.¹⁸⁰ Although some have argued that Gig Economy companies should engage with organized groups of workers while stopping short of advocating for the use of unions¹⁸¹—a distinction drawn in the rejected *Uber* settlement, in which the parties agreed to allow drivers to organize but not unionize¹⁸²—that suggestion fails to account for the risk that it would lead workers to run afoul of federal antitrust law. Although antitrust law provides for a labor exemption that protects union activities by employees,¹⁸³ that exemption could be held inapplicable to independent employees under established case-law.¹⁸⁴ Indeed, the

170 (2006) (arguing for broader application of federal laws barring employment discrimination against independent contractors).

¹⁷⁹ See Lobel, *supra* note 39, at 63 (discussing extension of certain speech rights under the Dodd-Frank and Sarbanes-Oxley Acts to all workers).

¹⁸⁰ See 29 U.S.C. § 157 (1935) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”).

¹⁸¹ See Holloway, *supra* note 63, at 333 (noting that “gig firms can engage in a constructive dialogue” with such groups even while “unionization will remain a goal for some,” until and unless “gig workers can be definitively classified as independent contractors”). *But cf.* Rogers, *supra* note 130, at 518–19 (arguing that Uber drivers should be allowed to organize and bargain collectively).

¹⁸² See *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1118–19 (N.D. Cal. 2016).

¹⁸³ See 15 U.S.C. § 17 (“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”).

¹⁸⁴ Compare *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940) (holding employees’ strike was not an antitrust violation because “restraints on the sale of

Chamber of Commerce has already attempted to use federal antitrust laws to enjoin a Seattle ordinance that would allow certain Gig Economy workers to collectively bargain.¹⁸⁵

Although this problem could also be avoided by amending the antitrust laws to create an independent employee exemption without providing independent employees the full protections of the National Labor Relations Act, the benefits of such a middle-ground approach are unclear.¹⁸⁶ While American labor law is far from perfect, there is no shortage of ideas for how to improve it in ways preferable to throwing the baby out with the bathwater by starting anew with an entirely untested form of organizing labor.¹⁸⁷ Moreover, to the extent that workers for any given Gig Economy company might be inclined to try to organize outside the strictures of the National Labor Relations Act, they should be given the

the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act"), *with* *Columbia River Packers Ass'n, Inc. v. Hinton*, 315 U.S. 143, 147 (1942) (holding that organization of "independent businessmen, free from such controls as an employer might exercise," were not immunized from attempted monopolization claims because the labor exemption does not apply to "controversies upon which the employer-employee relationship has no bearing"), *and* *Taylor v. Local No. 7 Int'l Union of Journeymen Horseshoers of U.S. & Canada (AFL-CIO)*, 353 F.2d 593 (4th Cir. 1965) (en banc) (holding antitrust labor exemption applies only "(1) if the parties to a dispute stand in the relationship of employer and employee and dispute some aspect of that relationship, or (2) if the employer-employee relationship of others is the crux of the dispute").

¹⁸⁵ See *Chamber of Commerce of U.S. v. City of Seattle*, 2017 WL 1233181 (W.D. Wash. Apr. 4, 2017) (preliminarily enjoining ordinance); *Chamber of Commerce of U.S. v. City of Seattle*, 2017 WL 3267730 (W.D. Wash. Aug. 1, 2017) (dismissing case but leaving injunction in place pending decision in companion case); *Clark v. City of Seattle*, No. 17 Civ. 0382, 2017 WL 3641908 *(W.D. Wash. Aug. 24, 2017) (vacating injunction); see also *U.S. Chamber of Commerce v. City of Seattle*, No. 17-35371 (9th Cir.) (docket on appeal); *Clark v. City of Seattle*, No. 17-35693 (9th Cir.) (docket on appeal).

¹⁸⁶ See *Harris & Krueger*, *supra* note 153, at 16-17 (arguing that Congress should "craft an 'independent workers exemption' from any antitrust laws" but noting that "[a]nother option would be to simply include independent workers under the NLRA.").

¹⁸⁷ *Cf. Andrias*, *supra* note 11, at 43-44, 70 (summarizing a variety of proposals regarding labor law reforms in the midst of arguing that broad-based political organizing offers a more promising path than "the traditional NLRA approach").

opportunity to choose for themselves which route is more promising. Extending the National Labor Relation Act's protections to independent employees would not preclude them from seeking alternate organizational routes if they so choose. Lastly, because many Gig Economy companies set the prices at which workers' services are offered to consumers through their platforms, there would be an elegant symmetry in allowing service-providers to collectively bargain with platform companies regarding the terms under which they will offer their services on those very same platforms.¹⁸⁸

3. *Benefits Afforded to Independent Employees*

Companies that have grown to sufficient size should be encouraged and incentivized to provide independent employees with benefits derived from the economies of scale that accrue to such employers.¹⁸⁹ Whether a company is of sufficient size might be measured by any number of metrics, such as revenue, profits, valuation, or number of workers. Certain provisions of the federal Affordable Care Act that phase in only for companies employing specified numbers of people provide one illustration of how this might be structured.¹⁹⁰

¹⁸⁸ See Paul, *supra* note 7, at 261 (arguing that “a consistent application of price-fixing norms” requires that, so long as platforms are allowed to set prices, so too “service providers ought to be able to engage in collective action, including coordinating directly on the prices of their services or other elements of their bargain” with the platform).

¹⁸⁹ See HARRIS & KRUEGER, *supra* note 151, at 16–17 (“There are potentially large efficiency advantages” to allowing Gig Economy companies “to pool their independent workers for the purpose of purchasing or directly providing or administering certain benefits for workers.”).

¹⁹⁰ See *Small Business Healthcare*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/healthcare> (distinguishing between self-employed workers, companies with fewer than 25 employees, companies with 26-50 employees, and companies with more than 50 employees). The Affordable Care Act itself also demonstrates that the federal government remains capable of enacting legislation to help support workers in an economy in which fewer are able to obtain the benefits of traditional employment. See, e.g., Carbone & Levit, *supra* note 17, at 1018–20 (explaining how “the declining relationship between employment and health insurance is one of the factors that made the ACA necessary in the first place”). Indeed, many Gig Economy companies recognize that the Affordable Care Act's insurance markets for individuals undergirds their ability to build

Among the benefits that might be provided to independent employees, for example, are financial and tax services or procurement of various types of insurance. Because large companies can administer or arrange for such benefits more efficiently than smaller companies or individual workers, independent employees would benefit significantly from such an arrangement. The Gig Economy group Peers and the New York-based Freelancers Union, which is comprised of independent contractors who meet certain criteria, provide helpful models for the types of benefits that could be provided to all independent employees and how the provision of those benefits might be arranged.¹⁹¹ Indeed, the Freelancers Union has already partnered with Lyft and it advises Uber on how to create portable benefits for its drivers.¹⁹²

Rather than statutorily enumerate a specific list of benefits to be provided, that decision is best left up to the companies, their regulators, and their workers (possibly through union representation, as discussed above), based upon their particular

businesses with large numbers of independent contractors. As venture capitalist Marc Andreessen has written, it is “perhaps the single biggest key enabler for the sharing/gig/1099 economy.” Evan McMorris-Santoro & Johana Bhuiyan, *How Obamacare Drives the Sharing Economy*, BUZZFEED NEWS (Oct. 14, 2014), https://www.buzzfeed.com/evanmcsan/how-obamacare-drives-the-sharing-economy?utm_term=.apdzyDK4vQ#.ru2k6xWYrB; see also Lobel, *supra* note 39, at 70 (arguing that “HealthCare.gov has become a human-resources site for the platform economy” because it “has made it easier for independent contractors to purchase insurance on their own”).

¹⁹¹ See, e.g., Lobel, *supra* note 39, at 72 (discussing Peers); Steven Greenhouse, *Tackling Concerns of Independent Workers*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/business/freelancers-union-tackles-concerns-of-independent-workers.html> (discussing the Freelancers Union); cf. Aloisi, *supra* note 78, at 680–82 (discussing several organizations providing services and resources to Gig Economy workers, as well as efforts to organize Gig Economy workers).

¹⁹² See, e.g., *Lyft Partners with Freelancers Union*, LYFT BLOG (June 30, 2014), <https://blog.lyft.com/posts/2014/6/30/lyft-partners-with-freelancers-union>; Chris Opfer, *Lyft Retirement Program Could Be Model for Sharing Economy Benefits*, BLOOMBERG BNA LABOR & EMP. BLOG (Dec. 1, 2015), <https://www.bna.com/lyft-retirement-program-b57982064126/>; Noam Scheiber & Mike Isaac, *Uber Recognizes New York Drivers’ Group, Short of Union*, N.Y. TIMES (May 10, 2016), <https://www.nytimes.com/2016/05/11/technology/uber-agrees-to-union-deal-in-new-york.html>.

industries and business models.¹⁹³ Variety among the benefits made available could become an important way for Gig Economy companies to differentiate themselves from one another as they compete for independent employees.¹⁹⁴ To take but one example, some Gig Economy companies in the transportation sector might find that helping independent employees procure better terms for automobile insurance is a boon to their recruitment efforts as compared to competitors that do not make similar efforts.¹⁹⁵ Indeed, Uber and Lyft already appear to compete on this basis.¹⁹⁶ Encouraging the provision of benefits that could vary by industry and company would likely lead to the opening of precisely the type of dialogue between independent employees and companies that many Gig Economy workers desire.¹⁹⁷

¹⁹³ *But see* Alana Semuels, *Could a Tax Fix the Gig Economy*, ATLANTIC (Nov. 6, 2017), <https://www.theatlantic.com/business/archive/2017/11/gig-economy/544895/> (discussing proposals to implement taxes to fund specific benefits for gig economy workers).

¹⁹⁴ *See, e.g.*, Cherry & Aloisi, *supra* note 132, at 684 (“Some platform companies have provided benefits, including health insurance. Their hope is to stand out from other platforms and attract the most talented workers.”); *In the Battle Between Lyft and Uber, the Focus is on Drivers*, All Things Considered (Nat’l Pub. Radio Broadcast Jan. 18, 2016), <https://www.npr.org/sections/alltechconsidered/2016/01/18/463473462/is-uber-good-to-drivers-it-s-relative>.

¹⁹⁵ There are good reasons to tie minimum insurance requirements to a company’s size. By definition, larger companies will be involved in more transactions, some of which will inevitably prove problematic, but they will also have a broader population of users across which the cost of insurance can be spread. *Cf. Acevedo, supra* note 42, at 30 (“The real reason we should consider imposing some sort of mandatory insurance obligation on platforms is that platform activity creates risks for society at large, and the costs associated with those risks should not fall solely on [the platforms’] suppliers.”).

¹⁹⁶ *See* Edelman & Geradin, *supra* note 43, at 311–12 (“Transportation platforms like Uber and Lyft typically provide insurance, usually including significant coverage for passengers (often more than required for taxis), as well as some coverage for drivers.”).

¹⁹⁷ *See, e.g.*, *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1118–19 (N.D. Cal. 2016) (including among the terms of proposed settlement creation of “a driver association as a means of ‘opening a dialogue between Uber and Drivers’”); *Acevedo, supra* note 42, at 33 (“[S]uppliers don’t consider themselves traditional Employees and don’t expect the traditional perks of that status” but do “want a recognition of their relationship with platforms that opens up the possibility of two-way engagement.”).

Allowing companies to provide varied benefits is also a natural result of the proposed test for determining whether a worker is an independent employee, as opposed to the traditional tests for determining employment status. As discussed above, many companies currently fear offering benefits to independent contractors because courts and regulatory agencies might interpret those benefits as a factor suggesting that the independent contractors are actually misclassified employees. A new test focusing solely on the control exercised and retained by companies over workers, rather than other economic aspects of their relationship, would empower companies to extend more benefits to non-employee workers than they believe they can safely do under current law.

4. *Separating Benefits from Hours Worked*

Independent employees would not be entitled to legal protections that are traditionally tied to the number of hours worked, such as minimum or overtime wages.¹⁹⁸ This is necessitated by the simple fact that there is no way to conclusively measure when or for how many hours a Gig Economy worker is actually working and, more importantly, how many hours they are working for a particular company. Although some commentators have summarily argued that there is no difficulty tracking workers' hours because Gig Economy platforms enable data gathering and analysis on an unprecedented scale,¹⁹⁹ such arguments elide fundamental questions regarding what information can be gleaned from that data. While it might be trivially simple to track how long a worker is logged in to an app, that does not necessarily answer the question of how much time was spent working.

To again take Uber as an example, an argument can be made that a driver is working for Uber while driving a passenger with whom they connected through Uber's platform. On the other hand, is that same driver working for Uber when they do not have a passenger and are only logged in to Uber's platform? And if so, is that true

¹⁹⁸ See, e.g., 29 U.S.C. § 206(a)(1)(C) (2018) (setting national minimum wage of \$7.25 per hour).

¹⁹⁹ See Cherry & Aloisi, *supra* note 132, at 678; cf. Hanauer & Rolf, *supra* note 141 ("The obvious solution to the explosion of part-time work—voluntary or otherwise—is to prorate the accrual of benefits on an hourly or equivalent basis.").

regardless of whether or not they are doing anything to actively look for or provide rides to passengers, such as driving through areas likely to contain potential passengers? Or if they are concurrently logged in to both Uber's platform and that of a competitor, such as Lyft, using both to run simultaneous searches for passengers? Or if they are logged in while performing some other task entirely?

The ability of Gig Economy workers to remain passively logged on to multiple platforms, coupled with their freedom to choose where, when, how, and even whether to provide their services to a given consumer with minimal (if any) managerial oversight combine to make it impossible to determine how many hours they can be said to be working for any given company or how to apportion their finite hours between the multiple tasks they might be simultaneously engaged in. And if hours cannot be effectively measured, it makes little sense to require employers to provide hours-based benefits. In other words, independent employees' failure to qualify for hours-based benefits is a linchpin of the trade-off they make for more flexibility and autonomy in their work.

Moreover, a worker classified as an employee is not necessarily entitled to compensation for "on-call" or "standby" time even under current law. As the Supreme Court long ago recognized, a worker who is "liable to be called upon at any moment, and not at liberty to go away," is "none the less on duty when inactive" because "their duty [is] to stand and wait."²⁰⁰ Stated otherwise by the *Grubhub* court, in any given case the facts "may show that the employee was engaged to wait, or they may show that he waited to be engaged" by his employer.²⁰¹ Accordingly, decisions involving Gig Economy companies have reached different results as to whether workers alleging they have been misclassified as independent contractors could pursue claims relating to the time spent in between gigs.²⁰²

²⁰⁰ *Mo., Kan. & Tex. Ry. Co. v. United States*, 231 U.S. 112, 119 (1913).

²⁰¹ *Tan v. Grubhub, Inc.* 171 F. Supp. 3d 998, 1008 (2016) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944)).

²⁰² See *Grubhub*, 171 F. Supp. 3d at 1008–10; *Tan v. Grubhub*, 2016 WL 3743365, at *2–3 (N.D. Cal. July 13, 2016); *Lawson v. Grubhub*, 2017 WL 2951608, at *8 (N.D. Cal. July 10, 2017); *Yucesoy v. Uber Techs., Inc.*, No. 15 Civ. 262, 2016 WL 493189, at *6 (N.D. Cal. Feb. 9, 2016); *Razak v. Uber Techs., Inc.*, No. 16 Civ. 573, 2016 WL 7241795 at *1 (E.D. Pa. Sept. 13, 2017).

These inconsistent results amply demonstrate the necessity of clarifying this area of law.

VI. CONCLUSION

The binary categorization of workers as either independent contractors or employees has failed. Our persistent application of antiquated legal tests to distinguish between outdated types of workers presents stark problems for all involved. Companies struggle with how to structure their workforce, workers do not know the benefits and protections to which they are entitled, and the judiciary is left to resolve disputes without clear guideposts as it sifts through the muck.

Rather than continue trying to force square pegs into round holes,²⁰³ this Article offers a new model by sketching the contours of a third type of worker: the independent employee. In particular, outmoded tests should be abandoned in favor of focusing solely on the amount of control exercised over a worker, defining independent employment as an intermediate category of work for those who are not as autonomous as independent contractors but who are also not subject to the same degree of instruction and supervision as traditional employees. This Article proposes a new legal regime in which independent employees would be entitled to many of the same protections granted to traditional employees, but who trade a degree of economic assurance for greater flexibility in setting the terms and conditions of their work.

In outlining this vision, this Article nevertheless recognizes that there are infinite variations of independent employment which might be put into practice. Focusing on one possibility provides a foundation upon which others may build by further illuminating the benefits and pitfalls of revising our employment laws to better reflect the new types of work that have emerged in the modern economy. This Article does not endeavor to provide a definitive path forward, but, in light of the importance of the worker-misclassification allegations threatening nascent companies and

²⁰³ See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d. 1067, 1081 (N.D. Cal. 2015).

business models, it aims to further this crucial conversation for the benefit of both companies and workers alike.