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## Gig-Dependence: Finding the Real Independent Contractors of Platform Work

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# Gig-Dependence: Finding the Real Independent Contractors of Platform Work

KEITH CUNNINGHAM-PARMETER\*

*Platforms such as Uber and TaskRabbit avoid employment obligations by categorizing their workers as “independent contractors.” Declining to follow overtime, antidiscrimination, and other workplace mandates, these platforms claim to employ no one. Applied on a grand scale, the entire project of platform labor threatens to destabilize our contemporary understanding of employment law.*

*But not all platform workers possess the characteristics of genuine independent contractors, as courts first envisioned that category. Judges did not originally formulate the independent contractor distinction to define the boundaries of workplace protections; rather, the independent contractor classification was designed to limit the liability of masters for their servants’ torts. Courts in these early cases identified certain workers—independent contractors—who possessed the skill, autonomy, and financial strength to pay for their own tortious misconduct and, accordingly, stand alone in the marketplace.*

*Today, when judges evaluate whether gig workers are “independent contractors,” they should look for the same hallmarks of commercial self-determination that originally prompted the independent contractor distinction. Fortunately, a few recent judicial decisions have embraced a simplified standard—the so-called “ABC test”—to assess whether contemporary workers are bona fide independent contractors. In contrast to more popular tests that have produced indeterminate results, the ABC standard begins with the presumption that workers who provide labor to firms are employees. If businesses want to overcome this presumption, they must prove three separate elements to show that their workers possess the marketplace strength of legitimate independent contractors. By using the ABC test to sort workers based on their economic autonomy, courts can more effectively distinguish*

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*between normal employees and the genuine independent contractors of platform work.*

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## INTRODUCTION

Soon there will be an Uber for everything. Need your room cleaned? Handy has that covered.<sup>1</sup> Want your Ikea furniture assembled? TaskRabbit can help.<sup>2</sup> Need somebody to proofread your resume? Amazon Mechanical Turk has a global army of editors at your disposal. And the workers on these

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1. See Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 509-10 (2016) (discussing the chore platform Handy).

2. See E. Gary Spitko, *A Structural-Purposive Interpretation of "Employment" in the Platform Economy*, 70 FLA. L. REV. 409, 411 (2018) (summarizing the variety of services available through on-demand platforms).

apps do more than complete simple, low-skilled tasks. From doctors, to computer programmers, to lawyers, a wide variety of workers can perform on-demand jobs at a moment's notice.<sup>3</sup>

The so-called “gig” or “platform” economy has exploded in just a few years, with recent annual growth exceeding 300 percent.<sup>4</sup> Although still relatively small as a share of the overall economy, the sectors that drive platform work are expected to jump from \$15 billion of annual revenue in 2014 to \$335 billion by 2025.<sup>5</sup> At first glance, these developments might seem like a boon to workers. In an era of ongoing social anxiety about wages and employment, platforms appear to give individuals a chance to earn extra money, while enjoying a high level of independence.<sup>6</sup> Recently, though, critics have challenged this benign image of app work.<sup>7</sup> In contrast to the notion that platforms promote worker autonomy, this alternative narrative describes the poor pay and conditions that come with gig work.<sup>8</sup> For instance, various reports have estimated that Uber drivers earn anywhere from \$3.37 to \$13.17 per hour after expenses, while other studies have described gig earnings that fall well below the minimum wage.<sup>9</sup>

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3. See Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 51-52 (2017) (examining the platform economy's rapid rate of growth).

4. See Rick Bales, *Resurrecting Labor*, 77 MD. L. REV. 1, 16-17 (2017) (discussing the relationship between platform work and other forms of precarious employment); V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 742 (2017) [hereinafter Dubal, *Winning the Battle*] (outlining the employment-related implications of gig work).

5. PRICEWATERHOUSECOOPERS, *THE SHARING ECONOMY* 14 (2015), <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf> [<https://perma.cc/74YZ-BKDC>]; see also Mark Graham & Mohammad Amir Anwar, *Two Models for a Fairer Sharing Economy*, in *THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY* 328, 330 (Nestor M. Davidson et al. eds., 2018) (discussing growth rates in the “sharing economy”).

6. See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1637 (2017) (examining gig work and narratives of worker empowerment).

7. See *id.* at 1630-31 (discussing Uber's alleged manipulation of passengers and drivers); Elizabeth C. Tippet & Bridget Schaaff, *How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459, 477 (2018) (summarizing the scholarly criticism of independent contractor designations in the platform economy).

8. See Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 SETON HALL L. REV. 393, 402-03 (2017) (comparing the status of platform workers to individuals with more stable forms of employment).

9. See Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *The Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 678-79 (2017) (discussing the challenge of earning living wages in the gig economy); Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 2017 U. CHI. LEGAL. F. 63, 77 (2017) (examining the hourly pay rates of on-demand work).

So, which is it? Does gig work represent a new labor paradigm that enables individuals to earn a living and call their own shots? Or, alternatively, do platforms utilize clever branding to mask underlying forms of worker mistreatment? Over the last several years, scholars and judges have engaged in heated exchanges on these topics.<sup>10</sup> Ultimately, these debates have centered on the paradigmatic employment law question of whether gig workers are “employees” or “independent contractors.”<sup>11</sup> American law treats employment status as an either-or proposition. Much like the on-off switch of a smartphone, the law groups most workers either as “employees” who enjoy workplace rights, or as “independent contractors” who must fend for themselves.<sup>12</sup>

Courts typically apply some version of two employment standards—the “economic realities” test or the “common law/agency” standard—to determine whether platform workers are independent contractors.<sup>13</sup> Unfortunately for gig workers, these tests typically yield inconclusive results.<sup>14</sup> Today, a decade since Uber’s founding,<sup>15</sup> judges still cannot answer the foundational question of whether Uber drivers are employees.<sup>16</sup> Scholars blame this indeterminacy on the inherent ambiguities or obsolescence of these tests.<sup>17</sup> For

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10. See V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 76-80 (2017) [hereinafter Dubal, *Wage Slave*] (noting that scholars disagree about whether courts can ever coherently distinguish between different types of platform workers); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 91 (2016) (characterizing the academic debates over the platform economy as “schismatic”).

11. See Martin H. Malin, *Protecting Platform Workers in the Gig Economy: Look to the FTC*, 51 IND. L. REV. 377, 379 (2018) (analogizing gig workers to franchisees).

12. See Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 799-80 (2018) (explaining how courts utilize employee status to determine the reach of numerous workplace protections).

13. See Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 LAW & CONTEMP. PROBS. 107, 121-22 (2018) (summarizing the primary tests used to determine employee status).

14. See Mathew T. Bodie, *Lessons from the Dramatists Guild for the Platform Economy*, 2017 U. CHI. LEGAL F. 17, 28-29 (2017) (examining the judicial confusion over gig-worker classifications).

15. See Miguel Helft, *How Travis Kalanick Is Building the Ultimate Transportation Machine*, FORBES (Dec. 14, 2016, 11:20 AM), <https://www.forbes.com/sites/miguelhelft/2016/12/14/how-travis-kalanick-is-building-the-ultimate-transportation-machine> [<https://perma.cc/7HCV-RFCD>] (discussing Uber’s growth).

16. Compare *Razak v. Uber Techs., Inc.*, No. 16-573, 2018 WL 1744467, at \*19 (E.D. Pa. Apr. 11, 2018) (granting Uber’s motion for summary judgment on the question of whether UberBLACK drivers are employees), with *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015) (ruling against Uber’s motion for summary judgment on the issue of employee misclassification).

17. See Dubal, *Wage Slave*, *supra* note 10, at 72-77 (summarizing the widespread agreement among commentators about the indeterminacy of contemporary employee standards).

example, deriving from master-servant law, today's agency test seems like an outdated way to determine the fate of Uber drivers, Handy cleaners, and TaskRabbit taskers.<sup>18</sup>

This Article explains how courts can reinvigorate existing employment standards by returning to the animating principles that initially caused courts to distinguish between “servants” (i.e., “employees”) and “independent contractors.” Judges first formulated this distinction not as a means for determining employment coverage, but rather as a method for limiting the liability of masters for their workers' tortious misconduct.<sup>19</sup> In essence, courts in these early cases identified a class of workers—independent contractors—who possessed the skill, autonomy, and financial strength to pay for their own torts and, accordingly, stand alone in the marketplace.<sup>20</sup>

Today, when judges evaluate whether gig workers are independent contractors, they should look for the same hallmarks of commercial self-determination that originally prompted courts to create the servant/independent contractor distinction. Just as the independent contractors of agency law had the financial fortitude to pay for their own torts, the “independent contractors” of the gig economy should possess analogous skill and financial autonomy. Returning to these first principles will require judges to reorient the list of factors currently used to evaluate employee status. Fortunately, a few recent judicial decisions have charted a course going forward.<sup>21</sup> Led by the California Supreme Court, these courts have embraced a simplified standard—the so-called “ABC test”—to determine whether contemporary workers are genuine independent contractors.<sup>22</sup> Rather than engage in the standard practice of multifactored balancing—a process guaranteed to yield muddled results—the ABC test begins with the presumption that most workers who

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18. See Mathew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 662 (2013) (discussing the origins of the common law's control test).

19. See MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* 136-43 (1989) (summarizing the historical development of the doctrine of vicarious employer liability); Charles W. Pierson, *A Recent Attempt to Limit the Independent Contractor Doctrine*, 8 YALE L.J. 63, 64 (1898) (discussing the history of the independent contractor distinction).

20. See generally James de Haan, *The Über-Union: Re-Thinking Collective Bargaining for the Gig Economy*, 12 CHARLESTON L. REV. 97, 103 (2017) (examining the economic self-sufficiency of independent contractors).

21. See Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L. & SOC. CHANGE 53, 83-85 (2015) (discussing various judicial applications of the ABC test for employment).

22. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 8-9 (Cal. 2018) (adopting the ABC test to consider the employment status of delivery drivers); see also *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 465 (N.J. 2015) (extending the ABC test to state wage claims).

provide labor to firms are employees. If firms want to overcome this presumption, they must prove three separate elements to establish that their workers possess the marketplace strength of legitimate independent contractors.<sup>23</sup>

Explaining how the ABC test can focus judicial attention on the first principles of the independent contractor distinction, this Article establishes a framework for assessing the status of platform workers. Part I of the Article summarizes the two dominant views of gig work: from entrepreneurial endeavor to vehicle for worker exploitation. The Article explains how recent judicial decisions on gig employment reflect these differing views. Part II examines how courts first used the independent contractor designation to identify workers who possessed a high level of skill and commercial autonomy. A search for these same characteristics can help contemporary courts distinguish between employees and bona fide independent contractors. Part III explains how the ABC test represents the most practical method for gauging the financial self-determination of gig workers. The Article concludes by discussing the test's relationship to existing standards and by anticipating several objections to the proposal.

The platform economy has ushered in a new era of worker precarity. Although various forms of insecure employment existed long before gig work, the wholesale categorization of platform workers as independent contractors threatens to dramatically widen the chasm between employees with rights and workers who have none.<sup>24</sup> By embracing the ABC test as an effective method for identifying bona fide independent contractors, courts can bring much-needed clarity to contemporary debates over the status of gig workers.

## I. DIFFERING ASSESSMENTS OF PLATFORM WORK IN THE LAW

Does Uber represent a paradigm shift in the relationship between workers and firms? On one hand, the ride-hailing app's decision to characterize its drivers as "independent contractors" seems like just another example of

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23. See John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 27-28 (2018) (summarizing the ABC test).

24. See Bales, *supra* note 4, at 16-17 (explaining how gig work has accelerated the erosion of workplace rights).

the U.S. labor market's ongoing shift toward precarious work arrangements.<sup>25</sup> For example, firms today often avoid calling their workers "employees," instead labeling them "freelancers" or "on-call workers."<sup>26</sup> If on-demand work simply represents a continuation of this pattern, then existing legal tests should be capable of ferreting out instances of employee misclassification in the gig economy. After all, ten to thirty percent of employers already misclassify their employees by designating them as "independent contractors" when they are not.<sup>27</sup> Given the widespread nature of the problem in other industries, courts might already possess the tools to assess allegations of employee misclassification in the platform economy.<sup>28</sup> The solution, according to this view, is simply to clarify and enforce existing standards.

But there is also a competing view that on-demand labor represents a fundamental change in the nature of work. Uber and other platforms claim that they are "technology companies" that do not employ the workers who perform their services.<sup>29</sup> If true, then gig work raises unique employment issues that might require distinct legal treatment. This section evaluates these two views of platform work and considers how legislatures and courts have reached vastly different answers to these questions. As explained below, to break this stalemate, judges cannot robotically apply prevailing employment tests. Ultimately, to effectively distinguish app employees from bona fide independent contractors, contemporary courts must ask the same question that initially sparked the independent contractor designation: Do today's "independent contractors" possess sufficient skill and economic autonomy to stand alone in the marketplace?

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25. See Lobel, *supra* note 10, at 131 (examining the expansion of contingent work arrangements).

26. LAWRENCE F. KATZ & ALAN B. KRUEGER, *THE RISE AND NATURE OF ALTERNATIVE WORK ARRANGEMENTS IN THE UNITED STATES 1995-2015* 1, 7 (2016), <https://www.nber.org/papers/w22667.pdf> [<https://perma.cc/3XDX-CTRT>] (discussing the growth of alternative worker designations in the U.S. labor force).

27. See SARAH LEBERSTEIN & CATHERINE RUCKELSHAUS, *INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT* 4 (2016); Pearce & Silva, *supra* note 23, at 14 (summarizing employment misclassification studies).

28. See Bodie, *supra* note 14, at 27-28 (citing various examples of individuals who maintain an ambiguous employment relationship with the firms that hire them).

29. See Julia Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 *HOFSTRA LAB. & EMP. L.J.* 1, 13 n.85 (2016) [hereinafter Tomassetti, *Does Uber Redefine the Firm?*] (outlining Uber's claim that it does not provide transportation services).



## A. APP WORK AND THE GROWTH OF RIGHTS INEQUALITY

More and more Americans work without the protections of basic employment rights.<sup>30</sup> Since at least the 1970s, U.S. companies have responded to post-industrialization by disclaiming their status as employers.<sup>31</sup> Because employment rights such as overtime and antidiscrimination protections attach only to “employees,” firms have offloaded these responsibilities to third parties (e.g., subcontractors and employment agencies) and to the workers themselves as “independent contractors.”<sup>32</sup> The results of this decades-long project are striking. From 2005 to 2015, *nearly all new net job growth* came from “alternative work arrangements” (temp workers, on-call workers, contract workers, and freelancers).<sup>33</sup>

Although scholars and commentators have paid critical attention to the problem of income inequality in the United States, the growing disparity between workers with and without employment rights has garnered far less notice.<sup>34</sup> Yet the two problems are interrelated. Because independent contractors receive fewer economic guarantees from firms (e.g., overtime, minimum wages, health insurance, unemployment insurance, workers’ compensation), the growth of independent contractor classifications necessarily erodes basic income protections as well.<sup>35</sup> As such, the dividing line between the “haves” and “have nots” in the labor market not only groups people by income and wealth, but also by the level of workplace protections that they enjoy.

Enter platform work. The “gig” or “platform” economy refers to marketplaces that utilize web-connected technologies to link customers and suppliers on a large, disaggregated scale.<sup>36</sup> Not every transaction that occurs

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30. See Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315, 358 (2014) [hereinafter Tomassetti, *Contracting/Producing Ambiguity*] (discussing the contention that employment laws have failed to keep pace with post-industrial work).

31. See Dubal, *Winning the Battle*, *supra* note 4, at 749-50 (examining restructured workplace relationships).

32. See Bales, *supra* note 4, at 16-17 (discussing the growth of contingent work arrangements).

33. KATZ & KRUEGER, *supra* note 26, at 7 (“A striking implication of these estimates is that all of the net employment growth in the U.S. economy from 2005 to 2015 appears to have occurred in alternative work arrangements.”).

34. See generally Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET* 31 (Annette Bernhardt et al. eds., 2008) (calling for increased critical attention to the problem of rights inequality); Tomassetti, *Contracting/Producing Ambiguity*, *supra* note 30, at 357 (discussing the misalignment of law and work).

35. See Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1514-15 (2016) (discussing the economic rights of employees).

36. See Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1572-73 (2018) (distinguishing between different sectors within the gig economy).

through these marketplaces raises employment law issues. For example, when parties sell or lease assets (e.g., Airbnb), no obvious employment relationship arises because the transactions do not primarily involve an exchange of capital and labor.<sup>37</sup> As such, the employment law issues created by the platform economy involve a subset of firms that market labor-intensive services to customers.<sup>38</sup> The gig sectors that most clearly raise workplace issues include transportation and delivery (e.g., Uber, Lyft, Amazon Flex, Grubhub, etc.), chores and housework (e.g., TaskRabbit, Handy, etc.), and crowdwork (e.g., Amazon Mechanical Turk, Upwork, Freelancer, etc.).<sup>39</sup>

Given that most platforms designate their service providers as “independent contractors,”<sup>40</sup> critics claim that gig work represents just another example of the labor market’s downward slide toward unstable work.<sup>41</sup> Indeed, despite marketing campaigns that tout the high wages and freedom of on-demand work, emerging evidence on gig labor has highlighted the precarious nature of certain forms of platform work.<sup>42</sup> For instance, the lack of decent pay remains a constant problem in this sector.<sup>43</sup> The gig economy’s typical payment structure, which compensates workers by the job, rather than by the hour, has yielded sub-minimum wages for some workers.<sup>44</sup> For example, one on-demand driver in California alleged that he earned \$2.64 per hour while

37. See *id.* (discussing various forms of platform-based transactions).

38. See Das Acevedo, *supra* note 12, at 806 (utilizing the term “platform” to refer to service-related transactions in the “sharing economy”).

39. See Graham & Anwar, *supra* note 5, at 330 (discussing various subcategories of platform work).

40. See generally Erez Aloni, *Capturing Excess in the On-Demand Economy*, 39 U. HAW. L. REV. 315, 336-37 (2017) (outlining the savings that gig firms enjoy by classifying workers as independent contractors); Dubal, *Winning the Battle*, *supra* note 4, at 741 (noting that venture capitalists have invested billions of dollars in the independent contractor business model of the gig economy); Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 680 (2008) (describing varying levels of employment compliance among firms within the same industry). *But see* Cherry & Aloisi, *supra* note 9, at 684 (listing several platforms that have classified their workers as employees).

41. See generally Cherry & Aloisi, *supra* note 9, at 638-39 (discussing the casualized nature of modern work); Dubal, *Winning the Battle*, *supra* note 4, at 751-52 (arguing that platforms “build upon and exacerbate the prevalence of the fissured workplace”); see also The Aspen Inst. Future of Work Initiative & Cornell Univ. Sch. of Indus. & Labor Relations, *What Is the Future of Gig Work?*, GIG ECONOMY DATA HUB, <https://www.gigeconomydata.org/basics/what-future-gig-work> [<https://perma.cc/U5PJ-4H8Q>] (situating platform work within the framework of larger economic trends).

42. See Oei, *supra* note 13, at 109 (explaining how platforms emphasize the high level of independence that workers enjoy).

43. See Cherry & Aloisi, *supra* note 9, at 678-79 (discussing the conditions of platform work).

44. See *id.* (examining the low pay that comes with certain on-demand jobs).

working for Uber and Lyft, while another Amazon Turker reportedly earned \$1.94 per hour for labeling images online.<sup>45</sup>

In addition to minimum wage problems, overtime compensation is unheard of in the industry. Thus, even though on-demand firms create incentives for individuals to work longer hours—Lyft rewards its “Power Drivers” who work more and Uber utilizes behavioral science to motivate workers to drive longer—individuals who work more than forty hours per week do not receive overtime.<sup>46</sup> Adding to the financial precarity of gig work, platforms that utilize the “independent contractor” designation do not contribute to Social Security, Medicare, or unemployment insurance.<sup>47</sup> Likewise, the independent contractors of the gig economy have no federal right to employer-sponsored healthcare.<sup>48</sup>

Beyond the lack of benefits and wage protections associated with gig labor, most workplace antidiscrimination protections do not apply to independent contractors.<sup>49</sup> This coverage gap is especially alarming given that customers can provide biased reviews, which may ultimately lead to discharge (i.e., “deactivation”). The customer rating systems that platforms typically use have no obvious mechanism for rooting out reviewers’ discriminatory animus based on race, gender, sexual orientation, disability, religion, or

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45. See LEBERSTEIN & RUCKELSHAUS, *supra* note 27, at 3; Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 601-02 (2016) (discussing the experience of an Amazon Turker who received five cents for every fifty-five clicks of labeled images).

46. See Aloni, *supra* note 40, at 351 (examining schedule-based incentives in the gig economy); Ariel Dobkin, *Information Fiduciaries in Practice: Data Privacy and User Expectations*, 33 BERKELEY TECH. L.J. 1, 23 (2018) (explaining how Uber encourages “goal achievement” among drivers).

47. See Richard R. Carlson, *Employment by Design: Employees, Independent Contractors and the Theory of the Firm*, 71 ARK. L. REV. 127, 131 (2018) [hereinafter Carlson, *Employment by Design*] (discussing the tax consequences of platform employment); Paul M. Secunda, *Uber Retirement*, 2017 U. CHI. LEGAL F. 435, 448 (2017) (same).

48. See Maryalene LaPonsie, *5 Companies That Offer Benefits to Gig Workers*, U.S. NEWS MONEY (Aug. 23, 2018, 12:01 PM), <https://money.usnews.com/careers/salaries-and-benefits/articles/2018-08-23/5-companies-that-offer-benefits-to-gig-workers>[<https://perma.cc/U9B9-FWCY>]; see also Lydia DePillis, *Gig Economy Workers Need Benefits. These Companies Are Popping up to Help*, CNN BUS. (Aug. 23, 2018, 7:41 AM), <https://money.cnn.com/2018/08/23/technology/gig-economy-worker-benefits/index.html> [<https://perma.cc/R7HR-DFVJ>] (discussing gig workers and employment benefits).

49. See Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 143-44 (2010) (outlining coverage issues under federal antidiscrimination protections).

other protected characteristics.<sup>50</sup> Because nearly all workplace antidiscrimination protections exclude independent contractors from coverage, platform workers cannot claim these rights even when customers give them poor reviews based on conscious or unconscious biases.<sup>51</sup>

Despite the shortcomings of platform labor, however, many individuals still expose themselves to the risks and rewards that come with this type of work. For instance, Gallup estimates that thirty-six percent of U.S. workers “have a gig work arrangement in some capacity.”<sup>52</sup> In contrast to the typical image of on-demand workers who earn extra cash through “side hustles,” many gig laborers bet their livelihoods on this type of work.<sup>53</sup> For example, roughly one quarter of gig workers generate seventy-five percent of their earnings from platform labor.<sup>54</sup> Surveys of Uber drivers have shown that forty percent have no other job and/or rely on the platform for their primary income.<sup>55</sup> In New York City, nearly two-thirds of Uber drivers work for the platform on a full-time basis.<sup>56</sup>

Given the various instances of personal and financial exposure that come with gig work, the question remains what role, if any, employment law should play in regulating these interactions. Critics charge that platforms have illegitimately “hacked” workplace protections.<sup>57</sup> But gig firms assert that the old rules of employment law simply do not apply to this emerging sector. Highlighting the autonomy and entrepreneurship that come with on-

50. See Calo & Rosenblat, *supra* note 6, at 1627 (examining problems of unconscious bias in the gig economy); Miriam A. Cherry, *Are Uber and Transportation Network Companies the Future of Transportation (Law) and Employment (Law)?*, 4 TEX. A&M L. REV. 173, 191 (2017) (same).

51. See Menetrez, *supra* note 49, at 143-44 (discussing the exclusion of independent contractors from workplace protections).

52. Shane McFeely & Ryan Pendell, *What Workplace Leaders Can Learn from the Real Gig Economy*, GALLUP (Aug. 16, 2018), <https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx> [<https://perma.cc/9AGN-Q5DF>].

53. See Alex Kirven, Comment, *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 263 (2018) (examining platform workers' earnings).

54. See Pearce & Silva, *supra* note 23, at 30-31 (explaining how some workers rely on platform-generated income, while others do not).

55. See Aloni, *supra* note 40, at 326 (discussing varying levels of dependence on platform work).

56. See William B. Gould IV, *Dynamex Is Dynamite, but Epic Systems Is Its Foil—Chamber of Commerce: The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 996 (2019) (examining worker reliance on gig-generated income).

57. See Charlotte S. Alexander & Elizabeth Tippet, *The Hacking of Employment Law*, 82 MO. L. REV. 973, 977 (2017) (distinguishing between various forms of regulatory hacks, only some of which technically violate the law); Tippet & Schaaff, *supra* note 7, at 462; see also Calo & Rosenblat, *supra* note 6, at 1645-46 (discussing the assertion made by critics that platforms engage in “regulatory arbitrage”).

demand work, they disclaim sharing any sort of employment relationship with individuals who work through their apps.<sup>58</sup> Before examining how legislatures and courts have responded to these assertions, this popular claim of platform exceptionalism must first be explored.

#### B. BEYOND THE REACH OF EMPLOYMENT LAW: THE LANGUAGE OF PLATFORM EXCEPTIONALISM

Platforms argue that just as their business models differ from legacy companies, their relationships with workers differ as well. Bolstering their public image as innocuous go-betweens, platforms have adopted branding strategies that characterize on-demand firms as “intermediaries,” rather than as “employers.” By emphasizing the neutrality and dynamism of gig work, this linguistic tactic helps build public support for a certain policy response that this Article calls “platform exceptionalism”—the notion that the distinctive nature of on-demand work warrants distinct legal treatment.<sup>59</sup>

Rather than “employ” individuals, on-demand companies claim to act as intermediaries that connect customers to independent service providers.<sup>60</sup> Much like a credit-card processor that neutrally facilitates transactions, most platforms disclaim employment-related obligations to workers.<sup>61</sup> For example, the on-demand meal company Grubhub has denied its status as a “food delivery service,” instead claiming that it is a “technology company that connects restaurants with independent delivery partners . . . .”<sup>62</sup> Grubhub calls drivers “Delivery Service Provider[s]” who operate their own “independent business of providing delivery services.”<sup>63</sup> Similarly, Lyft says that it provides “software” to customers, and Uber claims that it is a “technology company” that provides “referral service[s]” to drivers so that they can find

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58. See Dubal, *Winning the Battle*, *supra* note 4, at 741-43 (exploring the “independent contractor business models” of on-demand firms).

59. See Julia Tomassetti, *Digital Platform Work as Interactive Service Work*, 22 EMP. RTS. & EMP. POL’Y J. 1, 2-3 (2018) (examining the relationship between the rhetoric of gig firms and public policy outcomes).

60. See SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 6 (2015) (listing several on-demand companies that act as intermediaries between buyers and sellers).

61. See Calo & Rosenblat, *supra* note 6, at 1637 (examining how platforms emphasize the freedom and flexibility that they offer to workers). *But see* NAT’L EMP’T L. PROJECT, EMPLOYERS IN THE ON-DEMAND ECONOMY 1 (2016) (listing platforms such as Instacart that classify their workers as employees).

62. See Oei, *supra* note 13, at 127 (critiquing the rhetoric used to describe gig transactions).

63. *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d. 1071, 1074 (N.D. Cal. 2018).

“leads” or “users.”<sup>64</sup> Uber’s contract with drivers helps reinforce this narrative: “You acknowledge and agree that Company is a technology service provider that does not provide transportation services.”<sup>65</sup>

Beyond transportation and delivery, other on-demand sectors also utilize stylized language to deemphasize the underlying labor that workers exert. Consider, for example, Amazon Mechanical Turk, the so-called “online marketplace for work.”<sup>66</sup> The platform allows subscribing parties to post projects to its website (e.g., photo tagging, completing surveys, computer programming, etc.) that contain their own performance deadlines and compensation rates.<sup>67</sup> Those who post projects are called “requesters” and the individuals who ultimately perform the work are known as “contributors” or “Turkers.”<sup>68</sup> Amazon Mechanical Turk, like most platforms, omits the word “employee” from its terms of service.<sup>69</sup> Likewise, TaskRabbit’s user agreement labels workers as “taskers” and states in all caps: “COMPANY DOES NOT PERFORM TASKS AND DOES NOT EMPLOY INDIVIDUALS TO PERFORM TASKS.”<sup>70</sup> Embracing analogous phrasing, Handy calls its home cleaners “independent [p]rofessionals” and states that “Handy is not the employer of any Professional.”<sup>71</sup>

Even the terms “platform” and “gig” deemphasize the labor involved in these transactions. Whereas observers can spot the inaccuracy of older terminology like the “sharing economy”<sup>72</sup> (i.e., there is very little “sharing” that actually occurs in the “sharing economy”), more recent terms such as “platform” and “gig” also minimize the role that the firms play in structuring their

64. See Calo & Rosenblat, *supra* note 6, at 1637 (analyzing Uber’s linguistic choices).

65. *Technology Services Agreement*, RASIER, LLC (Dec. 11, 2015), [https://s3.amazonaws.com/uber-regulatory-documents/country/united\\_states/RASIER%20Technology%20Services%20Agreement%20December%202015.pdf](https://s3.amazonaws.com/uber-regulatory-documents/country/united_states/RASIER%20Technology%20Services%20Agreement%20December%202015.pdf) [<https://perma.cc/WDA8-ZT7J>].

66. See Alexander & Tippett, *supra* note 57, at 1003-04 (discussing the functions of Amazon Mechanical Turk).

67. See Dau-Schmidt, *supra* note 9, at 76 (outlining various forms of crowdsourced work).

68. See Elizabeth Tippett, *Employee Classification in the United States*, in *THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY* 291, 299 (Nestor M. Davidson et al. eds., 2018) (examining how rating systems affect worker retention in the platform economy); Alexander & Tippett, *supra* note 57, at 1003-04 (summarizing the terminology used by Amazon Mechanical Turk).

69. See generally Secunda, *supra* note 47, at 436 (outlining independent contractor designations in the gig economy).

70. *TaskRabbit Terms of Service*, TASKRABBIT (Sept. 4, 2018), <https://www.taskrabbit.com/terms> [<https://perma.cc/5G7L-HEBK>].

71. *Terms of Use/User Agreement*, HANDY (Jan. 25, 2019), <https://www.handy.com/terms> [<https://perma.cc/D7SL-GVN5>].

72. See Lobel, *supra* note 10, at 105 (outlining certain critiques of “sharing” terminology in the gig economy).

relationship with workers. A “platform” is a passive agent that merely facilitates transactions between customers and service providers.<sup>73</sup> Rather than hire or fire workers, “platforms” quietly operate in the background. Similarly, terms such as “gigs,” “tasks,” and “rides” obscure the work that individuals perform or the role that employment law should play in regulating this work.<sup>74</sup>

While gig firms downplay the role of labor in the platform economy, other variants of “gig talk” call attention to the freedom and flexibility that individuals enjoy.<sup>75</sup> According to this frame, the “micro-earners” of the platform economy take advantage of underutilized time to earn discretionary income that can supplement existing revenue streams.<sup>76</sup> These self-directed gig workers choose how much to work and when to work. By interfering with the exceptional freedom that these entrepreneurs enjoy, workplace protections seem to unduly disrupt their autonomy.

According to the language of platform exceptionalism, labor laws not only intrude on the individualism of entrepreneurs, they undermine benefits to the public as well. As disrupters of entrenched business interests, platforms claim to increase efficiencies through peer-to-peer transactions that eliminate bloated corporate monopolies.<sup>77</sup> Utilizing technological advances to harness excess capacity, on-demand companies claim to offer superior services at lower prices, as compared to legacy firms. This “win-win” not only helps sellers monetize available labor, but also helps consumers engage in trust-based transactions with strangers who willingly provide needed services.<sup>78</sup> By emphasizing the connectivity that platforms harness, this narrative creates little space for regulatory interventions that might undermine the value of gig-based transactions.

As the foregoing discussion demonstrates, the two narratives of gig work—one based in worker abuse and one based in individual autonomy—give rise to two very different views about how the law should deal with this

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73. See Tomassetti, *Does Uber Redefine the Firm?*, *supra* note 29, at 34 (examining how the “idiom of technology” deemphasizes the role that labor plays in platform work).

74. See Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdfund, and Labor Protection in the “Gig-Economy,”* 37 *COMP. LAB. L. & POL’Y J.* 471, 477-78 (2016) (noting the absence of terms like “labor” and “worker” in discussions about the gig economy).

75. See Oei, *supra* note 13, at 126 (explaining how “gig talk” speaks “directly to many of the current legal ambiguities confronting this new sector”).

76. See Aloni, *supra* note 40, at 321-22 (discussing the connection between platform rhetoric and public policy).

77. See Lobel, *supra* note 3, at 52-53 (examining the possible efficiencies of platform transactions).

78. See Calo & Rosenblat, *supra* note 6, at 1635-37 (discussing the values of freedom and flexibility that platforms espouse).

emerging sector of the workforce. Should courts curb instances of mistreatment by extending employment rights to gig workers? Or is platform work so categorically unique that workplace protections will hamper ongoing innovations? As the next section discusses, the responses from legislatures and courts have swung wildly between these two poles. This indeterminacy underscores the need for a coherent framework that can effectively evaluate the status of platform workers.

### C. TWO VIEWS OF APP WORK BY LEGISLATURES AND COURTS

Gig workers have not shied away from suing platforms for allegedly misclassifying them as independent contractors. Uber drivers have filed at least twenty-eight federal class actions and over ten thousand arbitration demands.<sup>79</sup> Although claims against other platforms have generated less attention, workers have sued Grubhub, Lyft, Postmates, and Washio, while Handy, DoorDash, and Caviar have arbitrated misclassification claims.<sup>80</sup> Despite the proliferation of such cases, however, the employment status of gig workers remains unsettled.<sup>81</sup>

Commentators have blamed this indeterminacy on the deficiencies of existing employment standards.<sup>82</sup> As noted above, courts use two primary tests—the common law/agency standard and the economic realities test—to define employment.<sup>83</sup> Varying somewhat by jurisdiction, each standard contains a range of nonbinding factors that courts balance at their discretion.<sup>84</sup>

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79. See Michael J. Bologna, *New Wage Payment Class Actions Filed Against Uber*, BNA—LAB. REL. WK. (June 29, 2017), <https://convergenceapi.bna.com/ContentItem/ArticlePublic/24507648000000197/303068?ReportGuid=57E36B2B-FA4E-420D-8F4C-708F9ACD0EB7?emailaddress=libraryer@winston.com> [<https://perma.cc/E5LZ-V573>]; Charlotte Garden, *Uber and Lyft Drivers Turn the Tables on Individual Arbitration*, ON LAB. (Jan. 8, 2019), <https://onlabor.org/uber-and-lyft-drivers-turn-the-tables-on-individual-arbitration> [<https://perma.cc/ME9C-RLPT>]; see also Tomassetti, *Does Uber Redefine the Firm?*, *supra* note 29, at 3-4 (examining the legal identity of on-demand drivers in misclassification litigation).

80. See Bodie, *supra* note 14, at 18 (recognizing the unresolved nature of employment classifications in the gig economy); Lobel, *supra* note 3, at 60 (discussing various misclassification cases involving platforms).

81. See Dubal, *Winning the Battle*, *supra* note 4, at 757-58 (outlining the ambiguous relationship between gig work and employee status).

82. See Timothy P. Glynn, *Taking the Employer out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 216-17 (2011) (discussing the scholarly criticism of various employment standards); see also Tomassetti, *Contracting/Producing Ambiguity*, *supra* note 30, at 335 (summarizing critiques of the common law test and economic realities standard).

83. See *supra* text accompanying notes 13-14; Alexander & Tippett, *supra* note 57, at 1008 (discussing the role that an employer's control over workers plays in each analysis).

84. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (summarizing various articulations of the common law standard); Sec'y of Labor, U.S. Dep't of Labor



Although the two tests differ in name and statutory origin, judges frequently confuse the tests by intermingling certain factors, while ignoring others.<sup>85</sup> In the wake of various attempts by judges to apply these standards to gig workers, two trends have emerged. During the early years of gig-worker litigation, courts generally rejected the rhetoric of platform exceptionalism and ruled against on-demand firms. More recently, however, other judges have embraced the language of autonomy and entrepreneurship that platforms espouse. This section considers each trend in turn.

### *1. Judicial Skepticism of Gig Workers as Independent Contractors*

Platforms did not fare particularly well when workers first sued them for misclassification.<sup>86</sup> During this early round of cases, courts generally rejected the common claims made by on-demand firms that they were “software companies” rather than providers of underlying services.<sup>87</sup> For example, in *O’Connor v. Uber Techs., Inc.*, a federal court in California dismissed Uber’s assertion that the platform “owns no vehicles” and “employs no drivers.”<sup>88</sup> In ruling against the ride-hailing firm, the *O’Connor* court found that Uber dictated drivers’ pay, held them to detailed requirements, and controlled their work performance.<sup>89</sup>

Uber’s competitor, Lyft, also lost an early misclassification decision in *Cotter v. Lyft*,<sup>90</sup> when a federal court characterized as “obviously wrong” Lyft’s assertion that it was “merely a platform, and that drivers perform[ed] no service for Lyft.”<sup>91</sup> But even though it rebuffed Lyft’s attempt to disclaim its role as a transportation provider, the *Cotter* court acknowledged the high level of freedom that drivers enjoyed: “Lyft drivers can work as little or as much as they want, and can schedule their driving around their other activities.”<sup>92</sup> On balance, though, the *Cotter* court held that this freedom did not

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v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987) (listing economic realities factors); see also Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187, 207-08 (1999) (critiquing the judicial application of economic realities factors).

85. See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 326-29 (2001) (describing the overlap in factors between the common law and economic realities tests).

86. See Lobel, *supra* note 3, at 58-60 (noting that early classification decisions tended to side with gig workers).

87. See Cherry, *supra* note 50, at 182 (explaining how courts have identified the “central role” that transportation plays in the business models of ride-hailing apps).

88. *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) (summarizing Uber’s assertion that the company does not employ its drivers).

89. *Id.* at 1151-52.

90. *Cotter v. Lyft*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

91. *Id.* at 1078.

92. *Id.* at 1069.

automatically transform Lyft drivers into independent contractors. Finding that Lyft controlled drivers' earnings and threatened drivers with "deactivation," the court allowed the plaintiffs' overtime and minimum wage claims to proceed.<sup>93</sup>

In addition to *O'Connor* and *Cotter*—the two most significant defeats that platforms suffered during the initial phase of misclassification litigation—Uber lost various rulings at the state administrative level. For instance, California's Labor Commissioner rejected Uber's contention that the platform merely mediated transactions between peers: "Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation. The reality, however, is that Defendants are involved in every aspect of the operation."<sup>94</sup> Echoing this sentiment, the Oregon Bureau of Labor and Industries found that Uber drivers were employees because the platform unilaterally established fares and monitored drivers' performance, among other factors.<sup>95</sup>

In sum, during the first wave of claims brought against gig companies, decisionmakers declined to embrace the rhetoric of platform exceptionalism. Instead, these decisions focused on the practical forms of control that on-demand transportation companies retained over drivers. But even then, ride-hailing apps were able to limit the fallout from their judicial losses: Uber's dispute with California drivers in *O'Connor* went to arbitration<sup>96</sup> and Lyft settled the *Cotter* case before any court ruled definitively on the drivers' status.<sup>97</sup> Nevertheless, the overall significance of these decisions, combined with losses at the state administrative level, signaled a shift toward workers and against platforms.<sup>98</sup> In contrast to these early developments, however, more recent judicial decisions have begun to embrace the language of platform exceptionalism and the idea that employment protections have no place in the gig economy.

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93. *Id.* at 1079.

94. Order, *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at \*6 (Cal. Labor Comm'r June 3, 2015).

95. The Employment Status of Uber Drivers, Advisory Opinion (Or. Bureau of Labor & Indus. Oct. 14, 2015).

96. *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102 (9th Cir. 2016), *superseded by* 848 F.3d 1201 (9th Cir. 2016); *see also* Oei, *supra* note 13, at 130-31 (discussing Uber and Lyft litigation).

97. *See* Oei, *supra* note 13, at 130 (summarizing the \$27 million settlement that Lyft reached with California drivers in 2017).

98. *See* Secunda, *supra* note 47, at 450 (discussing losses by Uber at the national and international levels).

## 2. Independence Returns: Courts and Legislatures Embrace Autonomy Narrative

The misclassification litigation landscape for platforms has improved dramatically in recent years. In contrast to earlier decisions, these more recent determinations have emphasized the individualism and self-determination that come with platform work.

Uber won its largest misclassification victory to date when a federal court in Pennsylvania recently ruled in favor of the platform.<sup>99</sup> The plaintiffs in *Razak v. Uber Technologies, Inc.*<sup>100</sup> drove for UberBLACK, the platform's limousine service. Reviewing the drivers' claims for unpaid overtime and minimum wages, the *Razak* court noted that Uber was "greatly popular with consumers."<sup>101</sup> Echoing the language of platform exceptionalism and the need for courts to tread lightly in the evolving world of on-demand labor, the *Razak* court explained how Uber represented "a novel form of business that did not exist at all ten years ago . . . ."<sup>102</sup> Intermingling the vernacular of technology, independence, and opportunity, the court referred to the "[i]ndependent transportation companies" that the plaintiffs had created and explained how those firms entered into "Software License and Online Service Agreement[s]" with Uber.<sup>103</sup> Although the *Razak* decision acknowledged that Uber provided more than just "software" to drivers, the opinion still used technology-focused terms to describe the company: "Uber's drivers depend on Uber's technology in getting jobs."<sup>104</sup> Highlighting the extreme freedoms that the limousine drivers enjoyed while using Uber's software, the court declined to categorize the platform as an employer.<sup>105</sup>

In addition to successfully disclaiming wage-related responsibilities in *Razak*, Uber has attempted to deny unemployment benefits to drivers as well. This campaign has yielded mixed results. For example, a New York unemployment insurance board recently ruled against the platform, holding that "Uber exercised sufficient supervision, direction, and control . . . such that an employer-employee relationship was created."<sup>106</sup> In contrast, a Florida court ruled in favor of the ride-hailing company, finding that "Uber is a tech-

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99. *Razak v. Uber Techs., Inc.*, CV 16-573, 2018 WL 1744467, at \*1 (E.D. Pa. Apr. 11, 2018) (noting that the decision was the first to grant summary judgment against UberBLACK drivers).

100. *Id.*

101. *Id.* at \*13 n.17.

102. *Id.*

103. *Id.* at \*5.

104. *Razak*, 2018 WL 1744467, at \*19.

105. *Id.*

106. *In re* [Redacted], ALJ Case No. 016-23858, at 9, 10 (N.Y. Unemployment Insurance App. Board June 9, 2017).

nology platform that connects drivers with paying customers seeking transportation services.”<sup>107</sup> Echoing the language of platform exceptionalism, the Florida court marveled at the “transformative nature of the internet and smartphones” and explained how Uber provided users with “transportation network software.”<sup>108</sup> Given the freedom that Uber’s technology afforded to drivers, the Florida court declined to hold Uber responsible for its drivers’ unemployment benefits.<sup>109</sup>

This recent spate of victories has extended beyond the ride-hailing sector. In *Lawson v. Grubhub*, a driver unsuccessfully attempted to collect overtime from the meal delivery platform Grubhub. Adopting the vernacular of platform exceptionalism, the *Lawson* court described Grubhub as “an internet restaurant ordering platform that connects diners with participating restaurants.”<sup>110</sup> The court discussed the freedoms that come with gig work, noting that the plaintiff in the case had previously worked for Lyft, Uber, Postmates, and Caviar: “He drove for these companies, including Grubhub, because the flexible scheduling allowed him to pursue his acting career.”<sup>111</sup> Indeed, the court anchored its independent contractor determination in the autonomy of platform work: “Grubhub could not make him work and could not count on him to work.”<sup>112</sup> Outlining Grubhub’s status as a “platform” and the driver’s overall freedom, the *Lawson* court rejected the plaintiff’s wage claims.<sup>113</sup>

Whereas judges in misclassification litigation have differed on whether workers enjoy genuine freedom in the gig economy, state legislatures have more consistently embraced the concept of platform exceptionalism. Apart from a few instances of protective legislation in cities like New York, which established a minimum hourly wage of \$17.22 for on-demand drivers,<sup>114</sup> and Seattle, which attempted to extend unionization rights to the same group,<sup>115</sup> most new regulations involving gig workers have hewed closely to the industry’s autonomy narrative. For instance, twenty-five state legislatures have

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107. *McGillis v. Dept. of Econ. Opportunity*, 210 So. 3d 220, 221 (Fla. 3d Dist. App. 2017); *see also* Cherry, *supra* note 50, at 189 (discussing different outcomes in unemployment compensation determinations).

108. *McGillis*, 210 So. 3d at 226.

109. *Id.*

110. *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1090 (N.D. Cal. 2018).

111. *Id.* at 1073-74.

112. *Id.* at 1085.

113. *Id.* at 1093.

114. *See* Ginia Bellafante, *Uber and the False Hopes of the Sharing Economy*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/uber-nyc-vote-drivers-ride-sharing.html> [<https://perma.cc/YW5M-LK8C>] (examining the conditions of platform work).

115. *See* Gould, *supra* note 56, at 997-98 (discussing the efforts by Seattle and New York City to extend rights to platform drivers).

passed laws that treat on-demand drivers as nonemployees.<sup>116</sup> Conversely, no state has extended full employment rights to platform workers.<sup>117</sup>

In enacting legislation that excludes on-demand drivers from standard workplace protections, lawmakers have spoken about the freedom and opportunity that come with gig work. For example, when Florida passed Uber-backed legislation that denied drivers employment rights, one lawmaker said that the law helped drivers “make their own choices about employment.”<sup>118</sup> Another Florida representative pointed to the “strong desire for this innovative and free-market service,” which provided drivers with “an extra source of income to help make ends meet.”<sup>119</sup> In Ohio, Uber championed the bipartisan passage of a bill that denied employment rights to drivers by saying, “[D]river-partners can continue to benefit from the flexible income-earning opportunities they enjoy on the Uber platform.”<sup>120</sup> And in Alaska, after the state enacted pro-Uber legislation, one representative said, “Drivers can work when, where[,] and how they want, which is why it makes sense to allow them to work as independent contractors.”<sup>121</sup> In these and other instances, legislatures have rushed to pass laws that emphasize the autonomy of gig work, thereby creating a separate legal space for platform workers that exists beyond the reach of workplace protections.<sup>122</sup>

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116. See JOY BORKHOLDER ET AL., *UBER STATE INTERFERENCE: HOW TRANSPORTATION NETWORK COMPANIES BUY, BULLY, AND BAMBOOZLE THEIR WAY TO DEREGULATION* 13 (2018) (summarizing legislative changes affecting transportation network companies such as Uber).

117. See Dubal, *Winning the Battle*, *supra* note 4, at 754-55 (examining legislative trends that favor companies in the gig economy).

118. See Heather Sommerville & Dan Levine, *U.S. States Pass Laws Backing Uber's View of Drivers as Contractors*, REUTERS (Dec. 10, 2015), <https://www.reuters.com/article/us-uber-statalaws-idUSKBN0TT2MZ20151210> [<https://perma.cc/KDA7-Z4PW>] (discussing gig worker legislation).

119. See *Florida House, Senate Pass Rideshare Legislation with Overwhelming Support*, FLA. TREND (Apr. 19, 2017), <https://www.floridatrend.com/article/21980/florida-house-senate-pass-rideshare-legislation-with-overwhelming-support> [<https://perma.cc/W5CG-QPRK>] (summarizing bipartisan support of legislation regulating transportation platforms).

120. See Fatima Hussein, *Uber, Lyft Will Be Regulated in Ohio*, CIN. ENQUIRER (Dec. 23, 2015), <https://www.cincinnati.com/story/money/2015/12/23/uber-lyft-regulated-ohio/77825012/> [<https://perma.cc/CP3L-9BMR>] (defining a transportation network company as a service that “relies on software to connect passengers to rides”).

121. See Suzanne Downing, *Ridesharing Bill Passes, Making Way for Uber, Lyft, MUST READ ALASKA* (May 17, 2017), <http://mustreadalaska.com/ridesharing-bill-passes-uber-lyft/> [<https://perma.cc/7N8V-CKUZ>]; see also Dubal, *Winning the Battle*, *supra* note 4, at 756 (discussing how Alaska exempted on-demand transportation companies from workers' compensation regulations).

122. See Dubal, *Winning the Battle*, *supra* note 4, at 756-57 (explaining how legislative developments have put increased pressure on misclassification cases to address gig-workplace problems).

## II. VICARIOUS LIABILITY: ORIGINS OF THE INDEPENDENT CONTRACTOR EXCLUSION

In the midst of sharp disagreements over the status of gig workers—with some courts focusing on worker exploitation and other judges and legislators embracing the idea of platform exceptionalism—misclassification litigation continues to proliferate throughout the country.<sup>123</sup> But despite the confusion over the issue, judges in these cases agree on three basic ground rules. First, to claim nearly any employment right, gig workers must prove that they are “employees” and not “independent contractors.”<sup>124</sup> Second, absent some contrary statutory directive, courts use the common law understanding of “employee” to categorize workers.<sup>125</sup> And third, the common law distinction between “employees” and “independent contractors,” derives from master-servant law and the notion that masters historically assumed vicarious responsibility for the torts of certain workers, but not for others.<sup>126</sup>

Despite widespread acknowledgment of the relationship between vicarious liability and today’s definition of “employee,” however, the connection between the two doctrines remains surprisingly undertheorized. Although scholars have recognized the existence of a direct, lineal path from master-servant law, to vicarious liability, to today’s common law definition of “employee,” they point out that each doctrine serves vastly different goals.<sup>127</sup> Although contemporary employment protections set minimum labor standards for workers, vicarious liability serves the distinct objective of allocating tort-based obligations to third parties.<sup>128</sup> According to the critique, courts developed the independent contractor distinction to *limit* employers’ vicarious liability, whereas legislatures enacted modern workplace protections to *expand* employers’ responsibilities to workers.<sup>129</sup> Given these disparate goals,

123. See Lobel, *supra* note 3, at 58-59 (summarizing the range of misclassification claims brought against platforms).

124. See HARRIS & KRUEGER, *supra* note 60, at 7 (discussing the protections that come with employee status).

125. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

126. See *generally id.* at 322-23 (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”).

127. See, e.g., Jooho Lee, *The Entrepreneurial Responsibilities Test*, 92 TUL. L. REV. 777, 789-90 (2018) (arguing that the goals of workplace regulations are “too attenuated to justify the control test as an appropriate rule for determining employee status”); Pearce & Silva, *supra* note 23, at 9-10 (considering the purpose behind workplace protections and the agency test for employment).

128. See Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 123 (2018) (summarizing the scholarly critique of the relationship between contemporary employment definitions and vicarious liability).

129. See LINDER, *supra* note 19, at 135 (criticizing the application of agency law’s independent contractor distinction to modern workplace protections).

it makes little sense for courts to utilize the same definition of “employee” and “independent contractor” in each instance.

But the apparent incongruity between the doctrine of vicarious liability and today’s workplace protections should not preclude courts from considering the qualities that originally defined the class of workers known as “independent contractors.” Given that today’s common law definition of “independent contractor” originated from the doctrine of vicarious liability, judges in misclassification litigation ought to consider the rationales that first motivated courts to develop the independent contractor label. In fact, a deeper explanation of these motivations reveals that the animating principles of this exception to vicarious employer liability better align with contemporary workplace policies than critics suggest.

When judges first devised the modern rules for holding employers vicariously liable for their workers’ acts, they separated employees (i.e., “servants”) from independent contractors as a means to ensure that the public could turn to financially secure parties to recover damages.<sup>130</sup> Unlike servants, who depended on their masters to pay for the costs of their misconduct, independent contractors constituted a class of financially stable workers who could compensate third parties for tort-related harm.<sup>131</sup> In other words, independent contractors possessed enough skill, freedom, and financial might to compensate outsiders without requiring the assistance of the masters who retained their services. By examining the goals of public compensation and risk prevention that gave rise to this rule of agency law, contemporary courts can reorient existing employment standards to more effectively distinguish between the contractors and “servants” of gig work.

#### A. ENSURING PUBLIC COMPENSATION THROUGH VICARIOUS LIABILITY

Courts have long held masters liable for certain wrongs committed by their servants. Despite this history, however, scholars disagree about the precise origins of the contemporary doctrine of vicarious employer liability.<sup>132</sup> Whereas some writers trace these rules to Germanic or Roman traditions that held masters liable for the acts of their servants, other scholars question these

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130. See *id.* (discussing the relationship between employment status and a tortfeasor’s ability to pay judgments).

131. See Agnieszka A. McPeak, *Regulating Ridesharing Platforms Through Tort Law*, 39 U. HAW. L. REV. 357, 375 (2017) (listing several principles associated with the vicarious liability doctrine, including cost allocation and corrective justice).

132. See generally H. Beau Baez III, *Volunteers, Victims, and Vicarious Liability: Why Tort Law Should Recognize Altruism*, 48 U. LOUISVILLE L. REV. 221, 225-32 (2009); Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1332 (2014) (discussing the debate among scholars over the history of *respondet superior*).

sources.<sup>133</sup> Notwithstanding disputes over this early history, however, a consensus view holds that today's definition of employment stems most directly from the master-servant law of pre-industrial England.<sup>134</sup>

During this period, judges did not always broadly define masters' liability. In fact, throughout the sixteenth and seventeenth centuries, English courts limited the legal responsibility of masters to third parties.<sup>135</sup> For example, the 1685 King's Bench decision of *Kingston v. Booth* stated, "[I]f I command my servant to do what is lawful, and he misbehave himself . . . I shall not answer for my servant, but my servant for himself . . ." <sup>136</sup> But in the years to come, as the practical distance between masters and servants grew with the increasing complexity of work, English courts began to hold businesses to higher standards for their servants' misconduct.<sup>137</sup>

Legal observers took note of the radical eighteenth-century shift from the notion that masters should pay only for the harms that they sanctioned to the much more expansive idea that they should pay for damages that resulted from their servants' unauthorized acts.<sup>138</sup> Ever since that time, scholars have

133. See Barbara Black, *Application of Respondeat Superior Principles to Securities Fraud Claims Under the Racketeer Influenced and Corrupt Organizations Act (RICO)*, 24 SANTA CLARA L. REV. 825, 856 n.33 (1984) (summarizing the scholarly dispute over the origins of the vicarious liability doctrine); O. W. Holmes, Jr., *Agency I*, 4 HARV. L. REV. 345, 355 (1891); Pierson, *supra* note 19, at 64 (outlining the history of vicarious employer liability); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 330 (1894) (connecting the doctrine of vicarious liability to earlier trends).

134. See Bodie, *supra* note 18, at 663 (discussing the connection between master-servant law and the contemporary common law test for employment); Fowler V. Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494, 495 (1935) (outlining the historical development of *respondeat superior*); Lee, *supra* note 127, at 786-87 (examining the relationship between master-servant law, vicarious liability, and today's common law definition of employment).

135. See John H. Wigmore, *Responsibility for Tortious Acts: Its History - II*, 7 HARV. L. REV. 383, 392 (1894) (summarizing the historical development of vicarious liability).

136. *Kingston v. Booth*, 90 Eng. Rep. 105, 105 (1683); O. Kahn-Freund, *Servants and Independent Contractors*, 14 MOD. L. REV. 504, 505 (1951); Jesse Andrews Raymond, *Agent's Liability to Third Persons for Nonfeasance*, 9 TEX. L. REV. 224, 226 (1931) (discussing the historical expansion of a master's liability for his servants' torts).

137. See Wigmore, *supra* note 135, at 394 (noting that it took "a century or more" for this branch of vicarious liability to develop); see also Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 96 (1984) (discussing the historical origins of vicarious employer liability).

138. See generally Harper, *supra* note 134, at 495; Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 106-07 (1916) (arguing that judges failed to justify this shift in the law); see also Dowd, *supra* note 137, at 97-99 (discussing the expansion of vicarious employer liability).



tried to articulate a satisfying rationale for the common law's movement toward strict employer liability.<sup>139</sup> Many of these justifications centered on a wide-ranging notion of employer responsibility. Lord Brougham, for instance, said, "[B]y employing him, I [the master] set the whole thing in motion; and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it."<sup>140</sup> According to this rationale, the law held masters responsible for their servants' misconduct because masters hired servants and controlled the details of the servants' work.<sup>141</sup> Indeed, today's common law test for employment embraces this same notion of control to distinguish between employees and independent contractors.<sup>142</sup>

But a rationale rooted in employer responsibility fails to demonstrate why courts held masters *vicariously* liable—as opposed to *directly* liable—for their servants' misconduct. If, as the justification goes, the law held masters liable due to the high level of control that they exercised over servants, then this liability derived from a presumption that masters contributed in some way to the wrongs of their servants. For example, given his control over his servant, the master could have prevented injuries by restraining his servant's negligent acts.<sup>143</sup> Even though the master was not directly at fault for committing the tort himself, his control over the interaction gave rise to some level of undetectable contributory fault.<sup>144</sup> But whether the law attributed the master's liability to his error in controlling his servant's work or because of his failure to prevent harm, the "employer responsibility" rationale blamed the master for playing some role in the misconduct.

Despite the prevalence of these accounts, however, the foregoing fault-based explanations ignored the *vicarious* nature of vicarious liability. If the master became liable because his control over an interaction increased the

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139. See generally Laski, *supra* note 138, at 109-11 (criticizing certain explanations that experts have given to justify the doctrine of vicarious liability); Glanville Williams, *Vicarious Liability and the Master's Indemnity*, 20 MOD. L. REV. 220, 228-35 (1957) (summarizing various rationales for vicarious employer liability).

140. *Duncan v. Findlater*, 7 Eng. Rep. 934, 940 (1839); see also Laski, *supra* note 138, at 109 (evaluating discussions of vicarious liability in early case law).

141. See Dowd, *supra* note 137, at 98-99 (discussing the rationale for linking control to vicarious employer liability).

142. See *id.* at 100-01 (summarizing the common view that the power of control gave employers the "means to control . . . liability").

143. See generally Clarence Morris, *Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 340-41 (1934) (explaining how the doctrine of *respondeat superior* creates incentives for employers to prevent wrongdoing).

144. See Robert Flannigan, *Enterprise Control: The Servant-Independent Contractor Distinction*, 37 U. TORONTO L.J. 25, 35 (1987) (outlining the relationship between control and fault within the doctrine of vicarious employer liability).

risk of injury, then his liability was primary and direct, not vicarious.<sup>145</sup> Likewise, if the law held the master responsible because he could have exercised control and prevented injuries, then the master's liability derived from a measure of blameworthiness on the master's part.

In sharp contrast to accounts based on culpability, however, the doctrine of *respondeat superior* ("let the master answer") does not focus on the fault of hiring entities. In fact, this branch of vicarious liability holds employers (i.e., "masters") liable for their employees' (i.e., "servants") misconduct even when employers exercise all reasonable care.<sup>146</sup> By definition, vicarious liability requires an employer to assume liability for a tortfeasor even though the employer has not committed any wrongful act.<sup>147</sup> As a strict-liability system, *respondeat superior* demands that firms compensate third parties for employee-generated harms that occur within the scope of employment despite employers' best efforts to prevent those harms.<sup>148</sup> In fact, the law holds employers responsible even when they exercise control in a non-negligent fashion or fail to exercise control at all.<sup>149</sup>

Whereas the concepts of fault and responsibility fail to justify the doctrine of *respondeat superior*, the notions of just compensation and risk prevention provide more convincing rationales.<sup>150</sup> During the development of the modern iteration of *respondeat superior*, the business world was changing from a realm of mostly private transactions to one involving larger commercial enterprises.<sup>151</sup> Reacting to this shifting business landscape, the law began to hold firms to higher obligations as a cost of doing business in the public sphere.<sup>152</sup> The growing economic status of businesses gave rise to a belief in law that firms should compensate the public for harms that resulted from business-related transactions, even if firms committed no error.<sup>153</sup>

But masters were not responsible for the torts committed by *all* workers whom they hired. Rather, to ensure third-party compensation, while limiting

145. See *id.* at 36 (discussing justifications for vicarious employer liability).

146. See Harper, *supra* note 134, at 496 (explaining how even innocent masters were responsible for their servants' torts).

147. See McPeak, *supra* note 131, at 375 (discussing justifications for the doctrine of vicarious liability).

148. See *id.* at 376-77 (noting that an employer's liability does not extend to frolics and detours); Morris, *supra* note 143, at 340 ("[I]t is no defense that the master is blameless.").

149. See Carlson, *Employment by Design* *supra* note 47, at 158-59 (describing the strict-liability nature of *respondeat superior*).

150. See Dowd, *supra* note 137, at 97 (discussing the scholarly disagreement over the rationales for vicarious employer liability).

151. See *id.* (examining the justifications for the doctrine of *respondeat superior*).

152. See *id.* at 98; Laski, *supra* note 138, at 111 (explaining how the changing role of businesses influenced the judicial development of the doctrine of *respondeat superior*).

153. See Dowd, *supra* note 137, at 96 (discussing the "revolutionary change in the liability of employers" that occurred during the eighteenth and nineteenth centuries).

the overall exposure of hiring entities, English and American courts eventually identified a class of workers—-independent contractors—who could bear these costs on their own.<sup>154</sup> As such, the independent contractor designation constituted an exception to the general rule that masters were responsible for their workers' torts—an exception that took decades to develop.<sup>155</sup> Throughout this process of identifying the individuals who could pay for their own misconduct, a worker's financial self-determination became a key guidepost for distinguishing between servants and independent contractors. Given the "general poverty of servants" at the time,<sup>156</sup> such workers were more likely to be judgment-proof than independent contractors.<sup>157</sup> In light of this reality, the law searched for a party who, more probably than not, had the financial wherewithal to reimburse the public for tort-related damages.

Here, the concepts of control, financial strength, risk prevention, and public compensation interrelate.<sup>158</sup> Courts evaluated a master's control over work, not as a mechanism for assessing blameworthiness, but as a method for ensuring that *some* party possessed an incentive to reduce threats to third parties. Judges assigned tort liability to masters who controlled their servants' work because masters stood in the best position to thwart such misconduct and compensate third parties in the event of damage. Masters could insure against servant-generated harms or pass on these losses to customers through price adjustments.<sup>159</sup> In comparison to masters, the "servant's financial irresponsibility,"<sup>160</sup> did not generate the same incentives to prevent injuries to the public.<sup>161</sup> As potentially judgment-proof defendants, servants possessed fewer economic motivations to engage in preventative measures.

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154. See *id.* at 99 (explaining how courts declined to hold firms vicariously liable for their independent contractors' torts because they "were independent businessmen"); Flannigan, *supra* note 144, at 37 (discussing the development of the independent contractor exclusion).

155. See Harper, *supra* note 134, at 497 ("The principle of *respondeat superior* had been thoroughly accepted as law . . . before the insulating concept of independent contractor was created"); Pierson, *supra* note 19, at 64 (noting the "recent origin" of the independent contractor distinction); see also Roscoe T. Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 511 (1935) (linking the growth of independent contractor classifications to broader economic trends).

156. See Williams, *supra* note 139, at 221-32 ("[W]e have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant.").

157. See Morris, *supra* note 143, at 340 (examining the "entrepreneur theory" used by proponents of *respondeat superior* to justify the doctrine).

158. See McPeak, *supra* note 131, at 375-76 (discussing the goals of tort law and vicarious liability).

159. See Morris, *supra* note 143, at 340-41 (summarizing certain economic justifications for holding masters vicariously liable for their servants' misconduct).

160. See *id.* at 341 (considering the role that a worker's financial capacity plays in determining vicarious employer liability).

161. See *id.* at 340 (examining early rationales for the doctrine of *respondeat superior*).

Thus, the doctrine of *respondeat superior* placed the burden of paying for damages on defendants who had the greater drive to avoid losses, while also reducing the risk that the public would suffer from non-recovery.<sup>162</sup> Justice Wiles summed up the rationale this way: “[T]here ought to be a remedy against some person capable of paying damages to those injured . . . .”<sup>163</sup> Faced with this choice, judges selected masters and independent contractors as the superior risk-bearers.<sup>164</sup>

In contrast to servants, courts did not need to create additional deterrence incentives for independent contractors precisely because of their presumed financial wherewithal. Unlike servants, who retained a functional ability to discharge their liability to masters, the direct liability of independent contractors encouraged them to avoid harm to the public. This impetus derived largely from the financial risk that tort liability posed. In essence, then, courts achieved the goals of public compensation and risk prevention by ensuring that either masters or independent contractors would compensate third parties in the end.<sup>165</sup>

Although many of the formative decisions during this period addressed the level of control that masters retained over workers, other opinions addressed the independent contractor’s skill and expertise, relative to the entities that hired them.<sup>166</sup> Take, for example, Lord Denman’s comments in *Allen v. Hayward*.<sup>167</sup> There, the court considered whether the law should hold navigation commissioners liable for the negligence of contractors whom the commissioners had hired to divert creeks. Lord Denman said, “[I]t seems perfectly clear that in any ordinary case the contractor to do works of this description is not to be construed as a servant, but a person carrying on an independent business . . . to perform works which [defendants] could not execute for themselves.”<sup>168</sup> Thus, the more that individuals hired others to carry out specialized work (i.e., tasks that hiring entities “could not execute

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162. See *id.* (outlining various goals served by holding employers vicariously liable).

163. *Limpus v. Gen. Omnibus Co.*, 158 E.R. 993, 998 (1862); see also Laski, *supra* note 138, at 110; Williams, *supra* note 139, at 232 (describing as “purely cynical” the theory that masters should pay for the tortious conduct of others because of their financial ability to do so).

164. See generally Harper, *supra* note 134, at 496 (outlining various explanations for vicarious liability).

165. See Morris, *supra* note 143, at 341-42 (discussing *respondeat superior* and behavioral incentives).

166. See LINDER, *supra* note 19, at 134 (examining two trends in the early case law on vicarious liability, one centered on “skill/integration” and another centered on “physical control”).

167. *Allen v. Hayward*, 115 Eng. Rep. 749 (1845); LINDER, *supra* note 19, at 140 (discussing the case).

168. *Allen*, 115 Eng. Rep. at 755.

for themselves”), the more likely that the law would hold contractors solely liable for their own misconduct.

Similarly, in *Milligan v. Wedge*, a butcher hired a licensed driver to take a beast to the butcher’s slaughterhouse.<sup>169</sup> En route to the slaughterhouse, the driver acted negligently and the animal “with great violence ran . . . and broke five chimney pieces . . . .”<sup>170</sup> Declining to hold the butcher liable for the damage, Justice Williams assumed that the butcher was not “acquainted with driving” such an animal, whereas the company that the butcher hired “understands the business” and controls its own servants.<sup>171</sup> In light of these factors, Justice Williams exonerated the butcher, stating that “where the person who does the injury exercises an independent employment, the party employing him is clearly not liable.”<sup>172</sup>

With their proficiency in distinct trades and their lack of integration into a hiring firm’s primary enterprise, independent contractors possessed marketplace strengths that translated into economic gains.<sup>173</sup> The independent contractor was his “own master” because he could serve multiple clients or the public at large.<sup>174</sup> In sum, the doctrine of *respondeat superior* did not apply to independent contractors because the skill and accumulated capital of this group enabled them to pay for their own torts.<sup>175</sup>

Just as early courts identified independent contractors who had the financial strength to compensate victims for their own negligent behavior, today’s courts should look for the same characteristics of economic self-reliance in workers. Unfortunately, judges have lost sight of these animating principles; instead, they have applied the “independent contractor” designation to a broad class of workers who lack genuine economic autonomy.

#### B. MISMATCH BETWEEN AGENCY GOALS AND CONTEMPORARY CONTRACTOR DESIGNATIONS

Firms no longer limit the “independent contractor” label to businesspeople who possess independence and financial wherewithal. Whereas the

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169. *Milligan v. Wedge*, 113 Eng. Rep. 993 (1840); LINDER, *supra* note 19, at 139 (examining the holding).

170. *Milligan*, 113 Eng. Rep. at 993.

171. *Id.* at 995.

172. *Id.*

173. See generally LINDER, *supra* note 19, at 137 (explaining how independent contractors possessed capital and skills).

174. See Carlson, *supra* note 85, at 303 (outlining certain characteristics associated with independent contractors).

175. See LINDER, *supra* note 19, at 134-35 (asserting that vicarious liability enabled third parties to seek recovery from the “deep pocket[s]” of employers, instead of seeking recovery from judgment-proof workers).

public might associate independent contractors with highly qualified freelancers, the reality is that many workers today hold “independent contractor” designations even though they perform low-skilled tasks.<sup>176</sup> Indeed, the expansion of this nonemployee label has birthed an entire sector of “working-class entrepreneurs” who must pull themselves up by their bootstraps without the help of workplace rights.<sup>177</sup> For example, in the gig economy, many firms categorize low-wage workers as “independent contractors” by claiming that they operate their own small businesses.<sup>178</sup>

But the expansion of the “independent contractor” label to low-paid work extends far beyond platform work. For example, home healthcare agencies require workers to sign “independent contractor” agreements, even though they perform the company’s main function of caring for the sick.<sup>179</sup> Some restaurants call their servers “independent contractors” and refuse to pay them overtime.<sup>180</sup> Exotic dancers receive “performance fees” as independent contractors, rather than minimum wages.<sup>181</sup> Janitors must pay for the right to clean downtown office buildings.<sup>182</sup> And over half of the nation’s port truckers are misclassified as “independent contractors.”<sup>183</sup> This is not the group of economically self-sufficient workers that originally motivated courts to create the independent contractor designation.

Today’s legal standard for identifying independent contractors no longer captures the characteristics that first defined this category of workers. In the typical misclassification dispute, courts tick off a perfunctory list of indeterminate factors, balance those factors in light of the circumstances, and

176. See Zatz, *supra* note 34, at 34 (distinguishing between the assumed traits of independent contractors and the reality of contemporary designations).

177. See Dubal, *Wage Slave*, *supra* note 10, at 81-82 (discussing the cultural values associated with entrepreneurship).

178. See *supra* Section I.B (examining popular representations of gig workers).

179. See Caitlin Connolly, *Independent Contractor Classification in Home Care*, NAT’L EMP’T L. PROJECT (Dec. 13, 2015), <https://www.nelp.org/publication/independent-contractor-classification-in-home-care/> [<https://perma.cc/QW7Z-3Q7Z>].

180. See, e.g., *Doty v. Elias*, 733 F.2d 720, 722 (10th Cir. 1984) (ruling against restaurant on employee misclassification claims); *Acosta v. CPS Foods, Ltd.*, 5:14CV490, 2017 WL 5157238, at \*2 (N.D. Ohio Nov. 3, 2017) (describing how one restaurant contracted with servers to participate in a “table rental program”).

181. See, e.g., *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 907-16 (S.D.N.Y. 2013) (finding that a club owner “regulated almost every aspect of the dancers’ behavior”); see also *DeGidio v. Crazy Horse Saloon & Rest., Inc.*, 4:13-CV-02136-BHH, 2017 WL 5624310, at \*1 (D.S.C. Jan. 26, 2017) (“Dollhouse does not pay entertainers any wages or include them on payroll.”).

182. See Micah Prieb Stoltzfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 314-15 (2011) (discussing the growth of nonemployee designations in certain sectors).

183. See REBECCA SMITH ET AL., *THE BIG RIG OVERHAUL* 4 (2014) (summarizing misclassification lawsuits involving port trucking).

decide whether workers are independent contractors or not.<sup>184</sup> These factors not only contradict one another, they often have very little to do with the realities of modern work. For instance, the common law test for employment lists the “location of work” and the “method of payment” as relevant factors for identifying independent contractors.<sup>185</sup> But given that gig workers often receive small payments for completing discrete tasks (“method of payment”) in multiple venues (“location of work”), such factors no longer indicate whether individuals possess the high level of economic autonomy that courts envisioned when they first fashioned the independent contractor exception. In the end, the vagueness and irrelevance of these factors have led to conflicting decisions and arbitrary results.<sup>186</sup> By reformulating employment standards based on the animating principles of the independent contractor exclusion, judges can more effectively distinguish between normal platform employees and bona fide independent contractors.

### III. REFORMING EXISTING STANDARDS WITH THE ABC TEST

Courts do not need to invent an entirely new legal test to evaluate the status of platform workers. In fact, the secret to cracking the code of gig work lies in an under-appreciated definition of employment that judges began applying to unemployment claims decades ago.<sup>187</sup> Soon after Congress enacted the Social Security Act of 1935, a number of states passed unemployment compensation laws that contained a three-part definition of “employee.”<sup>188</sup> By 1942, a majority of jurisdictions had enacted legislation that created a “three point exclusionary” definition of employment.<sup>189</sup> Today, twenty-seven states use the so-called “ABC” test to make unemployment and other determinations.<sup>190</sup> In contrast to the multifaceted balancing of more popular standards, the ABC test eschews this indeterminacy in favor of a simplified approach that better assesses the financial self-determination of workers.

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184. See generally Dubal, *Wage Slave*, *supra* note 10, at 71-75 (discussing the judicial confusion over contemporary employment tests).

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

186. See Means & Seiner, *supra* note 35, at 1518 (outlining the mismatch between existing employment standards and gig-worker classifications).

187. See *Carpet Remnant Warehouse, Inc. v. N.J. Dept. of Labor*, 593 A.2d 1177, 1184 (N.J. 1991); Deknatel & Hoff-Downing, *supra* note 21, at 65 n.66 (discussing the ABC test’s origins).

188. See generally *Carpet Remnant Warehouse, Inc.*, 593 A.2d at 1183-84 (outlining the historical development of the ABC test); *Interpretation of Employment Relationship Under Unemployment Compensation Statutes*, 36 ILL. L. REV. 873, 876 (1942) (same).

189. See *Interpretation of Employment Relationship Under Unemployment Compensation Statutes*, *supra* note 188, at 876 (providing a state-by-state list of ABC tests).

190. See *Sunshine*, *supra* note 128, at 130-31 (noting that some states have applied the ABC standard to discrete claims or certain industries); see also LEBERSTEIN & RUCKELSHAUS, *supra* note 27, at 5 (advocating for adoption of the ABC test).

Although ABC standards differ by state, a common formulation begins with the presumption that firms employ the workers whom they hire. A firm can justify a worker's nonemployee designation by proving three elements:

- (a) the firm has relinquished contractual control over the worker;
- (b) the individual performs work that falls outside of the firm's usual business; and
- (c) the individual operates a separate, independent business or trade.<sup>191</sup>

With its requirement that hiring firms overcome a presumption in favor of coverage, many employers have had difficulty convincing courts that their workers possess the economic autonomy of genuine independent contractors.<sup>192</sup>

#### A. DYNAMEX AND ABC'S EXPANSION

Despite its apparent simplicity and history, the ABC test has remained confined mostly to administrative unemployment determinations.<sup>193</sup> But several recent legislative and judicial developments have brought renewed attention to the test. For instance, state lawmakers have shown a willingness to apply the ABC standard to new industries and employment claims.<sup>194</sup> On the judicial front, courts have increasingly applied the ABC standard to claims that fall outside the realm of unemployment coverage. For example, the Seventh Circuit recently utilized the ABC test to evaluate the alleged wage violations of a delivery company.<sup>195</sup> Applying Illinois law, which uses the ABC standard for wage-deduction claims, the Seventh Circuit noted that the elements of the ABC test are "conjunctive, if [the defendant delivery company]

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191. See LEBERSTEIN & RUCKELSHAUS, *supra* note 27, at 4 (summarizing common features of the ABC test); Dau-Schmidt, *supra* note 9, at 80 (same).

192. See, e.g., *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 465 (N.J. 2015) (adopting the ABC test and rejecting an employer's narrower construction of a state wage law); *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 73 A.3d 1061, 1073 (Me. 2013) (extending unemployment benefits to bookkeepers and sales staff at a firm, but not to skilled construction workers); *Schaefer v. Job Serv. N.D.*, 463 N.W.2d 665, 668 (N.D. 1990) (applying the ABC test and requiring an employer to pay job insurance taxes).

193. See Deknatel & Hoff-Downing, *supra* note 21, at 73 (noting that no state has implemented an ABC test that applies universally to all employment claims); Dubal, *Wage Slave*, *supra* note 10, at 75 (stating that jurisdictions have used the ABC test primarily for determining unemployment eligibility).

194. See Deknatel & Hoff-Downing, *supra* note 21, at 66 (summarizing adoption of the ABC test by various states).

195. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1050 (7th Cir. 2016).



cannot satisfy just one prong of the test, its couriers must be treated as employees.”<sup>196</sup> Likewise, the New Jersey Supreme Court recently broadened the application of the ABC test to cover state wage claims.<sup>197</sup> Noting that the ABC standard “presumes that the claimant is an employee and imposes the burden to prove otherwise on the employer,” the court found that the ABC test “provide[s] more predictability” than a multifactored approach.<sup>198</sup>

Building on these doctrinal developments, the California Supreme Court recently issued a landmark ruling that could radically reshape gig-work relationships. In *Dynamex Operations West, Inc. v. Superior Court*,<sup>199</sup> a defendant delivery company operated an on-demand service that allowed companies like Home Depot to quickly retain delivery services on an as-needed basis.<sup>200</sup> Thus, much like ride-hailing apps, the defendant’s business enabled customers to order delivery services at a moment’s notice. As with gig workers, the plaintiff drivers used their own vehicles and set their own schedules.<sup>201</sup>

The California Supreme Court commented on the inadequacy of existing employment standards and described the “difficulty that courts in all jurisdictions have experienced in devising an acceptable general test . . . that properly distinguishes employees from independent contractors . . . .”<sup>202</sup> For decades, judges in California balanced numerous factors to determine whether workers could recover unpaid wages.<sup>203</sup> The *Dynamex* court lamented how this balancing standard “invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis.”<sup>204</sup>

Rejecting the state’s multifactored approach in favor of the ABC standard, the *Dynamex* court began its application of the new test by asking a seemingly straightforward question: Did the couriers perform tasks that fit within the defendant delivery company’s usual course of business?<sup>205</sup> Observing that “Dynamex’s entire business is that of a delivery service,” the California Supreme Court explained that any single element of the ABC test “may be independently determinative of the employee or independent contractor question . . . .”<sup>206</sup> Although an employer’s failure to prove any part of

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196. *Id.* at 1059.

197. *Hargrove*, 106 A.3d at 465.

198. *Id.* at 464.

199. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 8 (Cal. 2018).

200. *Id.*

201. *Id.*

202. *Id.* at 14.

203. *See S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 399 (Cal. 1989).

204. *Dynamex*, 416 P.3d at 34.

205. *Id.* at 41.

206. *Id.*

the ABC standard could establish employment liability standing alone, the *Dynamex* court nevertheless evaluated a second element of the test by asking whether workers operated their own “independently established business[es] . . . .”<sup>207</sup> Noting that the drivers performed delivery services only for the defendant and did not retain customers or employees of their own, the California Supreme Court authorized the plaintiffs to pursue their wage claims on a class-wide basis.<sup>208</sup>

*Dynamex* triggered swift and passionate responses from the business community. For example, the California Chamber of Commerce quickly complained to the governor and state legislature that *Dynamex* would have “far-reaching negative implications for nearly all sectors of the economy.”<sup>209</sup> Asking state lawmakers to reverse the decision, the Chamber claimed that *Dynamex*’s “one-size fits all policy” ignored the “complexity and nuance of [independent contracting] arrangements, and the value they bring to California’s economy.”<sup>210</sup> In all, legislatures received over six thousand emails from businesses urging lawmakers to reverse the decision.<sup>211</sup>

In reaching its unanimous conclusion in *Dynamex*, the California Supreme Court outlined a relatively straightforward method for navigating worker misclassification claims in the gig economy. With its three-prong, element-based approach, the ABC test focuses judicial attention on the same question that first motivated courts to create the independent contractor exclusion: Do contractors possess genuine economic autonomy? For example, if individuals exert labor subject to a firm’s retained control (the first prong of ABC), they will have greater difficulty generating income from unencumbered work on the open market. Similarly, if designated individuals work within a firm’s ordinary course of business (the second prong of ABC), they are less likely to possess the financial autonomy of independent contractors who perform skilled tasks for outside customers. Finally, if workers do not operate their own separate businesses (the third prong of ABC), they are less likely to possess the kind of economic strength of bona fide independent contractors who undertake greater entrepreneurial risks. The effectiveness of the ABC standard, then, lies in its ability to capture the concept of financial self-determination with each prong of the test standing alone. In this way, the

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207. *Id.* at 39.

208. *Id.* at 42.

209. See Letter from Cal. Chamber of Commerce et al., to Governor Edmund G. Brown, Governor of Cal. & Members of the Cal. State Legislature (June 20, 2018), <http://src.bna.com/zNI> [<https://perma.cc/TE4D-WDV3>].

210. See BEACON ECONOMICS, UNDERSTANDING CALIFORNIA’S *DYNAMEX* DECISION 18 (2018) (critiquing *Dynamex*).

211. See Margot Roosevelt, *Are You an Employee or a Contractor? Carpenters, Strippers, and Dog Walkers Now Face That Question*, L.A. TIMES (Feb. 23, 2019, 5:00 AM), <https://www.latimes.com/business/la-fi-dynamex-contractors-20190223-story.html> [<https://perma.cc/5KKP-K8SC>] (summarizing the reaction to *Dynamex*).

*Dynamex* decision not only extended wage protections to more workers in the world's fifth largest economy, it offered other courts a blueprint for making gig-worker determinations going forward.<sup>212</sup>

*1. Engaged in Firm's Usual Course of Business*

In many cases, the simplest route to applying the ABC test to gig work will begin and end by determining whether the worker's role fits within the platform's usual course of business. The *Dynamex* court framed the question by asking whether a putative employee "would ordinarily be viewed by others as working in the hiring entity's business."<sup>213</sup> The court provided two examples to illustrate the point, saying that "work-at-home seamstresses" operate within a clothing manufacturer's usual course of business and that custom cake decorators work within a bakery's usual course of business.<sup>214</sup> Of course, these are easy examples in which a worker's services align directly with an employers' primary business operations. But as with any employment analysis, the "course of business" inquiry will not always be so clear.

Arguing against application of this prong of the ABC test, a firm might assert that workers perform outside functions, even if those functions seem central to the company's operations. For example, as noted above, on-demand platforms that sell transportation and meal delivery services regularly argue that they are "technology" companies rather than service providers.<sup>215</sup> This confusion over the meaning of "usual course of business" occurred in the aftermath of *Dynamex*. Soon after the California Supreme Court announced the decision, a lower state court considered whether a gas station manager worked within the usual course of business of a gas station.<sup>216</sup> The manager was suing Shell Oil Products (the owner of the gas station) for unpaid wages.<sup>217</sup> Applying *Dynamex* and ruling against the worker, the lower court found that "Shell was not in the business of operating fueling stations—it was in the business of owning real estate and fuel."<sup>218</sup> Such arguments do not differ much from the claims made by on-demand companies that they do not actually deliver the services that the public associates with those firms.

But any strategy that requires platforms to argue against their own brands is unlikely to yield long-term success. For example, a California court rejected as "obviously wrong" Lyft's contention that it does nothing more

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212. See Gould, *supra* note 56, at 997-98, 1005 (discussing the impact of *Dynamex*).

213. *Dynamex*, 416 P.3d at 40.

214. *Id.* at 40.

215. See *supra* Section I.B (discussing the language of platform exceptionalism).

216. *Curry v. Equilon Enters., LLC*, 233 Cal. Rptr. 3d 295, 314 (Cal. App. 4th Dist. 2018).

217. *Id.*

218. *Id.*

than provide software to drivers and the public.<sup>219</sup> Likewise, a London tribunal expressed indignation at a similar claim made by Uber: “The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous.”<sup>220</sup> Given the general skepticism of such claims, when platforms offer specific services with distinct brands, the ABC standard makes it difficult to exclude workers who perform those services.

The more challenging variation of the “course of business” test involves individuals who do not obviously advance a platform’s primary mission.<sup>221</sup> For instance, the chore platform TaskRabbit lists a wide variety of jobs that its taskers can perform: carpentry, decoration, office administration, shopping, and “waiting in line,” to name a few.<sup>222</sup> TaskRabbit is owned by Ikea, the world’s largest furniture retailer, which now offers TaskRabbit services (i.e., furniture assembly) to Ikea customers.<sup>223</sup> Although the job of putting together tables and cabinets fits squarely within the firm’s usual course of business, with such a diverse catalogue of other services, how can courts accurately identify TaskRabbit’s typical operations?

The *Dynamex* decision provided some guidance on this question. The California Supreme Court referred to a firm’s “usual course of business,” not its primary brand. *Dynamex* described an “outside plumber” and an “outside electrician” as examples of independent contractors who do not work within the “usual course of the hiring entity’s business.”<sup>224</sup> By contrasting “outside” work with “usual” work, the court limited nonemployee classifications to workers who perform outside, isolated jobs on a very limited basis. In other words, if companies hire individuals to perform tasks that occur regularly and indefinitely as part of the firm’s normal business activities, those individuals do not work “outside” the firm, but instead engage in “usual” forms of work. For example, if Uber hires secretarial staff to work at its San Francisco headquarters, those individuals work within Uber’s usual course of

219. *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

220. *Aslam & Farrar v. Uber*, No. 2202550/2015, at 28 (Emp’t Trib. 2016), <https://www.judiciary.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf> [<https://perma.cc/8ZUT-9VJN>]; see also Charlotte Garden & Joseph E. Slater, *Comments on Restatement of Employment Law (Third), Chapter 1*, 21 EMP. RIGHTS & EMP. POL’Y J. 265, 300 (2017) (discussing the decision).

221. See HARRIS & KRUEGER, *supra* note 60, at 7 (questioning the ongoing relevance of a standard that focuses on the integral nature of a worker’s service to a firm).

222. TaskRabbit Support, *What Types of Tasks Can I Do as a Tasker?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411080-What-Types-of-Tasks-Can-I-Do-as-a-Tasker-> [<https://perma.cc/98N9-2Z9K>].

223. See Carolyn Said, *TaskRabbit Trims Prices in Bid to Find More Clients*, S.F. CHRON. (June 20, 2018, 10:05 AM), <https://www.sfchronicle.com/business/article/TaskRabbit-trims-prices-in-bid-to-find-more-13008586.php> [<https://perma.cc/3BLT-DEL3>] (listing various chores that taskers perform).

224. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 37 (Cal. 2018) (emphasis added).

business, even though Uber is a transportation (or “technology”) company, and not a secretarial business.

In many cases, the “usual course of business” inquiry will be definitive. For instance, the drivers of Lyft and the home cleaners of Handy perform tasks that directly align with the companies’ brands. As such, the ABC standard would almost certainly categorize these workers as employees. But even individuals who perform non-essential tasks do so within a platform’s usual course of business if those tasks occur regularly as part of ongoing operations. They are not “outside” workers, as *Dynamex* described that group. However, for courts that apply this standard solely to workers who are engaged in a platform’s core functions, other aspects of the ABC standard can also assess the validity of nonemployee designations.

## 2. Operating Separate Business

Although the *Dynamex* court held that the “usual course of business” analysis could decide certain misclassification disputes standing alone, the California Supreme Court nevertheless continued its evaluation by asking whether workers are “customarily engaged in an independently established trade, occupation, or business” of their own.<sup>225</sup> According to this prong of the ABC standard, genuine independent contractors tend to operate separate companies or engage in distinct trades, whereas employees do not.

At first glance, this “separate business” query seems to resemble the “economic realities” test that courts use to evaluate workplace claims in other areas.<sup>226</sup> Judges who apply this test describe its broad coverage and ask whether workers are “economically dependent” on the firms that hired them.<sup>227</sup> According to the economic realities test, if a worker depends economically on a company, then the worker is more likely to be an employee. Despite the apparent expansiveness of this test, however, scholars have criticized courts for failing to define “economic dependence” or to explain its relationship to broader remedial statutes.<sup>228</sup> Indeed, in a world where workers piece together various gigs, the concept of “economic dependence” does not gauge a worker’s self-determination as effectively as ABC’s investigation

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225. *Id.* at 7.

226. See Estlund, *supra* note 40, at 689 (examining the judicial application of the economic realities test).

227. See Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1009-10 (1999) (discussing the difficulty that judges have with applying the economic realities test).

228. See generally *id.* (asserting that economic dependence “factors become an end in themselves”); Estlund, *supra* note 40, at 690 (highlighting the tenuous connection between “economic realities” and underlying statutory authority).

into a person's separately established business. After all, on any given day, a platform worker might drive for Uber, carry food for Grubhub, and deliver packages for Amazon Flex. Even though such a worker may not depend economically on a single firm, she might not possess the financial autonomy of a genuine independent contractor.

Recall that courts originally excluded independent contractors from the doctrine of *respondeat superior* based on their financial *independence*. As a policy matter, judges were concerned with identifying workers who could compensate third parties without the financial backing of the firms that hired them.<sup>229</sup> In other words, courts based this exception to vicarious liability on a worker's relationship to the market ("independence") rather than on the worker's financial relationship to any single firm ("dependence"). Reflecting these rationales, the ABC test asks whether workers enjoy financial autonomy by operating their own separate businesses.

The *Dynamex* court noted that operators of separate businesses typically pay for their own advertising, incorporation, or licensure.<sup>230</sup> Likewise, they offer their services to the public or to multiple clients.<sup>231</sup> In addition to developing their own customer base, genuine entrepreneurs attempt to create unique value in the marketplace through targeted investment, whereas employees simply work longer hours to earn higher wages.<sup>232</sup> Distinguishing normal employees from small business owners, *Dynamex* cited a Massachusetts decision involving a bicycle courier who worked as an "independent contractor" for a same-day delivery service.<sup>233</sup> The courier did not hold himself out to the public as an independent businessman or advertise; likewise the courier did not have his own business cards, invoices, or clients.<sup>234</sup> In essence, the bicycle courier was not an independent contractor because he did not sell his services to the public in a manner that resembled a separate, independent company.

Without evidence of an individual's investment in her own distinct business (through advertising, client solicitation, etc.) the typical gig worker

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229. See *supra* Section II.A (examining the animating principles of the independent contractor exclusion).

230. *Dynamex*, 416 P.3d at 39; see also *Kirby of Norwich v. Adm'r Unemployment Comp. Act*, 176 A.3d 1180, 1188 (Conn. 2018) (listing factors related to the ABC test's "separate business" prong).

231. *Dynamex*, 416 P.3d at 39.

232. See generally Lee, *supra* note 127, at 811-18 (discussing characteristics of entrepreneurs); Griffin Toronjo Pivateau, *The Prism of Entrepreneurship: Creating a New Lens for Worker Classification*, 70 BAYLOR L. REV. 595, 630 (2018) (noting that entrepreneurship often involves creating new firms).

233. *Dynamex*, 416 P.3d at 39 n.31 (Cal. 2018) (citing *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Emp't & Training*, 778 N.E.2d 964, 971 (Mass. App. 2002)).

234. *Boston Bicycle Couriers*, 778 N.E.2d at 973.

simply does engage in the same kind of public outreach as independent businesspeople who develop marketplace opportunities. Indeed, on-demand firms often forbid workers from contacting customers outside of their apps.<sup>235</sup> For instance, many platforms require workers to communicate to customers with software that can detect the presence of the “@” symbol in parties’ messages.<sup>236</sup> This monitoring ensures that workers will not circumvent the platform and directly obtain payment from customers.

Just as platform workers do not act like small businesses that connect directly to customers, the public does not perceive most gig workers as separate companies. For example, Uber passengers do not download the Uber app to retain the services of small business owners. Instead, they pay Uber to deliver an efficient overall experience, from the driver-rider match, to screening-out poor drivers, to providing a seamless payment system.<sup>237</sup> Far removed from the experience of small business owners, Uber drivers cannot respond to price signals or evaluate earning opportunities because the Uber app does not reveal the fare that they will earn or the passenger’s destination until *after* the driver has accepted an assignment.<sup>238</sup>

The *Dynamex* decision characterized the archetypal independent contractor as “an individual who *independently* has made the decision to go into business for himself or herself.”<sup>239</sup> Viewed through this lens, the timing of a person’s decision to engage in platform work can help distinguish bona fide entrepreneurs from gig workers who simply download an app. Following *Dynamex*, a lower court in California underscored this point by citing ABC authority from four other states and saying, “The adverb ‘independently’ clearly modifies the word ‘established,’ and must carry the meaning that the . . . business was established, independently of the employer . . . .”<sup>240</sup> Viewed in this light, the typical gig worker does not first open a small business and then join a platform to expand that business. For example, most Lyft drivers

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235. See Kirven, *supra* note 53, at 282 (explaining how transportation platforms prevent drivers from contacting customers).

236. See Tippet, *supra* note 68, at 297 (discussing algorithmic control in the platform economy).

237. See Lee, *supra* note 127, at 822-23 (examining the presence of genuine entrepreneurship in app-based work).

238. See Calo & Rosenblat, *supra* note 6, at 1661 (discussing Uber’s policy of “blind ride acceptance”); Tomassetti, *Does Uber Redefine the Firm?*, *supra* note 29, at 27 (explaining how the Uber app prevents drivers and passengers from negotiating).

239. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 39 (Cal. 2018) (emphasis added).

240. *Garcia v. Border Transp. Group, LLC*, 239 Cal. Rptr. 3d 360, 372 (Cal. App. 4th Dist. 2018) (quoting *In re Bargain Busters, Inc.*, 287 A.2d 554, 559 (Vt. 1972) and citing *JSF Promotions, Inc. v. Adm’r, Unemployment Comp. Act*, 828 A.2d 609, 613 (Conn. 2003); *Midwest Property Recovery, Inc. v. Job Serv. of N.D.*, 475 N.W.2d 918, 924 (N.D. 1991); *McGuire v. Dept. of Emp’t Sec.*, 768 P.2d 985, 988 (Utah Ct. App. 1989)).

do not own separate transportation companies and most Grubhub drivers do not operate their own food delivery businesses.<sup>241</sup> But in other instances, certain on-demand workers may actually engage with platforms to advance their own companies. For example, TaskRabbit allows carpenters and electricians to use its platform.<sup>242</sup> For these workers, the TaskRabbit app may simply generate new leads for their existing firms. In this way, the ABC standard helps distinguish regular gig workers from genuine small business owners.

Finally, ABC's "separate business" prong asks courts to look beyond certain theoretical opportunities for entrepreneurship that gig work may present. Thus, judges who assess the economic autonomy of workers must differentiate between *genuine* entrepreneurship and instances of *potential* entrepreneurship that platforms espouse.<sup>243</sup> As an example of theoretical entrepreneurship, on-demand firms frequently point to their terms of service, which often allow individuals to work for competitors or hire their own subcontractors.<sup>244</sup> For instance, Uber allows drivers to hire subcontractors, but only if the platform first vets and authorizes these subcontractors.<sup>245</sup> Similarly, Handy allows its "Service Professionals" to hire "helpers," but only after the helpers complete a "basic background check satisfactory to Handy."<sup>246</sup> Applied to these instances of potential entrepreneurship, a measure of genuine entrepreneurship would assess whether workers act upon these contractual freedoms. Thus, if a platform driver actually employs her own bevy of subcontractors, she is more like a separate business. Likewise, if she works for multiple apps, advertises her services, and develops her own client base, she is more like a small business owner. In contrast, if she simply works longer hours for multiple platforms, she is more like an ordinary employee who merely holds down multiple jobs.

Increasingly, courts and commentators have recognized this distinction between theoretical and actual entrepreneurship. For example, the new Restatement of Employment Law describes the "independent businessperson" as an "individual [who] in his or her own interest *exercises* entrepreneurial

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241. See Mark J. Loewenstein, *Agency Law and the New Economy*, 72 BUS. LAW. 1009, 1040 (2017) (explaining how independent businesses promote themselves to potential customers).

242. TaskRabbit Support, *What Types of Tasks Can I Do as a Tasker?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411080-What-Types-of-Tasks-Can-I-Do-as-a-Tasker-> [<https://perma.cc/3VFS-TZZM>].

243. See Dubal, *Wage Slave*, *supra* note 10, at 94 (examining a variation of the "entrepreneurial potential" test).

244. See *generally* Lao, *supra* note 36, at 1552-53 (discussing the tradeoffs of freedom and risk that come with platform work).

245. See Haan, *supra* note 20, at 15 (examining workers' ability to subcontract in the platform economy).

246. *Service Professional Agreement*, HANDY TECHS., INC. (Dec. 14, 2018), [https://www.handy.com/pro\\_terms](https://www.handy.com/pro_terms) [<https://perma.cc/VW7Y-7RCV>].



control over important business decisions . . . .”<sup>247</sup> Likewise, the *Dynamex* decision stated, “The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.”<sup>248</sup> Just as a part-time cook’s ability to moonlight for a competitor does not transform the cook into a small business owner, a gig worker’s freedom to hire subcontractors or to work for other platforms does not necessarily constitute an opportunity for genuine entrepreneurial advancement. In essence, the “separate business” analysis helps determine whether platforms actually harness the entrepreneurship of workers who download their apps.<sup>249</sup>

### 3. Free from Control

The ABC standard vests courts with discretion to assess the level of control that platforms retain over workers. Mirroring the common law test, this prong of the ABC standard evaluates the “control and direction of the hiring entity in the performance of the work . . . .”<sup>250</sup> As demonstrated by recent disputes over platform work, however, this factor often fails to provide definitive answers because the control factor can cut both ways. For example, although gig workers enjoy certain freedoms in determining their working hours, platforms often control workers’ pay and subject them to specific performance expectations.<sup>251</sup> Given the inconclusive nature of the control analysis, the *Dynamex* decision noted that “a court is free to consider the separate parts of the ABC test in whatever order it chooses.”<sup>252</sup> Because the ABC standard is an element-based test and not a balancing standard, a platform cannot classify its workers as independent contractors if it fails to prove any part of the test. As such, the ABC standard authorizes judges to forego an indeterminate control analysis if other aspects of the test provide clearer paths to resolution.

Still, control has long been the dominant factor in misclassification analyses, and courts are unlikely to ignore this factor altogether.<sup>253</sup> As such, certain guidelines can assist judges with evaluating the level of freedom that gig

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247. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01(b) (AM. LAW INST. 2015) (emphasis added); see also *Sunshine*, *supra* note 128, at 129-30 (discussing the relationship between entrepreneurship and control).

248. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 39 (Cal. 2018).

249. See *Dubal*, *Wage Slave*, *supra* note 10, at 122 (distinguishing between “entrepreneurial potential” and “entrepreneurial realization”).

250. *Dynamex*, 416 P.3d at 36.

251. See *supra* Section I.C.1 (explaining why judges initially rejected the concept of platform exceptionalism).

252. *Dynamex*, 416 P.3d at 40.

253. See *Carlson*, *supra* note 85, at 314 (examining the importance of the control analysis in most employment determinations).

workers actually enjoy. For example, although instances of direct influence over workers can signify control, on-demand firms can also control workers by retaining the *right* to exert such influence, even if platforms do not actually act upon that right.<sup>254</sup> In addition, platforms can control workers through indirect methods of assessment that meaningfully influence the conditions of on-demand work.<sup>255</sup>

The forms of control that firms retain over workers vary widely from platform to platform. For instance, Uber and Lyft impose specific service rules on drivers, unilaterally announce prices, and subject poorly performing drivers to deactivation.<sup>256</sup> These platforms monitor how long it takes drivers to accept ride requests and the rate at which they cancel accepted requests.<sup>257</sup> Still, drivers retain control over their schedule and total hours.<sup>258</sup> But firms retain some influence over these decisions as well. For example, ride-hailing apps use dynamic pricing to affect an individual's decision about when and where to drive.<sup>259</sup> Uber unilaterally dictates the times and locations of "surge pricing" and does not tell drivers the precise rates that they might earn. In this way, the platform relies upon information asymmetries to constrain the universe of choices available to drivers.<sup>260</sup>

But some platforms in other sectors of the gig economy retain less control over workers. Unlike Uber, Lyft, and Grubhub, many platforms do not dictate prices.<sup>261</sup> For instance, the chore platform TaskRabbit does not tell taskers how much they should charge for a job or whether to take a job at all. Taskers set their own rates and then submit invoices once they have completed a task.<sup>262</sup> But even here, taskers do not experience completely unen-

254. See Das Acevedo, *supra* note 12, at 819-22 (discussing the role that retained control plays in platform work).

255. See Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1727 (2016) (outlining control's various subjects and delivery methods).

256. See Lao, *supra* note 36, at 1555-56 (discussing worker autonomy in the gig economy).

257. See Das Acevedo, *supra* note 12, at 815 (evaluating the supposed freedoms that ride-hailing drivers enjoy).

258. See Lao, *supra* note 36, at 1555-56 (examining certain tradeoffs that come with gig work).

259. See Das Acevedo, *supra* note 12, at 815-16 (examining the influence that platforms exert over workers).

260. See Calo & Rosenblat, *supra* note 6, at 1661-62 (describing the "heat maps" that the Uber app displays to indicate surge pricing).

261. See Tomassetti, *Does Uber Redefine the Firm?*, *supra* note 29, at 26 (examining platform work and control).

262. See Malin, *supra* note 11, at 383 (taking a skeptical view of the idea that TaskRabbit shares an employment relationship with taskers); Means, *supra* note 35, at 1540-41 (comparing the business models of platforms such as TaskRabbit and Upwork).

cumbered decision-making. As with other platforms, TaskRabbit tracks customer ratings and sets the commission that the platform takes from every transaction. For taskers who perform poorly, the app utilizes a matching algorithm that can result in low-quality assignments or infrequent work.<sup>263</sup>

The control analysis appears even murkier for crowdworkers who perform tasks on platforms such as Amazon Mechanical Turk. Seeming to enjoy tremendous freedoms, Turkers can survey the prices that requesters will pay before they commit to performing any particular job. But a crowdworker's freedoms diminish once work begins. For instance, requesters retain discretion to refuse payment for completed tasks. Evidence of an unpaid job can lower a Turker's ratings, which can functionally impair the person's future work opportunities.<sup>264</sup> In addition to the contingent nature of payment, certain crowdwork platforms monitor their workers' performance through "time-on-task" software programs.<sup>265</sup> For example, the platform Freelancer measures workers' keystrokes and takes screenshots of workers' devices to ensure the accuracy of their bills.<sup>266</sup> Faced with uncertain payments, customer reviews, and invasive monitoring, many crowdworkers enjoy less autonomy than initial appearances might suggest.

As demonstrated by the conflicting outcomes of misclassification disputes, courts cannot always detect the influence that platforms exert over workers.<sup>267</sup> In contrast to more traditional job settings, where supervisors dictate commands to subordinates, on-demand firms exert control in less obvious ways.<sup>268</sup> For instance, platforms may use an algorithm rather than a human decisionmaker to deactivate workers. The supervisors of platform work are deputized customers who review individuals through online ratings. Workers may be unaware of undisclosed rules embedded in software programs that determine their fate based on customer reviews or acceptance rates.<sup>269</sup> Given their unrevealed nature, these standards constitute instances

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263. See Tippet, *supra* note 68, at 298 (outlining the effect that algorithms have on worker autonomy).

264. See De Stefano, *supra* note 74, at 492-93 (examining the control that firms retain over crowdworkers).

265. See Tippet, *supra* note 68, at 295 (comparing the experience of crowdworkers to on-demand drivers).

266. See Brishen Rogers, *Fissuring, Data-Driven Governance, and Platform Economy Labor Standards*, in *THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY* 304, 307 (Nestor M. Davidson et al. eds., 2018) (outlining information asymmetries in the gig economy).

267. See *supra* Section I.C (summarizing differing views of app work among courts).

268. See Das Acevedo, *supra* note 12, at 816 (outlining the diverse forms of control associated with platform work).

269. See Tippet, *supra* note 68, at 299 (examining various systems for supervising gig workers).

of invisible control that platforms retain.<sup>270</sup> In sum, whether platforms dictate payment terms, set specific performance objectives, monitor workers' performance, solicit customer feedback, or deactivate accounts, numerous forms of control can operate in the background of platform work.

#### B. RETHINKING CONTEMPORARY GIG LITIGATION IN LIGHT OF THE ABC TEST

The standard judicial practice of balancing multiple employment factors has hindered courts' ability to assess the financial self-determination of workers. This section reconsiders recent misclassification decisions from the gig economy in light of the ABC test. It explains how, in comparison to other employment tests, the ABC standard provides a more effective mechanism for scrutinizing the nonemployee designations of gig workers.

Consider the case of *Lawson v. Grubhub*. Raef Lawson worked as a meal delivery driver in Southern California for the platform Grubhub.<sup>271</sup> Evaluating Lawson's wage claims in light of a modified control test, the court acknowledged the central role that the plaintiff's work played in Grubhub's business model by stating that "delivery . . . is key to Grubhub's continued growth . . ."<sup>272</sup> Recall that the *Dynamex* decision began its application of the ABC test with a simple query: Is the worker engaged in the hiring entity's usual business?<sup>273</sup> Had the *Lawson* court applied this same standard, the plaintiff would have prevailed because he delivered food for Grubhub—the company's main productive activity.<sup>274</sup>

But as with most gig misclassification cases, the court instead evaluated Grubhub's control over the driver.<sup>275</sup> Explaining how the plaintiff determined his own hours, transportation method, appearance, and delivery route, the *Lawson* court found that Grubhub extended many freedoms to the driver. Yet the plaintiff in *Lawson* was not completely free to perform his job. For example, the platform unilaterally determined his compensation rates and the fees that customers paid.<sup>276</sup> Nevertheless, the court ruled for Grubhub, holding that the control analysis tipped significantly in the platform's favor.<sup>277</sup>

The *Lawson* decision illustrates how current employment standards fail to fully assess the economic autonomy of workers. The delivery driver in

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270. *See id.* (discussing the protocols of gig work).

271. *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d. 1071, 1072 (N.D. Cal. 2018).

272. *Id.* at 1090.

273. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 44 (Cal. 2018).

274. *See Tomassetti, Does Uber Redefine the Firm?*, *supra* note 29, at 5 (describing the common expectation that a firm's business identity should relate to its performance of primary productive activities).

275. *Lawson*, 302 F. Supp. 3d. at 1093.

276. *Id.* at 1075.

277. *Id.* at 1092.

*Lawson* did not remotely resemble the kind of economically secure businessperson that courts envisioned when they crafted the independent contractor exclusion; he “worked multiple low-wage jobs in addition to his nascent acting career.”<sup>278</sup> The plaintiff had no say over his wages: Grubhub paid him anywhere from \$9 to \$15 per hour, at its discretion.<sup>279</sup> He could not start his own food delivery business or hire his own staff. As the *Lawson* court observed, because of “the nature of the work, the pay, and how the app works, subcontracting was not a realistic option.”<sup>280</sup> Most fundamentally, Mr. Lawson performed a task that was central to Grubhub’s business model: food delivery. In essence, the ABC test could have allowed the *Lawson* court to move beyond indeterminate balancing and, instead, focus on the delivery driver’s economic autonomy.

*Razak v. Uber Technologies, Inc.*,<sup>281</sup> another major employment victory for platforms, also highlights the value of the ABC test, as compared to existing standards. In that case, Uber convinced a federal court in Pennsylvania that its limousine drivers were independent businesspeople who had no right to collect overtime.<sup>282</sup> Applying the economic realities test, the *Razak* decision focused on the drivers’ apparent entrepreneurship. For instance, the court explained how the plaintiffs operated their own limousine companies and could hire “helpers” to drive for their companies.<sup>283</sup> Seeming to mirror the ambition of independent businesspeople, some drivers paid for their own advertising and provided rides to outside customers without using the Uber app.<sup>284</sup> In light of these opportunities for economic gain and the freedom that came with gig work, the *Razak* court found that the plaintiffs were independent contractors: “UberBLACK drivers bolster their earnings by managing when, where, and how to perform their task of transporting passengers.”<sup>285</sup>

If, however, the *Razak* court had applied the ABC test to the drivers’ claims, the decision could have more effectively gauged the varying levels of entrepreneurship that each plaintiff actually possessed. Whereas the ABC test would have prompted an investigation into instances of real entrepreneurship, much of the *Razak* discussion failed to distinguish between the drivers’ theoretical and actual entrepreneurial acts. For instance, although some of the plaintiffs hired other limousine drivers to work for them, thus

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278. *Id.* at 1089.

279. *Id.* at 1077.

280. *Lawson*, 302 F. Supp. 3d at 1084.

281. *Razak v. Uber Techs., Inc.*, CV 16-573, 2018 WL 1744467, at \*12 (E.D. Pa. Apr. 11, 2018); *see also supra* Section I.C.2 (examining recent judicial decisions on the status of gig workers).

282. *Razak*, 2018 WL 1744467, at \*18.

283. *Id.* at \*15.

284. *Id.* at \*17.

285. *Id.* at \*18.

signifying genuine entrepreneurship, the record suggested that at least one plaintiff operated a sole proprietorship that did not employ any drivers other than the plaintiff himself.<sup>286</sup> Likewise, even though Uber allowed drivers to work for competitors, the *Razak* court failed to specify which drivers actually took advantage of this opportunity and enjoyed genuine entrepreneurial gains as small business owners.<sup>287</sup> In addition, some of the plaintiffs earned *all* of their income from Uber during certain years, thus suggesting that the opportunities for entrepreneurship were illusory at best.<sup>288</sup>

Finally, because it applied the economic realities test, rather than the ABC standard, the *Razak* court barely addressed the question of whether the drivers' work fell within Uber's usual course of business. Even though the decision acknowledged that "Uber drivers are an essential part of Uber's business as a transportation company," this observation played virtually no role in the outcome of the case.<sup>289</sup> In contrast, the ABC standard would have established Uber as the plaintiffs' employer if limousine services were part of UberBLACK's regular business. By examining the connection between the plaintiffs' work and the defendant's brand, the ABC test could have clarified whether the drivers were actually independent business owners or merely employees who downloaded the Uber app.

#### C. OBJECTIONS AND RELATIONSHIP TO EXISTING EMPLOYMENT STANDARDS

Critics could raise several objections to the current proposal. Most fundamentally, they could argue that courts formulated existing employment standards long ago, and that judges cannot simply abandon these factors in favor of the ABC test. Indeed, the jurisdictions that have adopted the ABC test have almost universally done so through the legislative processes rather than by judicial proclamation. Aside from the *Dynamex* decision, there are very few examples of courts adopting the ABC standard absent some clear legislative directive.<sup>290</sup>

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286. *Id.* at \*15 (noting how one of the plaintiff's companies received payments from Uber, which the company later distributed to drivers); *see also* Defendants' Revised Reply to Plaintiffs' Statement of Facts Opposing Defendants' Motion for Summary Judgment at 13-14, 52, 61, *Razak v. Uber Techs., Inc.*, CV 16-573 (Apr. 4, 2018) (explaining how one plaintiff was a sole proprietor with no employees, while other plaintiffs hired drivers as subcontractors).

287. *Razak*, 2018 WL 1744467, at \*15 ("Plaintiffs and their helpers are permitted to work for competing companies.").

288. *See* Defendants' Revised Reply to Plaintiffs' Statement of Facts Opposing Defendants' Motion for Summary Judgment at 93-10, *Razak v. Uber Techs., Inc.*, CV 16-573 (Apr. 4, 2018) (discussing the income streams of various plaintiffs).

289. *Razak*, 2018 WL 1744467, at \*19.

290. *But see* *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 459 (N.J. 2015) (adopting the ABC test after recognizing the "failure of either the text of the [Wage Payment Law] or its

Observers could further point out that the California Supreme Court based its *Dynamex* decision on the state's wage law, which broadly defines "employ" as to "suffer or permit" work.<sup>291</sup> Although this terminology has "striking breadth" in the wage and hour context, it is absent from the common law standard.<sup>292</sup> Indeed, the *Dynamex* decision stated explicitly that the "suffer or permit" definition of "employ" was "broader and more inclusive than the preexisting common law test . . . ."<sup>293</sup>

Although persuasive on their face, none of these objections should prevent courts from applying the ABC test to a variety of claims, including those that involve the common law standard. First, many workers already sue employers under workplace statutes that define "employ" as to "suffer or permit" work. For example, most states use some version of the "suffer or permit" terminology in their wage statutes, and federal law defines "employ" the same way for purposes of family leave, wage and hour coverage, and agricultural worker protections.<sup>294</sup> Although most courts that apply the "suffer or permit" language use the economic realities test,<sup>295</sup> both the California Supreme Court and the New Jersey Supreme Court adopted the ABC standard as the superior application of this statutory text.<sup>296</sup> To the extent that future courts review claims that contain identical statutory language, these cases provide a roadmap for achieving the broad remedial purpose of the "suffer or permit" terminology.

But courts can apply the ABC test to common law claims as well. In contrast to the current articulation of the common law standard, which contains numerous nonbinding factors, the ABC test more effectively evaluates a worker's economic autonomy.<sup>297</sup> As such, the ABC standard better reflects

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implementing regulations to prescribe a standard to guide the distinction between an employee and an independent contractor").

291. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 21 (Cal. 2018).

292. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

293. *Dynamex*, 416 P.3d at 33.

294. Fair Labor Standards Act, 29 U.S.C. § 203(g) (2018); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1802(5) (2018); Family and Medical Leave Act, 29 U.S.C. § 2611(3) (2018); *see also* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2015-1, THE APPLICATION OF THE FAIR LABOR STANDARDS ACT'S "SUFFER OR PERMIT" STANDARD IN THE IDENTIFICATION OF EMPLOYEES WHO ARE MISCLASSIFIED AS INDEPENDENT CONTRACTORS 2 n.2 (July 15, 2015), *withdrawn on other grounds* (June 7, 2017) (listing federal laws that include "suffer or permit" language); James Reif, *To Suffer or Permit to Work: Did Congress and State Legislatures Say What They Meant and Mean What They Said?*, 6 NE. U. L.J. 347, 372 (2014) (outlining "suffer or permit" terminology in state wage statutes).

295. *See* Bodie, *supra* note 18, at 662-63 (discussing the economic realities test).

296. *Dynamex*, 416 P.3d at 36; *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 465 (N.J. 2015).

297. *See supra* Section II.A (examining the rationales for excluding independent contractors from the doctrine of vicarious employer liability).

the underlying reasons behind the agency test's independent contractor exclusion.<sup>298</sup> Even though most jurisdictions have adopted the ABC test through legislative acts, courts still retain the authority to recast the common law test in light of the ABC standard. Judges who currently apply the agency standard frequently note that the test allows them to balance and weigh factors at their discretion.<sup>299</sup> In fact, the Restatement of Agency authorizes this adaptation by listing certain common law factors that "among others" courts should consider.<sup>300</sup> Likewise, the D.C. Circuit acted upon the judicial authority to reorient the common law test when it announced a new focus away from "control" and toward "entrepreneurialism" based on this "important animating principle" of the agency standard.<sup>301</sup> This freedom to add and remove various prongs of the test explains why different courts and agencies have listed five, ten, and sometimes twenty factors to articulate the common law standard.<sup>302</sup>

Even during the early days of the common law test, courts added new factors to the analysis in response to evolving workplace relationships.<sup>303</sup> This adaptability makes sense in light of the vast historical ground that the agency standard has traveled.<sup>304</sup> Adjusting to the new challenges posed by gig work, the common law standard can change while still enabling courts to sort workers based on their financial self-determination. Given the test's fluidity, nothing prevents judges from adopting the ABC standard as a more effective articulation of common law principles.

Observers might also criticize the ABC test for its sheer breadth, as compared to existing standards. For example, the second element of the ABC test (i.e., performing work in the firm's usual course of business) has the potential to encompass many individuals who currently work as independent contractors. Take, for instance, temporary computer programmers at technology firms or physicians at hospitals. Even though many of these individuals

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298. See Pearce & Silva, *supra* note 23, at 27 (calling the ABC standard a "simplified version" of the common law test).

299. See Rogers, *supra* note 1, at 512 (discussing the freedom that courts have to consider different employment factors).

300. See RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

301. FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009); see generally Bodie, *supra* note 18, at 663 (asserting that the control test "may be losing its firm grip" on the definition of employment).

302. See Dubal, *Wage Slave*, *supra* note 10, at 77-78 (discussing the Internal Revenue Service's twenty-factor test); Sunshine, *supra* note 128, at 116-17 (examining different variations of the common law test).

303. See Carlson, *supra* note 85, at 310 (explaining how early employment decisions added factors based on the changing circumstances of work).

304. See generally Carlson, *Employment by Design*, *supra* note 47, at 158-59 (discussing the connection between employment law and master-servant law); Lee, *supra* note 127, at 786-87 (examining the origins of the common law test).



work as independent contractors, they would become employees under the ABC test because their work falls squarely within the hiring company's usual course of business. As such, the ABC test might include economically autonomous individuals who actually possess the attributes of real independent contractors.

But the ABC standard's extensive reach represents a feature of the test, not a bug. As discussed above, many individuals who currently work under nonemployee designations bear little resemblance to the financially autonomous independent contractors of agency law.<sup>305</sup> Certainly, the ABC test could theoretically cover individuals who possess a high level of economic power. But courts and legislatures can solve this problem of overbreadth in many ways. First, judges have applied the ABC standard to the unemployment arena for over eighty years. This extensive precedent suggests that courts have found ways to implement the ABC test without destroying industries or encompassing all workers in the process. Second, even if judges apply the ABC standard to a broader class of workers, lawmakers can always exclude certain groups or industries through legislation. As California's current experience with the *Dynamex* decision demonstrates, businesses are quite capable of lobbying lawmakers for exemptions from the ABC test based on the perceived financial independence of certain workers.<sup>306</sup> Likewise, legislatures in other circumstances have repeatedly shown an ability to create carveouts for individuals who work casually or infrequently.<sup>307</sup> If certain platform workers genuinely benefit from the entrepreneurship of their nonemployee designations, then lawmakers can exercise their power to exclude these workers from the ABC standard. Finally, given the ongoing problem of worker misclassification and the perception that gig firms have "hacked" employment laws,<sup>308</sup> adopting a mechanism for broadly extending employment protections to more workers represents a vastly superior alternative to the status quo's movement toward exclusion.

## CONCLUSION

The platform economy seems to grant workers tremendous freedoms. With the swipe of a phone, they can decide when to work, whom to work for,

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305. See *supra* Section II.B (discussing the mismatch between agency goals and contemporary contractor designations).

306. See Roosevelt, *supra* note 211 (summarizing efforts by California's business lobby to obtain exemptions from *Dynamex*).

307. See generally Miriam A. Cherry & Antonio Aloisi, *A Critical Examination of a Third Employment Category for On-Demand Work*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 316, 327 (Nestor M. Davidson et al. eds., 2018) (outlining the different levels of engagement that workers have with platforms); Rogers, *supra* note 1, at 515 (summarizing legislative efforts to classify specific groups of workers).

308. See Alexander & Tippett, *supra* note 57, at 1011-12 (discussing the "avoidance hacks" of platforms).

or whether to work at all. Based on this apparent freedom, some courts and legislatures have allowed platforms to operate in a legal zone that exists outside the realm of employment law. Applied on a grand scale, the entire project of on-demand labor threatens to destabilize our contemporary understanding of employment law.

But the touted freedoms of gig work are often overstated. For example, many platforms unilaterally set their workers' pay, monitor their performance, and decide when to deactivate them. Amid these debates over the real or imagined freedoms of platform work, judges should return to first principles and determine whether gig workers actually possess the financial self-determination of bona fide independent contractors.

For those firms that merely provide software and unencumbered earning opportunities to workers, the ABC test will not alter their business models. In contrast, a shift to the ABC standard will extend workplace protections to non-entrepreneurial workers who are engaged in a platform's ordinary course of business. By sorting workers based on their economic autonomy, courts can more effectively distinguish between normal gig employees and the genuine independent contractors of platform work.