PROPOSITION 22 AND THE FIGHT TO PREVENT PLATORM WORKERS FROM MISCLASSIFICATION AND EXPLOITATION

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I. INTRODUCTION

In November of 2020, following historic advertising spending[1] from companies including Uber, Lyft, and DoorDash, Californians approved Proposition 22 ("Prop. 22"), the "App-Based Drivers as Contractors and Labor Policies Initiative." These companies are described as composing the "platform economy," a term used to describe companies that use proprietary algorithms to rapidly match labor[2] with customers in return for a service fee and user data.[3] Perhaps the most prominent company within the platform economy is Uber. When Uber was created in 2009, it was widely recognized as having the potential to "disrupt the taxi industry" by skirting long-standing San Francisco taxi regulations to connect drivers to customers through its application.[4] In the United States, Uber and other rideshare companies have dramatically changed the taxi industry,[5] and the platform economy model poses a serious threat to traditional jobs in many other industries

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[1] Faiz Siddiqui, *Uber, Other Gig Companies Spend Nearly $200 Million to Knock Down an Employment Law They Don't Like—and it Might Work*, WASH. POST (Oct. 26, 2020, 2:19 PM), https://www.washingtonpost.com/technology/2020/10/09/prop22-uber-doordash.

[2] "Labor" is a broad term here. For a company like Airbnb, "labor" refers to someone who puts their property on the market for a period of time. For further discussion of the business models of Transportation Network Companies (TNCs) and Delivery Network Companies (DNCs), *see infra* pp. 5–6.

[3] Zane Muller, *Algorithmic Harms to Workers in the Platform Economy: The Case of Uber*, 53 COLUM. J.L. & SOC. PROBS. 167, 168 (2020).

[4] Veena Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 124 (2017).

[5] *See id.* at 125–26.

as well.[6] Because of the disruptive impact of the platform economy, the issue of how to classify the workers who participate in it has become one of national importance.

The struggle in determining how to classify app-based drivers and other workers in the platform economy is a modern version of a problem that has existed for over a century: how to develop a system of laws that properly classifies workers as either "independent contractors" or "employees."[7] Workers classified as employees receive benefits such as guaranteed minimum wage and overtime, enrollment in social security plans, access to unemployment insurance and workers' compensation, and the ability to unionize legally.[8] Employers can save money on federal taxes and escape liability incurred by their workers if their labor force is classified as independent contractors.[9] However, if certain independent contractors should actually be classified as employees, then the companies employing them can evade hard-won and decades-old legislation meant to protect workers from exploitation.[10] Rideshare companies argue that their drivers should be classified as independent contractors because their drivers need this classification in order to preserve their flexibility.[11] They argue that classifying their drivers as independent contractors is

[6] Meredith Whittaker & Veena Dubal, *'Those in Power Won't Give up Willingly': Veena Dubal and Meredith Whittaker on the Future of Organizing Under Prop 22*, ONEZERO (Nov. 5, 2020), https://onezero.medium.com/prop-22-where-do-gig-workers-go-from-here-e6eaa3ee2324.
[7] *See infra* Section V.
[8] 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, 54–55 (2015); Alaina Billingham, Note, *Driving the Industry Crazy: Classifying Ride-Share Drivers Following Dynamex*, 72 RUTGERS U. L. REV. 189, 194 (2019).
[9] *See* Billingham, *supra* note 8, at 194; Alex Kirven, *Whose Gig Is it Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 259–60 (2018).
[10] Billingham, *supra* note 8, at 191 ("[R]ide-share companies are financially motivated to classify workers as independent contractors instead of employees in order to continue earning high profits, but at a cost of drivers' rights.").
[11] Uber Under the Hood, *Moving Work Forward in California*, MEDIUM (Aug. 29, 2019), https://medium.com/uber-under-the-hood/moving-work-forward-in-california-7de60b6827b4.

accurate and not just an attempt to save on labor costs.[12] On the other hand, labor activists argue that these drivers should be classified as employees and that misclassification of these drivers and other gig workers as independent contractors will irreversibly establish a permanent and expanding class of unprotected workers.[13]

Prop. 22, now codified in sections 7448 through 7467 of the California Business and Professions Code,[14] marked a major shift in how California state law classifies app-based drivers. This ballot initiative carved out an exception in the 2019 California Assembly Bill 5 ("AB 5")[15] to ensure that app-based drivers for rideshare companies are classified as independent contractors, albeit with certain special benefits.[16] The ballot initiative upended the progress that labor advocates made in 2019 with AB 5, which changed California's worker classification laws to a system that strongly favored the classification of workers as employees rather than independent contractors.[17] Now, Uber and other platform companies want to use the momentum of Prop. 22 to pass similar initiatives in other states and at the federal level.[18]

This Note will provide a brief overview of the platform economy's place within the larger "gig economy," analyze the demographics of app-based drivers for rideshare companies, and

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[12] *Id.* "[T]he alternative — making all drivers full-time employees, whether or not they want it (and to be sure, most don't) — would fundamentally change what Uber and ridesharing is."

[13] REY FUENTES, REBECCA SMITH & BRIAN CHEN, RIGGING THE GIG: HOW UBER, LYFT, AND DOORDASH'S BALLOT INITIATIVE WOULD PUT CORPORATIONS ABOVE THE LAW AND STEAL WAGES, BENEFITS, AND PROTECTIONS FROM CALIFORNIA WORKERS 2 (July 2020); *see also* 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, 995 (2018) ("Independent contractors constitute a sort of precariat class . . . . In contrast to traditional jobs, independent contractor jobs frequently have a foreseeable expiration date.").

[14] CAL. BUS. & PROF. 10.5 § 7448 - §7467 (Deering 2020)

[15] Legis. Counsel Bureau No. 5, 2019 Assemb., Reg. Sess. (Cal. 2019).

[16] *See infra* n.142. This Note will refer to this designation as the "third way," independent worker, or dependent contractor. These terms all reflect a designation of a class of worker between an employee and independent contractor. While they are not clearly employees in the traditional sense (e.g. a taxi driver for a company like Yellow Cab), they are also not traditional independent contractors (e.g. a private driver with her own client list).

[17] Legis. Counsel Bureau No. 5, 2019 Assemb., Reg. Sess. (Cal. 2019).

[18] *See infra* n.203.

attempt to assess the financial realities of these workers. Then, this Note will discuss how federal and state laws classify workers, how certain tests have fared classifying app-based workers, and why Prop. 22 was such a major defeat for California labor activists. Finally, this Note will discuss which strategies researchers and activists have suggested to ensure that app-based drivers are properly classified and how those strategies can be actualized in a post-Prop. 22 landscape.

II. EXAMINING THE PLATFORM ECONOMY

The platform economy makes up one part of the larger "gig economy," which has expanded in recent years.[19] When we talk about the gig economy, we refer to workers who frequently take up short-term, part-time employment or freelance work instead of relying on full-time employment.[20] This includes app-based drivers for companies like Uber, along with workers such as contract nurses and workers in temporary positions in industries that rely heavy on intermittent work, like construction.[21] Recent estimates from Gallup and Upwork found that around 35% of the American workforce has participated in freelance work this year, as either a primary or a secondary job.[22] In these studies, the most-cited reasons for choosing freelance work are greater autonomy, schedule flexibility, and higher earning potential.[23]

As mentioned earlier, the "platform economy" more specifically refers to companies that use proprietary algorithms to match up workers with opportunities. Most workers in the platform economy use mobile applications to access these opportunities. Estimates of the size of the

[19] GALLUP, *The Gig Economy and Alternative Work Arrangements* (2018), https://www.gallup.com/file/workplace/240878/Gig_Economy_Paper_2018.pdf; Kirven, *supra* note 9, at 257.
[20] Kirven, *supra* note 9, at 251, n.2.
[21] 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.
[22] *Id.*; *Freelancing in America 2019,* UPWORK (2019), https://content-static.upwork.com/blog/uploads/sites/11/2020/04/06165223/Freelancing-in-America.pdf.
[23] *Freelancing in America 2019*, *supra* note 22.

platform economy vary significantly because of the difficulty of gauging how many different people work on the many apps that arrange electronically mediated labor. In 2017, the U.S. Bureau of Labor Statistics estimated that there were 1.6 million electronically-mediated workers, or around only 1% of the American labor force.[24] Conversely, in a 2018 interview, University of Chicago economist and former Uber chief economist John List suggested that up to 15% of the workforce are primarily employed as gig workers and that Uber has data on "millions" of drivers.[25] What we do know is that platform companies such as Uber, Airbnb, and DoorDash are significant gnerators of economic speculation in the American economy.[26]

I identify three primary factors that have led to the rise of the platform economy. First, the American labor force has undergone serious transformation and fragmentation since the 1970s, with workers switching from manufacturing to service positions and memberships in unions decreasing substantially.[27] With less job security, workers are more likely to rely on a series of temporary jobs to make up for higher wages and promotions that typically come from long-term work. Second, the rapid adoption of mobile technology has made "digital networks"[28] instantly accessible to huge portions of the population. Many people now "participate in information

[24] U.S. BUREAU OF LAB. STATS., *Labor Force Statistics from the Current Population Survey*, https://www.bls.gov/cps/electronically-mediated-employment.htm#highlights (last modified Sept. 28, 2018).
[25] Stephen J. Dubner, *What Can Uber Teach Us About the Gender Pay Gap? (Ep. 317)*, FREAKONOMICS (Feb. 6, 2018, 11:59 AM), https://freakonomics.com/podcast/what-can-uber-teach-us-about-the-gender-pay-gap. Within the context of this interview, List uses "gig economy" interchangeably with what I refer to as the "platform economy."
[26] All three companies have had very public Initial Public Offerings ("IPOs") within the last two years and are now valued at billions of dollars. *Uber Technologies, Inc. (UBER)*, YAHOO FINANCE, https://finance.yahoo.com/quote/UBER; Erin Griffith, *DoorDash Soars in First Day of Trading*, N.Y. TIMES (Dec. 9, 2020) https://www.nytimes.com/2020/12/09/technology/doordash-ipo-stock.html; Olivia Carville, Katie Roof & Crystal Tse, *Airbnb Valuation Reaches $100 Billion in Trading Debut Surge*, BLOOMBERG (Dec. 10, 2020, 4:41 AM), https://www.bloomberg.com/news/articles/2020-12-10/airbnb-s-47-billion-value-faces-debut-test-in-doordash-s-wake.
[27] Kirven, *supra* note 9, at 256.
[28] *See* Muller, *supra* note 3, at 171–72.

exchange via a digital network according to their own motivations and abilities, without central control or direction,"[29] and thus do not need to rely on traditional methods of finding jobs. Finally, the Great Recession in 2009 accelerated the transition to the gig economy, by both encouraging employers to save costs by switching their labor from employees to independent contractors and by leaving behind a vulnerable class of workers in need of quick jobs to provide supplemental income.[30]

III. DEMOGRAPHICS OF APP-BASED DRIVERS WORKING FOR TRANSPORTATION NETWORK COMPANIES ("TNCS") AND DELIVERY NETWORK COMPANIES ("DNCS")

Within the platform economy, some of the biggest hirers are Uber and Lyft, which essentially operate a duopoly[31] of Transportation Network Companies ("TNCs"),[32] along with DoorDash and other Delivery Network Companies ("DNCs").[33] These companies use a fleet of app-based drivers to provide the services traditionally performed by taxi, limousine, and courier companies through their proprietary applications. In order to understand who these workers are and how they use these companies to find work, labor economist Michael Reich of UC Berkeley, a leader in research surrounding the platform economy, breaks down the workforce of TNCs and DNCs into four categories.[34] He recommends this approach because TNCs and DNCs often claim

[29] *Id.* at 172.
[30] 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, 10–11 (2018).
[31] John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1551 (2019).
[32] CAL. PUB. UTIL. CODE § 5431 (Deering 2019) defines a TNC as "an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle."
[33] CAL. BUS. & PROF. CODE § 7463(f) (Deering 2020) defines a DNC as a "business entity that maintains an online-enabled application or platform used to facilitate delivery services within the State of California on an on-demand basis, and maintains a record of the amount of engaged time and engaged miles accumulated by DNC couriers."
[34] Michael Reich, *Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers* 4 (Inst. Rsch. Lab. & Emp. Working Paper No. 107–20, 2020), http://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf.

that most of their workforce use their apps "sporadically when convenient" and not as full-time employment.[35] In a sworn declaration in support of Lyft, Dr. Catherine Tucker of the Massachusetts Institute of Technology ("MIT") Sloan School of Management claimed that the company's own data supports this assertion:

> "[T]he vast majority of drivers use the Lyft App on a part time basis . . . approximately 58 percent of drivers average fewer than 10 hours a week and approximately 83 percent of drivers average fewer than 20 hours per week. The average driver drives 11.70 hours a week and the median driver drives 8.20 hours a week."[36]

Reich's research paints a different picture. His four categories are: (1) full-time drivers "who regularly work 32 hours or more" per week and "depend upon driving for their primary source of income"; (2) part-time drivers "who drive between 20 and 32 hours" a week and may have other employment; (3) regular casual drivers "who drive between 10 to 19 hours" a week; and (4) irregular casual drivers who drive ten hours or less a week and "do not drive every week."[37] Survey data from Seattle suggests that full-time drivers provide 55% of Uber rides and full-time/part-time drivers combined provide more than 80% of Uber rides.[38] This data shows that, even though the typical driver might use platform applications to pick up riders infrequently, workers who treat rideshare driving as a full-time or part-time job provide the vast majority of rides for passengers.

A major challenge in accurately estimating how often app-based drivers use Uber and Lyft is that these companies are reluctant to share the full extent of their data with independent

[35] *Id.;* Lyft, Inc.'s Opp'n to Mot. for Prelim. Inj. at 10, People v. Uber Techs., Inc. (July 24, 2020) (No. CGC-20-584402).
[36] Decl. of Dr. Catherine Tucker and App. A-B In Supp. Of Lyft, Inc.'s Opp'n to Plaintiff's Mot. for Prelim. Inj. at 44, People v. Uber Techs., Inc. (July 24,2020) (No. CGC-20-584402).
[37] Reich, *supra* note 34, at 4.
[38] *Id.* at 4–5.

researchers.[39] For example, in his research, Reich points to an independent J.P. Morgan Chase analysis which states that 10% of drivers provide 57% of the work conducted by Uber.[40] However, in an official statement from the company, Uber data analyst Alison Stein says her own internal data contradicts this, without giving any concrete evidence.[41] Uber and Lyft did grant some access to their driver data to certain researchers, including Louis Hyman, a work historian at Cornell University's Industrial and Labor Relations School, whose recent study analyzed rideshare driver behavior; but this study and others have received criticism from other economists for working under close supervision of the TNCs and making assumptions favorable to them.[42] However, even the data from Hyman's study still suggests that workers who treat rideshare driving as a full-time or part-time job provide most of the labor for TNCs.[43]

App-based drivers who rely on work provided by TNCs or DNCs are particularly vulnerable to labor exploitation. The majority of full-time and part-time app-based drivers are people of color, immigrants, and those without a college degree.[44] A 2018 survey of New York City app-based drivers found that over 90% of the labor force was composed of immigrants and that more than half of drivers had only a high school diploma or less.[45] Another more recent study

[39] *Id.* at 5.
[40] *Id.*.
[41] Alison Stein, *Unpacking Pay Standards: A Response to the UC Berkeley Labor Center*, MEDIUM (Nov. 7, 2019), https://medium.com/uber-under-the-hood/unpacking-pay-standards-a-response-to-the-uc-berkeley-labor-center-aa5549871040.
[42] Noam Scheiber, *When Scholars Collaborate with Tech Companies, How Reliable are the Findings?*, N.Y. TIMES (July 12, 2020), https://www.nytimes.com/2020/07/12/business/economy/uber-lyft-drivers-wages.html.
[43] Reich, *supra* note 34, at 5; LOUIS HYMAN, ERICA L. GROSHEN, ADAM SETH LITWIN, MARTIN T. WELLS, KWELINA THOMPSON, & KYRYLO CHERNYSHOV, PLATFORM DRIVING IN SEATTLE 32–35, (2020).
[44] Reich, *supra* note 34, at 10.
[45] Large numbers of immigrants are seen throughout demographic data, but New York likely has an even greater percentage of immigrant drivers than a typical city. JAMES A. PARROTT & MICHAEL REICH, CTR FOR N.Y.C. AFFS., AN EARNINGS STANDARD FOR NEW YORK CITY'S APP-BASED DRIVERS: ECONOMIC ANALYSIS AND POLICY ASSESSMENT 15–16 (2018), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3a946d2a73a677f855b9/1530542742060/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf.

conducted by the UC Santa Cruz Institute for Social Transformation found that 78% of all app-based drivers on rideshare and delivery platforms are people of color and that 45% of these workers could not handle a $400 emergency expense.[46] Labor activists argue that the large majority of app-based drivers are persons of color because they face high barriers to entry into stable employment, making the low-wage, insecure option of rideshare driving one of the limited work opportunities available to them.[47] For this group of workers, misclassification as independent contractors is a new way of perpetuating racial inequality—these jobs are accessible, but they do not provide people of color with the same protections and benefits they would otherwise receive if recognized as employees.

IV. THE FINANCIAL REALITIES OF APP-BASED DRIVERS

The data on rideshare drivers' earnings is unclear, again largely due to lack of data transparency. Two other conceptual problems add to the difficulty of properly evaluating the "work time" of app-based drivers and the expenses that these drivers incur.[48] Uber and Lyft argue that "work time" should only consist of time spent picking up or driving customers,[49] while Reich argues that it should also include time spent looking for other passengers while Uber or other applications are running[50] (often referred to as "P1"). There are strong arguments on both sides, and one notable argument for not including P1 as part of work time is that drivers can have network applications from diferent companies on at the same time in order to maximize the number of

[46] CHRIS BENNER WITH ERIN JOHANSSON, KUNG FENG, & HAYS WITT, U.C. SANTA CRUZ INST. SOC. TRANSFORMATION, ON-DEMAND AND ON-THE-EDGE: RIDE HAILING AND DELIVERY WORKERS IN SAN FRANCISCO 2 (2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOntheEdge_ExecSum.pdf.
[47] FUENTES ET AL., *supra* note 13, at 1.
[48] REICH, *supra* note 34, (manuscript at 5).
[49] Stein, *supra* note 41. This is how Prop. 22 calculates work time as well.
[50] REICH, *supra* note 34, (manuscript at 5).

customers during a rideshare session.[51] Expense per mile estimates also vary depending on the source. The Internal Revenue Service ("IRS") estimates expenses at fifty-eight cents per mile,[52] but the American Automobile Association ("AAA") estimates expenses for mid-size cars, like many app-based drivers use, at seventeen to twenty-three cents per mile.[53]

The two reports mentioned earlier, from Professor Tucker of MIT and Professor Hyman of Cornell University, received financing and internal data from Lyft and Uber, respectively.[54] Tucker placed Lyft drivers' median earnings at around $20 per hour,[55] while Hyman placed TNC drivers' median earnings at $23.25 per hour.[56] Studies conducted by Reich and other researchers without TNC funding were more skeptical about how much money app-drivers actually make. In a 2018 Economic Policy Institute report, Lawrence Mishel re-evaluated data provided by Uber and determined a median hourly wage of nationwide drivers of $11.77 per hour after expenses.[57] Reich's own work based on a survey of Seattle drivers found an average wage of $9.73 per hour after expenses.[58] Notably, in all of these studies, earnings vary significantly among drivers.[59] As

[51] CHRISTOPHER THORNBERG ET AL., U.C. RIVERSIDE SCH. BUS. CTR. ECON. FORECASTING & DEV., PROPOSITION 22: ANALYZING THE IMPACT ON APP-BASED DRIVERS' EARNINGS 6 (2020), https://ucreconomicforecast.org/wp-content/uploads/2020/08/Prop22_Driver_Earnings_Analysis_August2020.pdf. The argument goes that if an app-based driver has multiple apps open at the same time, the driver is not working for any company in particular and should not be compensated for this. It should be noted that if drivers are formally recognized as employees, they would not be able to do this anymore.
[52] *Id.* at 7.
[53] *Id.*
[54] REICH, *supra* note 34, (manuscript at 6).
[55] *Id.* Reich criticizes this analysis as not properly factoring in "work time."
[56] *See generally* HYMAN ET AL., *supra* note 43. Reich also criticizes this finding and frames it as 26% of full-time drivers making less than minimum wage after factoring in expenses.
[57] LAWRENCE MISHEL, ECON. POL'Y INST., UBER AND THE LABOR MARKET 2 (2018), https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy.
[58] REICH, *supra* note 34, (manuscript at 7).
[59] *Id.*

Hyman observed, however, the longer that drivers work, the less variation emerged in their earnings.[60]

V. THE CHALLENGES OF DEFINING THE STATUS OF APP-BASED WORKERS

The debate over whether app-based drivers that work for platform companies are employees or not is a modern iteration of a long-running struggle. American common law has used tests to determine whether a worker is an employee or not since at least the mid-nineteenth century.[61] In the 1930s, federal legislation passed as part of the New Deal gave employees more protections, including the right to collectively bargain, which dramatically increased the importance of labor classification laws.[62] Then, with the passing of the Taft-Hartley Act in 1947, Congress formally separated employees from independent contractors, codifying that "employee[s] . . . shall not include any individual having the status of an independent contractor."[63] This explicitly excluded independent contractors from certain protections afforded to employees.[64] Since then, various federal and state bodies have developed and refined their own tests that try to delineate between employees and independent contractors. A theme that has emerged is that multi-factor "right to control" tests leave decisionmakers ample room for interpretation, resulting in frequent shifts in how courts view certain classes of workers based on their weighted application of these factors.[65]

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[60] HYMAN ET AL., *supra* note 43, at 117.
[61] Back then, it served primarily to determine liability in negligence suits, as very few labor statutes or wage regulations existed. 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, 304 (2001).
[62] *Id.* at 315. VEENA B. DUBAL, AN UBER AMBIVALENCE: EMPLOYEE STATUS, WORKER PERSPECTIVES, & REGULATION IN THE GIG ECONOMY, (Deepa Das Acevedo ed., forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488009.
[63] Carlson, *supra* note 61, at 321.
[64] Dubal, *supra* note 62, at 6.
[65] *Id.* at 7.

This Section will discuss the most prominent labor classification tests at the federal and state level. Before discussing these tests, I will discuss how TNCs and DNCs interact with drivers that use their applications, to provide context on how courts apply labor classification tests for app-based drivers. After discussing these tests, I will review trends in litigation surrounding the classification of app-based drivers and how courts have used right to control tests to classify app-based drivers.

A. WHAT IS THE RELATIONSHIP LIKE BETWEEN TNCS/DNCS AND THEIR DRIVERS?

Uber[66] and most other TNCs and DNCs believe that the app-based drivers using their applications should be classified as independent contractors, and these companies argue that a switch from an independent contractor to employee model would limit the flexibility their drivers enjoy.[67] Uber points to research and several internal studies[68] that suggest that its drivers value flexibility and choice of when to work above all else. Uber also argues that if its drivers were classified as employees, it would have "far fewer drivers than [it] currently supports," harming the customer experience by reducing the reliability of finding an Uber in time and increasing prices.[69] Uber has also argued that it is not a transportation company but, rather, a technology company that enables independent entrepreneurs to find a better work-life balance.[70] This argument has been

[66] Uber argues that changing the designation of their drivers from independent contractors to employees "would fundamentally change what Uber and ridesharing [are]," which is another way of phrasing the view that people mainly "rideshare" if they have free time and do not see it as a job. Uber Under the Hood, *supra* note 11.
[67] *Id.*
[68] *Id.* In this article, Uber points to an internal study of its drivers from 2015 and a study from the United Kingdom, which worked in proximity with the company. As mentioned throughout, there is reason for skepticism surrounding these kinds of studies.
[69] *Id.*
[70] Muller, *supra* note 3, at 173; O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133,1137–38 (N.D. Cal. 2015).

rejected in court,[71] but it shows the lengths that Uber will go in its public statements to distance its agency and control from drivers in order to prove that these drivers are not its employees.

Whether app-based drivers would actually be unable to enjoy the same level of flexibility if they were explicitly classified as employees is disputed.[72] However, academic studies consistently show that app-based drivers do value flexibility highly and would prefer to remain classified as independent contractors.[73] Prominent labor law researcher Veena Dubal conducted ethnographic research among San Francisco drivers to better understand why many app-based drivers do not want to be classified as employees.[74] Dubal found that rideshare drivers are generally ambivalent towards how they are classified; they desire the benefits associated with employment but fear retribution[75] from Uber and other TNCs and DNCs if they receive employee designation. Dubal argues that these findings show that app-based drivers need more legislative employee protections to preserve their right to set their own schedules and maintain some level of flexibility, not laws that simply classify them as independent contractors despite evidence that Uber and other platform companies exert significant influence over them.[76]

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[71] *See* O'Connor, 82 F. Supp. 3d 1133 at 1141.

[72] DUBAL, *supra* note 62, (manuscript at 11–12) ("Scheduling flexibility and on-the job autonomy arise from business practices. Although time flexibility is *sometimes* one of many factors considered for determining worker status, it is also commensurate with employment.").

[73] *Id.* (manuscript at 11). In addition to academic studies, *The Rideshare Guy*, a very popular blog among app-based drivers that shares advice on the industry, conducts informal surveys that give more evidence that rideshare drivers would prefer classification as independent contractors. In 2020, around 70% of the drivers the website polled said they would prefer to be labelled as independent contractors, and only 11.5% said they would want to be classified as employees. The number of drivers who affirmed their preference for independent contractor status has gone down since 2019, likely because of the novel coronavirus pandemic. Harry Campbell, *Lyft and Uber Driver Survey 2019: Uber Driver Satisfaction Takes a Big Hit*, THE RIDESHARE GUY (Feb. 24, 2021), https://therideshareguy.com/uber-driver-survey/.

[74] *See generally* DUBAL, *supra* note 62.

[75] *Id.* (manuscript at 14).

[76] *See generally id.*

Several factors suggest that full-time and part-time drivers are dependent on TNCs and DNCs.[77] While the companies act as if they have abdicated control over drivers, they control what routes drivers can take and how much income they earn through the companies' applications.[78] Companies in the platform economy prefer to position themselves as "impartial intermediar[ies]"[79] but tailor their algorithms to nudge drivers to select certain routes over others, a form of "soft coercion."[80] App-based drivers also have to follow certain standards set in place by TNCs and DNCs. For example, to get hired as Uber drivers, they must "pass a background check, a 'city knowledge exam,' a vehicle inspection and complete a personal interview."[81] App-based drivers are also at the mercy of user rating systems managed by TNCs and DNCs. Uber and Lyft both have systems in place that deactivate a driver's account if the driver's rating falls below a certain threshold and does not improve.[82]

Major TNCs and DNCs, such as Uber and Lyft, do not provide their drivers with cars, limousines, or other methods of transportation. This supports the idea that drivers should not be treated as employees because platform companies' main function is to provide an application that can act as a conduit to connect people with vehicles with people in need of transportation. However, many full-time and part-time drivers acquire a vehicle primarily for the purpose of

[77] In February 2021, the Supreme Court of the United Kingdom formally weighed in on this debate and held that rideshare drivers are "workers" for Uber and not self-employed. *See infra* n.166 for a lengthier discussion on the "third class" of labor relationship under UK law.
[78] Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1662–63 (2017).
[79] *Id.* at 1635.
[80] *Id.* at 1662–63. "Soft coercion" refers to the idea that rideshare companies make cetain routes essentially mandatory through toggling their pricing mechanisms. Drivers must also "watch a training video that instructs them on the proper dress code, how to properly interact with customers, and suggestions for improving the rider's experience, including stocking their cars with water and cell phone chargers."
[81] Kirven, *supra* note 9, at 280.
[82] *Id.* at 281.

driving for Uber or Lyft.[83] This purchase makes the drivers particularly vulnerable to fluctuations in the labor market and resistant to seeking more traditional minimum-wage jobs because of the investments they have already made. Many drivers for TNCs and DNCs have become dependent on them for income, regardless of whether they intended to or not.

B. AN OVERVIEW OF LABOR CLASSIFICATION TESTS RELEVANT FOR APP-BASED DRIVERS

The most common analyses used to determine whether a worker is an employee or an independent contractor are the "right to control" tests.[84] Essentially, these tests are employed to examine how much control an employer has over the "means and manner" of a worker's performance.[85] The more control an employer has over a worker's conduct, the more likely a court will find that the worker is an employee rather than an independent contractor.[86] In *Community for Creative Non-Violence v. Reid*, the Supreme Court held that when federal statutory law does not explicitly define "employee," courts should use the right-to-control test articulated in Restatement (Second) of Agency § 220 ("Restatement") to make the determination.[87] This test defines an employee as a "servant hired to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control" and lists ten factors that courts can consider to make this determination.[88] Scholars have

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[83] REICH, *supra* note 34, (manuscript at 5).
[84] Pearce & Silva, *supra* note 30, at 7.
[85] DUBAL, *supra* note 62, (manuscript at 7).
[86] *Id.*
[87] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989); Pearce & Silva, *supra* note 30, at 8–9.
[88] From the RESTATEMENT (SECOND) OF AGENCY § 220 (1958):

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe

argued that, today, in the face of rapid technological change including the widespread adoption of app-based platforms, this test has become easy to manipulate and does not give the broad protection it was intended to when it was adopted in the 1950s.[89]

The two most important federal statutes for employee protections, the Fair Labor Standards Act ("FLSA")[90] and National Labor Relations Act ("NLRA"),[91] use variations of the Restatement right-to-control test to classify workers.[92] Critically, both of these laws only apply to employees and not workers classified as independent contractors.[93] Claims brought under the FLSA are subject to the five-factor "economic realities" test to determine whether workers are employees or independent contractors.[94] The economic realities test also uses multiple factors to determine

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they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

[89] *See* Jennifer Pinsof*, A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 351 (2016). One example of a factor that no longer reflects the realities of the modern work environment is "locality." *Id.* at 363. While working "on-site" was an accurate marker of whether a worker was an employee or independent contractor when these statutes were enacted in the 1940s and '50s, in the modern age—and especially after the emergence of the COVID-19 pandemic—remote and off-site work has become commonplace in clear examples of employee relationships. However, this factor is still used today to argue against a worker's classification as an employee.

[90] The FLSA, passed as part of the New Deal in response to the Great Depression, ensures the provision of a federal minimum wage for regular hours and overtime premiums for long hours. Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old is New Again,* 104 CORNELL L. REV. 557, 558 (2019); 29 U.S.C. §§ 201–219 (2020).

[91] The NLRA was also passed as part of the New Deal, similarly to the FLSA. Workers found to be employees under the NLRA have the federal right to collectively organize and bargain, among other rights. The NLRA is enforced by the National Labor Relations Board ("NLRB"), "a 'quasi-judicial' body . . . with five Members appointed by the president to 5-year terms, the term of one Member expiring each year." *The Board*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/who-we-are/the-board (last visited Dec. 5, 2021); The President also appoints a General Counsel of the Board, who oversees other NLRB attorneys, investigates charges, and issues complaints. 29 U.S.C. § 153. This structure of the NLRB leads to a "see-saw decision making process," where interpretation of who is covered by the NLRA changes depending on which political party is in power. Dubal, *supra* note 62, at 7; William B. Gould IV, The Future of the Gig Economy, Labor Law and the Role of Unions: How Will They Look Going Forward 5 (Dec. 6, 2017) (unpublished manuscript) (on file with Stanford Law School).

[92] On the FLSA, *see* Pearce & Silva, *supra* note 30, at 9; on the NLRA *see* DUBAL, *supra* note 62, (manuscript at 7).

[93] On the FLSA, *see* Griffith, *supra* note 90, at 560. On the NLRA, *see* Griffin Toronjo Pivateau, *Opposite Sides of the Same Coin: Worker Classification in the New Economy*, 37 HOFSTRA LAB. & EMP. L.J. 95, 112 (2019).

[94] For an employment relationship to exist under the common law, (1) the employer must exercise a degree of control over the workers, (2) the workers must have an opportunity to profit or invest in the business, (3) performing the work must require a degree of skill, (4) the working relationship must be permanent or at least durable, and (5) the work must be integral to the employer's business. Jones v. Pawar Bros. Corp., 434 F. Supp. 3d 14, 24 (E.D.N.Y. 2020).

whether an employer has control over the worker, but through the lens of whether, "as a matter of economic reality,"[95] workers are in business for themselves or economically dependent on their employer. Claims brought under the NLRA have traditionally used the right to control test,[96] but in recent years the National Labor Relations Board ("NLRB") has shifted its classification methods.[97] In 2014, with a board consisting of Democratic appointees, the NLRB used a right-to-control test very similar to the economic realities test the FLSA uses.[98] However, in a 2009 case, and recently in 2019, a Republican-dominated NLRB used the right to control test filtered through the lens of "entrepreneurial opportunity."[99] Under this analysis, the more "entrepreneurial opportunity"[100] workers have for financial gains and losses—even if that opportunity is never realized—the more likely the worker is to be an independent contractor.[101] In practice, this interpretation of the right to control test leads to classification of more workers as independent contractors.

Many commentators have pointed out the disadvantages of multi-factor control tests.[102] The number of factors and different ways they can be weighed leave businesses and workers unsure of how workers will ultimately be classified.[103] Also, a multi-factor standard gives

[95] *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR (July 2008), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.
[96] Robert Sprague, *Using the ABC Test to Classify Workers: End Of The Platform-Based Business Model Or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 744 (2020).
[97] *Id.*; *see also* FedEx Home Delivery, 361 NLRB 610 (2014).
[98] Sprague, *supra* note 96, at 744.
[99] DUBAL, *supra* note 62, at 7; FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009); *See generally* SuperShuttle DFW, Inc. & Amalgamated Transit Union Local 1338, 2019 NLRB LEXIS 15, at *8 (2019) (No. 16–RC–010963).
[100] Even papers that advocate the consideration of entrepreneurship in worker classification tests admit that a precise definition of the concept is elusive. *See* Pivateau, *supra* note 93, at 119.
[101] DUBAL, *supra* note 62, (manuscript at 7).
[102] Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 954 (2018).
[103] *Id.*

businesses "greater opportunity to evade [their] fundamental responsibilities under a wage and hour law by dividing [their] workforce[s] into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard,"[104] a problem prevalent in the gig economy.

In response, several jurisdictions have chosen to adopt the "simpler, more structured"[105] "ABC" test.[106] The test has become "the dominant reform for state independent contractor definitions"[107] since it was adopted in Massachusetts in 2004. It assumes that workers are employees and only allows them to be classified as independent contractors if the "hiring business" can show three conditions:

> (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[108]

The ABC test is intentionally broader than other tests to protect workers from employers who might try to structure their company to exclude deserving workers from labor protections.[109]

Conversely, recognizing the inadequacies of multi-factor tests to classify workers in the platform economy, some jurisdictions have chosen to take an approach explicitly designed to classify workers in the platform economy as independent contractors.[110] These statutes give clear

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[104] *Id.* at 955.
[105] Dynamex Operations, 4 Cal. 5th at 955.
[106] Sprague, *supra* note 96, at 748.
[107] Pearce & Silva, *supra* note 30, at 11.
[108] Dynamex Operations, 4 Cal. 5th at 955–56. See *infra* p. 22 for additional discussion on criticisms of the ABC test.
[109] Dynamex Operations, 4 Cal. 5th at 958.
[110] Sprague, *supra* note 96, at 746.

definitions of companies that use the internet or applications to "facilitate the provision of services" and label those who use the platform to provide services as "marketplace contractors."[111] As long as there is a contract between the marketplace contractor and the platform, the worker is classified as an independent contractor.[112] These types of laws have faced criticism from labor groups and policy advocates,[113] who argue that the such bills will leave many vulnerable workers without protections, even if external factors suggest these workers are dependent on their employer.

C. TRENDS IN LITIGATION SURROUNDING APP-BASED DRIVERS AND THE RIGHT TO CONTROL TEST

The rapid emergence of Uber and other platform companies in the mid-2010s resulted in dozens[114] of class action lawsuits from workers, who claimed that their employers misclassified them as independent contractors.[115] Until at least 2017, all of these cases ultimately resulted in settlements.[116] Two of the most important early cases from this period are *O'Connor v. Uber Techs, Inc*.[117] and *Cotter v. Lyft Inc.*[118] These two cases illustrate why judges struggle to come to clear

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[111] *Id.* at 747.
[112] *Id.*
[113] Jacob Monty, *TWC Adopts Controversial Rule — Gig Workers are Independent Contractors,* 30:7 TEX. EMP. L. LETTER 1, (2019); Natalie Foster, Libby Reder & Ethan Pollack, *State Legislation Aimed at Helping Online Platforms Could Harm Workers*, ASPEN INST. (2018), https://www.aspeninstitute.org/blog-posts/worker-classification-state-legislation-2018.
[114] Billingham, *supra* note 8, at 203.
[115] Pamela A. Izvanariu, *Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133, 138 n.9 (2016). To give an idea of the amount of litigation happening between 2015 and 2017, Izvanairu identifies nineteen separate class-action lawsuits filed across twelve different states.
[116] Lawyers for TNCs and DNCs in these cases did not know how judges would apply right-to-control tests, leading them to settle whenever possible. Billingham, *supra* note 8, at 203.
[117] O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015). This case was the first lawsuit against Uber to have a large class of drivers certified. In addition, scholars believed that, because of potentially sympathetic judges and juries, the court might have come to a decision that Uber drivers were employees and not independent contractors. For a summary of the case, *see* Dubal, *supra* note 4, at 132.
[118] Cotter v. Lyft Inc., 60 F. Supp. 3d 1067 (N.D. Cal. 2015). This case was ruled on the same day as *O'Connor*, and dealt with a class-action lawsuit of Lyft drivers as opposed to Uber drivers. *See* Pearce & Silva, *supra* note 30, at 23.

decisions over whether app-based drivers are employees or independent contractors under multi-factor, right to control tests. In both cases, the North District of California determined that multi-factor, right to control tests cannot rule presumptively on whether app-based drivers are either independent contractors or employees and that worker status must be decided by a jury.[119] The court in *Cotter* described the situation facing the jury as being "handed a square peg and asked to choose between two round holes," writing that the sheer amount of factors in these tests—some of which favor classification as employees while others favor classification as independent contractors—provide "nothing remotely close to a clear answer."[120] The court had to apply "20th century" worker classification tests that were unprepared to deal with "21st century problem[s]."[121] Ultimately, both of these cases settled, and a jury never received the opportunity to rule on how app-based drivers should be classified.[122]

Within the past two years, judicial bodies have given more definitive, but contradicting, recommendations as to how app-based drivers should be classified under multi-factor control tests. In April 2019, the General Counsel of the NLRB issued an Advice Memorandum regarding a claim of Uber drivers who wanted to collectively bargain, which stated that, through the lens of entrepreneurial opportunity, Uber drivers should be considered independent contractors.[123] The memorandum argues that "considering all the common-law factors through 'the prism of

[119] *See O'Connor*, 82 F. Supp. 3d 1133 at 1153; *Cotter*, 60 F. Supp. 3d 1067 at 1070.
[120] *Cotter*, 60 F. Supp. 3d. at 1081–82.
[121] *Id.*
[122] Matthew L. Timko, *The Gig Economy: An Annotated Bibliography*, 39 N. ILL. U. L. REV. 361, 364 (2019).
[123] Pivateau, *supra* note 93, at 113. The order followed a decision in which the NLRB overturned Obama-era policy towards classification of delivery workers and ruled that franchisees who operated rideshare vans were independent contractors. The Board argued that "employer control and entrepreneurial opportunity are two sides of the same coin," essentially arguing that, because drivers have the opportunity on their own to make gains or losses, they should not be considered independent drivers. SuperShuttle DFW, Inc. & Amalgamated Transit Union Local 1338, 367 NLRB No. 75, 3 (Jan. 25, 2019). *See also supra* note 99.

entrepreneurial opportunity,'" establishes that "UberX drivers [are] independent contractors."[124] In contrast, a New York state appellate court ruled that under a multi-factor control test similar to the Restatement test, courier drivers for Postmates, a DNC, should be classified as employees.[125] Some evidence that the majority found supported this determination—that Postmates did exercise sufficient control over the courier—was that the courier could not negotiate his fees, the courier could not choose the assignment of his deliveries once logged on, and Postmates had total control "over the means which it obtains customers."[126] However, one judge on the court wrote a scathing dissent, arguing that proper application of the right to control test to the evidence would support that the courier should be classified as an independent contractor.[127] The dissent also argued that multi-factor tests have failed to "recognize that the realities of the contemporary working world have outpaced our jurisprudence,"[128] a blunt but telling conclusion on how capable these tests are at making coherent and consistent decisions on app-based drivers.

While these class action lawsuits were successful in making TNCs pay their drivers,[129] a major shift in class action litigation has occurred since the 2018 *Epic Systems v. Lewis* ruling.[130] In *Epic Systems*, the Supreme Court held that employees who sign individual arbitration

[124] *See* Memorandum from Jayme L. Sophir, Associate General Counsel, NLRB to Jill Coffman, Regional Director, NLRB 14 (Apr. 16, 2019). The main factors identified in the memorandum are the following: drivers had virtually unfettered freedom to set their own work schedule; drivers were free to choose where they worked; drivers could, and often did, freely work for competitors; drivers provided the principal instrumentality, i.e., the cars they used to complete trips; drivers were responsible for chief operating costs such as gas, cleaning, and maintenance of their cars; drivers were not required to take trips at the direction of Uber and could reject proposed trips at their discretion; and drivers signed contracts which expressly characterized their relationship to Uber as independent contractors—and Uber provided no benefits, paid leave, or holiday pay. *See generally id.*
[125] *In re* Vega, 35 N.Y.3d 131, 137 (2020).
[126] *Id.* at 138, 140.
[127] *Id.* at 160.
[128] *Id.* at 155.
[129] Billingham, *supra* note 9, at 203.
[130] *See generally* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

agreements forfeit NLRA protection to later file class-action lawsuits.[131] Because TNCs and DNCs typically write individual arbitration clauses into contracts with their drivers,[132] the holding in *Epic Systems* has had a chilling effect on new class action lawsuits seeking relief under federal statutes. For example, in *O'Connor v. Uber Techs.*, the Ninth Circuit held that the "district court's denial of Uber's motions to compel arbitration . . . must be reversed," and that the individual arbitration agreements between each driver and the licensor were enforceable, effectively ending a long-running class-action lawsuit to seek benefits.[133] Some labor attorneys have responded by encouraging as many drivers as possible to enter into individual arbitration disputes against platform companies.[134] While filing fees for each individual arbitration case are relatively low (up to $20,000),[135] the thousands of drivers engaged in arbitration means subjecting companies like Uber to a "death by a thousand cuts,"[136] forcing them to spend significant amounts of time and millions of dollars settling individual arbitration claims in states with unsettled labor classification laws.

VI. THE EMERGENCE OF A "THIRD WAY" IN CLASSIFYING APP-BASED DRIVERS

In 2019, California adopted a labor test that made it easier for app-based drivers to be recognized as employees. However, only a month after a case strongly suggested that the ABC test

[131] Gould, *supra* note 13, at 1014–15.
[132] *See* Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 205 (2017).
[133] O'Connor v. Uber Techs., 904 F.3d 1087, 1095 (2018).
[134] Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come Up the Loser*, L.A. TIMES (May 8, 2019, 10:22 AM), https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html. Uber's 2019 prospectus filed with the SEC prior to its IPO (S1) claimed that "over 60,000 drivers . . . have filed (or expressed an intention to file) arbitration demands against us that assert similar claims." Uber Techs., Inc., Registration Statement (Form S-1) 28 (Apr. 11, 2019).
[135] Uber Techs., Inc., Registration Statement (Form S-1) 28 (Apr. 11, 2019). Estimate of the total cost of one arbitration dispute between "$10,000–$20,000." Rosenblatt, *supra* note 134.
[136] Rosenblatt, *supra* note 134.

would qualify app-based drivers as employees,[137] voters passed Prop. 22 and essentially locked in the classification of app-based drivers as "independent contractors plus." Now, TNCs and DNCs have a successful model they can use to push for federal and state legislation to formally establish a "third way." Whether the third way model will benefit app-based drivers and workers in the platform economy, or leave them exposed to exploitation by cutting them off from the full scope of benefits and protection employees receive, remains to be seen.

A. *DYNAMEX*, AB 5, AND *PEOPLE V. UBER TECHS.*: MAJOR ADVANCEMENTS TOWARDS THE RECOGNITION OF EMPLOYEE STATUS FOR CALIFORNIA GIG WORKERS

Before the *Dynamex* decision in 2018, most California lower courts used the multi-factor Borello labor classification test, another version of a multi-factor right to control test.[138] In *Dynamex*, the California Supreme Court ruled that the ABC test should replace the Borello test to classify workers, albeit in a narrow context of orders from the Industrial Wage Commission ("IWC").[139] The court focused on one of three definitions of employment included in the IWC labor code: "(b) to suffer or permit to work."[140] The court argued that this clause must be interpreted liberally in order to ensure that workers without significant bargaining power are "provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare."[141]

In September 2019, the California legislature codified and expanded *Dynamex* through Assembly Bill 5 ("AB 5"). AB 5 expanded the ABC test to apply to "the Labor Code, the

[137] *See* People v. Uber Techs., Inc., 56 Cal. App. 5th 266, 298 (2020).
[138] Ben Burdick, *Dynamex Operations West, Inc. v. Superior Court*, 40 BERKELEY J. EMP. & LAB. L. 169, 170 (2019); S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d 341, 350 (1989).
[139] Burdick, *supra* note 138, at 170.
[140] Dynamex Operations, 4 Cal. 5th at 943.
[141] *Id.* at 952. *See supra* note 102 for why the court found the agency right-to-control test inadequate.

Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission,"[142] and it provided mechanisms for the state to enforce the ABC test against companies that improperly classify its workers.[143] In response, many industries lobbied for exemptions that would shield them from the law's effect.[144] The law predictably received criticism from TNCs and DNCs as well as free enterprise organizations opposed to the presumptive categorization of workers as employees.[145] AB 5 also received pushback from some in creative industries who were angered at the seemingly arbitrary way certain groups were able to lobby for specific exemptions under the law.[146] Notably, TNCs and DNCs were not included in these exemptions,[147] and after AB 5 passed, these companies commenced litigation to make two arguments. First, under the ABC test, their drivers should be classified as independent contractors, and that AB 5 was unconstitutional and should be repealed.[148]

Efforts to prevent the Attorney General from providing injunctive relief to classify app-based drivers as independent contractors finally stopped on October 22, 2020, when a California

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[142] Legis. Counsel Bureau No. 5, 2019 Assemb., Reg. Sess. (Cal. 2019).
[143] CAL. LAB. CODE § 2750.3(j) (repealed 2020) states, "In addition to any other remedies available, an action for injunctive relief to prevent the continued misclassification of employees as independent contractors may be prosecuted against the putative employer in a court of competent jurisdiction by the Attorney General."
[144] John Myers, Johana Bhuiyan & Margot Roosevelt, *Newsom Signs Bill Rewriting California Employment Law, Limiting Use of Independent Contractors*, L.A.TIMES (Sept. 18, 2019, 3:55 PM), https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california.
[145] Rachel Greszler, *California Lawmakers Will Gag the Gig Economy With Assembly Bill 5*, HERITAGE FOUND. (Sept. 19, 2019), https://www.heritage.org/jobs-and-labor/commentary/california-lawmakers-will-gag-the-gig-economy-assembly-bill-5.
[146] Johana Bhuiyan, *Coronavirus is Supercharging the Fight Over California's New Employment Law*, L.A. TIMES (March 26, 2020, 3:11 PM), https://www.latimes.com/business/technology/story/2020-03-26/coronavirus-disrupted-their-income-now-their-calls-for-california-to-take-action-on-ab5-are-getting-louder.
[147] *Id.*
[148] Josh Eidelson, *California Governor Signs Labor Law, Setting Up Bitter Gig Economy Fight*, BLOOMBERG (Sept. 18, 2019, 10:46 AM), https://www.bloomberglaw.com/product/blaw/document/PY1JNO6JTSE8?criteria_id=3e5dcf5b61e9277eb1ba58f6c0c1cf0a; Olson v. California, No. CV 19-10956-DMG, 2020 WL 905572, at *5, 25, 27–28 (C.D. Cal. 2020).

appellate court upheld a decision to enjoin Uber and Lyft from classifying its drivers as independent contractors.[149] The court performed a lengthy analysis under the ABC test on the relationship between the TNCs and their drivers, and it ultimately concluded that "based on prong B [of the ABC test] alone,"[150] there was a "more than . . . reasonable probability" that the TNCs and DNCs would not succeed in proving that their relationship with drivers has all three factors needed to show that their drivers are independent contractors.[151]

B. THE "THIRD WAY" AND THE PLATFORM ECONOMY'S VISION FOR THE FUTURE OF LABOR

In parallel to their efforts to stop enforcement of AB 5, Uber and Lyft also made efforts to persuade the public and the California legislature to continue to label its workforce as independent contractors while also offering their drivers certain benefits.[152] Today, Uber uses the term "independent contractor plus" or "IC+" to describe a class of workers between independent contractors and employees.[153] Negotiations with the prominent labor union International

[149] People v. Uber Techs., Inc., 56 Cal. App. 5th 266, 266 (2020).
[150] *Id.* at 301.
[151] *Id.* Uber and Lyft tried to argue that they are primarily technology companies and, therefore, that the rideshare services that drivers use is outside of their normal course of business, in attempt to fulfill prong B of the ABC test. *Id.* at 281.
[152] Dara Khosrowshahi, Logan Green & John Zimmer, *Open Forum: Uber, Lyft Ready to Do Our Part for Drivers*, S.F. CHRON. (June 12, 2019, 12:52 PM), https://www.sfchronicle.com/opinion/openforum/article/Open-Forum-Uber-Lyft-ready-to-do-our-part-for-13969843.php?psid=9sqNg.
[153] Edward Ongweso Jr., *What Is "IC+," Uber's New Plan to Warp Labor Laws Nationwide?*, VICE (Nov. 19, 2020, 2:00 PM), https://www.vice.com/en/article/akdvpa/what-is-ic-ubers-new-plan-to-warp-labor-laws-nationwide. I equate how app-based drivers are now classified with the "dependent contractor" classification that exists in other countries. Some scholars, such as Veena Dubal, do not like the term "IC+" because "independent contractors are small-business people who set their own prices, develop their own clientele, and can grow their business through entrepreneurial acumen. [TNC] drivers cannot do any of those things." Levi Sumagaysay, *Uber Brands Gig Companies' Efforts to Reshape Labor Laws as "IC+,"* MARKETWATCH (Nov. 11, 2020, 6:51 PM), https://www.marketwatch.com/story/uber-brands-gig-companies-efforts-to-reshape-labor-laws-as-ic-11605138662. I am using IC+ to describe workers who are classified as independent contractors under the law but are entitled to certain benefits that independent contractors do not normally receive. They receive these benefits because of their reliance on one or a few employers and, in practice, do not really resemble what we think of as independent contractors. Whether app-based drivers should be considered independent in any sense is something that I analyze throughout this Note and an issue that this Note alone cannot conclusively determine.

Brotherhood of Teamsters and other labor groups to establish a "third way" in California broke down in mid-2019,[154] and once AB 5 passed, TNCs and DNCs took matters into their own hands.[155]

The idea to include a third category of workers in American legal classification tests to better classify workers in the platform economy emerged largely from an influential paper written by Former Deputy Secretary of Labor Seth Harris and Princeton economist Alan Krueger in 2015 as part of "The Hamilton Project," an economic policy initiative within the Brookings Institute.[156] Harris and Kreuger argue that federal, and some state, legislation establishing the "independent worker," separate from employees and independent contractors, would solve many of the issues surrounding the classification of platform workers.[157] They view the "independent worker" category as a fix to two issues in particular: (1) the difficulty in accurately measuring how long app-based workers actually "work" while they are online; and (2) ensuring start-ups do not create artificial restrictions to save money by employing independent contractors while others use a traditional employee model.[158] Their "independent workers" would be able to collectively bargain and would receive federal civil rights protections and certain employee protections such as

[154] Josh Eidelson, *Teamsters Union Splits from Uber and Lyft on California Worker Rights Law*, BLOOMBERG (July 25, 2019, 7:22 PM), https://www.bloomberg.com/news/articles/2019-07-25/union-splits-from-uber-and-lyft-on-california-worker-rights-law.

[155] Dara Khorowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html. Khorowshahi explicitly makes an appeal to voters by calling Prop. 22 a "third way" model.

[156] Miriam A. Cherry*, "Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 648 (2017). Written as part of the Hamilton Project, an economic initiative within the Brookings Institute, "the Project was designed in part to provide a forum for leading thinkers across the nation to put forward innovative and potentially important economic policy ideas." SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER," (Dec. 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

[157] *See* HARRIS & KRUEGER, *supra* note 156, at at 15–19.

[158] *Id.* at 13–14.

employer contributions to Social Security and Medicare payroll taxes.[159] Nevertheless, to maintain worker flexibility and avoid issues with quantifying "working hours," independent workers would not qualify for overtime or minimum wage requirements.[160]

Silicon Valley has embraced the third way, but this model has received criticism.[161] In a 2017 article responding to Harris and Krueger, labor law scholar Miriam A. Cherry argues that third way models adopted in other countries have not necessarily provided clean solutions to classifying workers that resemble the "platform workers" of today.[162] In Canada, the "dependent contractor" classification began as a method to give bargaining rights to individual craftspeople and artisans reliant on a single employer, and it was largely successful.[163] In contrast, in Italy the creation of a third class of laborer was intended to "extend labor protections and increase flexibility,"[164] but it instead eroded the rights of employees and independent contractors, creating thirty years of legislative issues. In 2015, the Italian legislature passed legislation that dramatically reduced how many workers should be classified under this "third way."[165]

The United Kingdom ("UK") also has a third way labor classification system and calls the intermediary class of laborers "workers."[166] Workers in the UK do not receive the full scope of protections that employees receive, but workers do receive benefits that independent contractors do not, such as the right to a national minimum wage, holidays, and protection from

[159] *Id.* at 27.
[160] *Id.* at 2.
[161] Cherry, *supra* note 156, at 646–47.
[162] *See id*. at 676. She argues that the "platform worker," while on the surface appearing totally novel, is not that different from types of labor that have existed in the past. *Id.* at 647.
[163] *Id.* at 652–53.
[164] *Id.* at 666.
[165] *Id.* at 660–66.
[166] Employment Rights Act 1996, 3 § 230 (Eng.), https://www.legislation.gov.uk/ukpga/1996/18/section/230.

discrimination.[167] Crucially, in February 2021, the UK Supreme Court upheld a decision from an employment tribunal finding that drivers from Uber are workers and not independent contractors.[168] The court addressed the critical issue of whether Uber should be treated merely as an intermediary or if it exercised control over its drivers such that its drivers should be classified as "workers."[169] The court concluded that "although free to choose when and where they worked . . . when they are working[,] drivers work for and under contracts with Uber."[170] To make this decision, the Court appraised various factors, a method that in many ways resembles multi-factor control tests that many jurisdictions in the United States use to distinguish between employees and independent contractors.[171]

I see third way classifications as largely unnecessary. Third way classifications are used by platform companies to bolster their claims that they advocate for workers when, in reality, they mainly want to set their own standards for their workers free from state and federal regulation. The Canadian idea of ensuring independent contractors, who are dependent on one employer (or perhaps two, in the case of the TNC marketplace), have collective bargaining rights is good in

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[167] Rachel Thompson, *Uber Loses Its Final Appeal in UK Supreme Court in Landmark Ruling*, MASHABLE (Feb. 2021), https://in.mashable.com/tech/20465/uber-loses-its-final-appeal-in-uk-supreme-court-in-landmark-ruling.

[168] Uber BV v. Alsam [2021] UKSC 5, ¶ 1, 2. The ruling in this case concludes a five-year legal battle between rideshare drivers and Uber. Uber fought tooth-and-nail to establish the classification of its drivers as independent contractors rather than workers, raising the question whether Uber is truly committed to "hybrid" models, as they claim Prop. 22 is, or if they supported Prop. 22 as a way to give its drivers as few protections as possible while retaining voter support.

[169] *Id.* at ¶¶ 42, 92.

[170] *Id.* at ¶ 93.

[171] The court paid attention to the five major findings that established Uber's control over its employees. First, drivers' wages are set by Uber's algorithms, and drivers have no way to charge more for their services. Uber also controls the "service fee," setting how much of a driver's pay goes to the company. Second, Uber sets the terms of the contracts with its drivers and does not offer any opportunity for bargaining. Third, Uber constrains what rides drivers can accept, limits information drivers receive (including final destination) before picking up a rider, and penalizes drivers by limiting their access to the app if they act in certain ways. Fourth, Uber vets which cars its drivers use and strongly encourages drivers to stick with the routes its proprietary technology suggests by making them liable for delays if they do not. Finally, the Court determined that Uber controls its drivers because it restricts the amount of communication drivers can have with passengers. *Id.* at ¶¶ 94–101.

theory, but Prop. 22 does not even grant this right. While the UK reached what many believe is the correct result by classifying Uber drivers as "workers," the final decision took years to affirm, and one could conceivably see the decision go the other way in a court more sympathetic to employers. Adding another class to the labor distinction can fall into the same traps that they are designed to avoid.[172] Although the Restatement's "right to control" model has become ineffective for the workers of today, adding another class of workers to the equation will not necessarily solve the problem.

C. PROPOSITION 22 IN PRACTICE

In this next section I will outline how Prop. 22 funtions. The law classifies app-based drivers as independent contractors if the network companies follow four simple rules relating to how they treat their workers.[173] It establishes other protections for app-based drivers, including an earnings guarantee of 120% of the applicable minimum wage for a driver's "engaged time."[174] Harris and Krueger explicitly advocated against a provision like this because of the difficulty of calculating the amount of time that people engaged in the platform economy are actually

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[172] Prop. 22's "solution" to this problem is to create a specific loophole that TNCs and DNCs can use to automatically classify rideshare drivers as independent contractors. This approach fails to reckon with the real relationship between these companies and their labor force and strips potentially deserving workers of employment benefits.

[173] CAL. BUS. & PROF. CODE 10.5 § 7451:

> An app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met:
> (a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.
> (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
> (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
> (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.

[174] CAL. BUS. & PROF. CODE 10.5 § 7453(d)(4)(A).

"working."[175] The initiative also compensates drivers $0.30 per mile for vehicle expenses[176] and offers a healthcare subsidy to those who drive more than fifteen hours a week.[177] Also included in the initiative are protection for drivers against discrimination and sexual harassment, a zero-tolerance policy against drinking or drugs on the job, compulsory criminal background checks for drivers, and, crucially, the stipulation that only a seven-eighths majority of the California legislature can change anything about these laws once they are approved.[178] As mentioned earlier, the measure includes no protections for Uber workers to organize and collectively bargain under state law, and because of the way the law is structured, it "elevates the [TNC or DNC] contract . . . as essentially the only determinant of workers' rights, [and] takes away any real opportunities that workers have to affect the terms of that contract through collective action."[179]

Just as economists have different measurements of how much app-based drivers earn now, they also have reached different conclusions as to how effective the measures enacted in Prop. 22 are at providing drivers a living wage. Reich and fellow UC Berkeley economist Ken Jacobs's analysis of Prop, 22 estimates that app-based drivers could earn as little as $5.64 per hour under Prop. 22 after expenses and benefits.[180] This estimate is due, in large part, to Prop. 22 only

[175] HARRIS & KRUEGER, *supra* note 156, at 13. Cherry, interestingly, argues that these kinds of "third way" statutes do in fact need minimum wage standards, or gig workers risk slipping far below rising state minimum wages. Cherry, *supra* note 156, at 678–79.
[176] CAL. BUS. & PROF. CODE 10.5 § 7453(d)(4)(B).
[177] CAL. BUS. & PROF. CODE 10.5 § 7454.
[178] CAL. BUS. & PROF. CODE 10.5 § 7456–62; CAL. BUS. & PROF. CODE 10.5 § 7465(a).
[179] FUENTES ET AL., *supra* note 13, at 19. "Any statute that authorizes any entity or organization to represent the interests of app-based drivers in connection with drivers' contractual relationships with network companies, or drivers' compensation, benefits, or working conditions, constitutes an amendment of this chapter and must be enacted in compliance with the procedures governing amendments consistent with the purposes of this chapter as set forth in subdivision (a) and subdivision (b) of this section." CAL. BUS. & PROF. CODE 10.5 § 7465(c)(4). *See infra* n.192.
[180] KEN JACOBS & MICHAEL REICH, U.C. BERKELEY L. CTR., THE EFFECTS OF PROPOSITION 22 ON DRIVER EARNINGS: RESPONSE TO A LYFT-FUNDED REPORT BY DR. CHRISTOPHER THORNBERG 1 (2020), https://laborcenter.berkeley.edu/wp-content/uploads/2020/08/Response-to-Thornberg.pdf.

compensating drivers for "engaged time," meaning that drivers would not receive hourly wages while they wait for their next assignment.[181] In addition, Jacobs and Reich assess that the health care stipend and expense reimbursements that TNCs and DNCs will provide are lower than the actual expenses app-based drivers will incur from their total time spent on the road. UC Riverside economist Christopher Thornberg calls Reich and Jacobs's claims "flawed", in a study funded by Lyft that Thornberg conducted using Lyft's proprietary data to respond to these claims.[182] Thornberg predicts that the median of equivalent earnings for full-time drivers will be $27.58 per hour and sees the minimum wage floor for drivers as a last resort, rather than a rate that many drivers will actually earn.[183] If the Reich and Jacobs estimate of $5.64 is accurate, then Prop. 22 allows TNCs and DNCs to pay its drivers far below the state minimum wage. Thornberg's median rate gives hope that this floor is far from the norm for most drivers, but TNCs and DNCs can change their compensation algorithm whenever they want, leaving the future of ridesharing uncertain.

VII. PATHS FORWARD FOR LABOR ACTIVISTS TO PROTECT PLATFORM WORKERS FROM EXPLOTIATION BEYOND "IC+"

Labor activists have, understandably, decried the passage of Prop. 22 and argued that it cuts a giant hole in AB 5 to create a separate classification for app-based drivers.[184] This Section describes three ways to help protect workers in the platform economy as TNCs and DNCs attempt to create legislation similar to Prop. 22 at the federal level and in other jurisdictions. These ideas

[181] Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Only Guarantees $5.64 an Hour*, U.C. BERKELEY LAB. CTR. (Oct. 2019), https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2. A report from consulting firm Fehr & Peers places non-engaged at 33% of time drivers are on the road.
[182] THORNBERG, *supra* note 51, at 1–4.
[183] *Id.* at 3.
[184] *See* Sumagaysay, *supra* note 153; Whitaker & Dubal, *supra* note 6.

are not mutually exclusive, and activists will likely attempt to use all of these strategies and others going forward.

A. MORE DATA TRANSPARENCY

Some scholars believe the best way to solve the classification problem is to force Uber and other companies that rely on app-based labor to reveal more of their information to the public and their drivers.[185] Uber stands out among other companies participating in the platform economy as particularly manipulative in leveraging the asymmetric data on their customers and labor supply.[186] In Europe, lawmakers have enacted regulations to ensure the availability of driver data for regulators.[187] The more data that courts are able to obtain about the relationship between TNCs/DNCs and their drivers, the easier it will be for courts to determine how workers should be classified under right of control tests and for legislators to make informed decisions on how to craft rules relating to the platform economy. In addition, expanding data concerning driver pay would allow researchers and legislators to evaluate if bills like Prop. 22 increase or limit driver wages.[188]

Recently, Worker Info Exchange, an organization that seeks data transparency to protect workers from "unfair work allocation, performance management and dismissals" achieved a major

[185] *See* Timko, *supra* note 122, at 375–77.
[186] *See* Calo & Rosenblat, *supra* note 78, at 1654–64. Examples include updating driver contracts every few days, hiding information from the marketplace, and rides available from drivers. For information on how Uber obscures data on its drivers' hours and wages, *see infra* pp. 6–7.
[187] Ongweso Jr., *supra* note 153.
[188] For example, a recent article suggests that driver pay has decreased as a result of Prop. 22 but can only provide limited anecdotal evidence. If Uber wants to argue to the public that its "hybrid" models are good for drivers, it can provide its own data to back up its claims. *See* Michael Sainato, *"I Can't Keep Doing This": Gig Workers Say Pay Has Fallen After California's Prop 22*, THE GUARDIAN (Feb. 18, 2021, 5:00 AM), https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-doordash-prop-22-drivers-california.

court victory in the UK and the Netherlands.[189] TNC provider Ola Cabs, a competitor of Uber's, must reveal two algorithms that it uses to make decisions about the trips drivers may take and when drivers should be fired—"fraud probability score" and "earnings profile," respectively—to drivers upon their request.[190] While this type of data only represents some of the information that TNCs and DNCs have of their drivers, increased access to this data can inform drivers about how these companies make certain decisions, allowing drivers to function more like independent contractors, instead of at the mercy of algorithms they will never actually see.

B. COLLECTIVE BARGAINING FOR INDEPENDENT CONTRACTORS ("SEATTLE MODEL") AND SECTORAL BARGAINING

In Seattle, the city government has allowed employers to classify both traditional taxi and app-based drivers as independent contractors, but it has legislatively given drivers a voice through collective bargaining for labor rights and benefits.[191] In December 2015, the Seattle City Council passed a new ordinance that established a collective bargaining system for drivers who had been classified as independent contractors.[192] This ordinance goes even further than the NLRA in protecting the rights of drivers to organize, but it assumes that drivers will already be established as independent contractors rather than employees.[193] The ordinance is intended to let drivers keep their designation as independent contractors to maintain flexibility while also being able to

[189] WORKER INFO EXCHANGE, *Gig Economy Workers Score Historic Digital Rights Victory Against Uber and Ola Cabs* (Mar. 16, 2021), https://www.workerinfoexchange.org/post/gig-workers-score-historic-digital-rights-victory-against-uber-ola-2.
[190] *Id.*
[191] Ronald C. Brown, *Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!,* 29 WASH. INT'L L.J. 533, 535 (2020). Because of the way that Prop. 22 was structured, California can no longer execute the "Seattle strategy," further highlighting the dangers of "third way" legislature proposed by platform companies without the input of workers. *Id.*
[192] Charlotte Garden, *The Seattle Solution: Collective Bargaining by For-Hire Drivers and Prospects for Pro-Labor Federalism*, 12 HARV. L. & POL'Y REV. 1, 2 (2017).
[193] *Id.* at 2, 5.

collectively bargain outside the NLRA. TNCs predictably challenged the ordinance, but in a 2018 case, the Ninth Circuit did not find that the statute preempted federal law,[194] giving labor organizers a model to follow for organizing rideshare drivers within cities, even when drivers are classified as independent contractors under state law.

An alternative to local, city-level bargaining models that has recently sparked debate among labor advocates is sectoral bargaining. Certain organizations, including Clean Slate for Worker Power, which is part of Harvard Law School's Labor and Worklife Program, recommend sectoral bargaining instead of traditional enterprise bargaining.[195] The main advantage of sectoral bargaining is that the agreements it produces become binding on all firms and workers in the section. This kind of bargaining seems useful to segments of the population such as rideshare drivers, who are extremely dispersed and do not congregate at any particular worksite, making traditional unionization efforts particularly difficult.[196] TNCs and DNCs appear open to sectoral bargaining as well, with Lyft President John Zimmer expressing his openness to it in an opinion piece after the passing of Prop. 22.[197] However, many prominent labor advocates, including leading lawyers Veena Dubal and Miriam A. Cherry, whose work was cited earlier in this Note, have signed on to a proposal that endorses sectoral bargaining only under certain conditions.[198] They emphasize

[194] Chamber of Com. v. City of Seattle, 890 F.3d 769, 791 (9th Cir. 2018). For a summary and analysis, *see* Gould, *supra* note 13, at 1023.
[195] SHARON BLOCK & BENJAMIN SACHS, LAB. & WORKLIFE PROGRAM, HARV. L. SCH., CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY, EXECUTIVE SUMMARY 3, https://www.cleanslateworkerpower.org/clean-slate-agenda (last visited Sept. 20, 2021).
[196] Oren Cass, *Sectoral Bargaining's Promise and Peril*, AM. COMPASS (Sept. 14, 2020), https://americancompass.org/discussions/sectoral-bargainings-promise-and-peril/#top.
[197] Taryn Luna, *After Winning Prop. 22, Lyft President Says He Still Wants a Deal with Unions*, L.A. TIMES (Nov. 5, 2020, 11:15 AM), https://www.latimes.com/california/story/2020-11-05/prop-22-win-lyft-founder-union-deal-california.
[198] PRINCIPLES FOR SECTORAL BARGAINING, *Sectoral Bargaining: Principles for Reform* (Mar. 1, 2021), https://concerned-sectoral-bargaining.medium.com/sectoral-bargaining-principles-for-reform-7b7f2c945624.

that sectoral bargaining under current labor dynamics could expand and entrench the role that gig work with sub-employee protections has in the economy and, therefore, urge caution in the process.[199] Two of the group's primary demands include (1) expanding the ABC test for employment status and (2) ensuring FLSA and NLRA benefits remain for employees. While misclassified platform workers would surely welcome these changes, after the success of Prop. 22, it seems highly unlikely that representatives of gig economy employers would accept changes this significant without federal legislation in favor of worker protection.

C. ADVOCACY AT THE FEDERAL LEVEL

The regulation of companies in the platform economy is poised to be a contentious issue over the next four years. On the 2020 campaign trail, President Joe Biden announced that once in office, he would implement the ABC labor classification test at the federal level,[200] which would provide clarity to the FLSA and NLRA. Legislation officially recognizing the ABC test as the preferred method of classification would make real progress in ensuring that platform workers receive protections that other workers dependent on an employer do. As of now, the best chance of getting an ABC test passed at the federal level is the Protecting the Right to Organize Act ("PRO Act"), which has passed in the House but will almost certainly not pass in the Senate due to strong Republican opposition to the bill (unless the filibuster is eliminated).[201] Most importantly for this paper, the PRO Act would amend the NLRA to explicitly add the ABC test to determine whether

[199] *Id.*
[200] BIDEN HARRIS 2020, *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, https://joebiden.com/empowerworkers/# (last accessed Nov. 22, 2020) ("The ABC test will mean many more workers will get the legal protections and benefits they rightfully should receive. As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.").
[201] PEOPLE'S WORLD, *PRO Act Passes House, Senate Republicans Plan to Kill It* (Mar. 10, 2021), https://www.peoplesworld.org/article/pro-act-workers-rights-bill-passes-house-senate-republicans-plan-to-kill-it/.

workers are employees or independent contractors.[202] While state and other federal laws that classify workers differently would still remain in place, changing the NLRA this way would likely open the door for gig workers to form unions and collectively bargain. It also would give gig worker representatives more leverage in possible sectoral bargaining talks.

Top executives from Uber and Lyft have already said that they plan to take the Prop. 22 model and push for similar legislation federally and in other states.[203] Perhaps even more concerning for labor in general is the idea that "third way" models could be adapted for any industry that uses a digital interface.[204] Activists are also concerned because of the Biden administration's close ties with executives for rideshare companies,[205] including that of Vice President Kamala Harris and her brother-in-law Tony West, who is the current legal officer of Uber and was integral in the creation of Prop 22.[206] Another Biden administration official who is feared by labor activists and opposes "third way" classification systems is Seth Harris, who helped popularize the idea of adding a hybrid classification for gig workers among Silicon Valley

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[202] Protecting the Right to Organize Act of 2019. H.R. 2474, 116th Cong. § 2(a)(2), (2019).

[203] Sumagaysay, *supra* note 153. Uber CEO Dara Khosrowshahi stated, "Over the long term, the IC+ model is going to win." *Id.* Lyft co-founder and Chief Executive Logan Green said the company intends to "engage with legislators" around the nation, and that he hoped Prop. 22 would become "a model for other states." *Id.* A bill implementing policies similar to Prop 22 has emerged in Massachusetts and has Democratic support. Edward Ongweso Jr., *Drivers Are Protesting a Proposition 22 Clone In Massachusetts*, VICE (Mar. 4, 2021, 7:53 PM), https://www.vice.com/en/article/y3g7mg/drivers-are-protesting-a-proposition-22-clone-in-massachusetts.

[204] Ongweso Jr., *supra* note 153. Early Uber investor Shawn Carolan stated that "[w]orkers in all sorts of industries—from agriculture to zookeeping—could benefit from the structure that Prop. 22 provides, if it were extended to them . . . . The existence of flexible work arrangements in fields like nursing, executive assistance, tutoring, programming, restaurant work and design suggests that a Prop. 22-inspired approach could make sense there as well." *Id.*

[205] Lauren Kaori Gurley, *Biden Promised to Reclassify Gig Workers. But How Will He Actually Do It?*, VICE (Nov. 11, 2020, 6:00 AM), https://www.vice.com/en/article/4adv8g/biden-promised-to-reclassify-gig-workers-but-how-will-he-actually-do-it.

[206] Alaina Lancaster, *Uber's Tony West Talks Diversity and Prop. 22 Backup Plans,* LAW.COM: THE RECORDER (Oct. 7, 2020, 5:54 PM), https://www.law.com/therecorder/2020/10/07/ubers-tony-west-talks-diversity-and-prop-22-backup-plans/?slreturn=20201025125116.

executives.[207] President Biden has already released a statement encouraging the House to pass the PRO Act.[208] However, he has not taken the next step of explicitly supporting the removal of the Senate filibuster to ensure that the PRO Act passes. If President Biden abandons the PRO Act and instead pursues federal legislation that embraces a "third way" classification, thereby increasing chances of bipartisan support, I would strongly advocate that he talk to labor leaders and researchers to avoid Prop. 22-like legislation, which ignored these concerns.

VIII. CONCLUSION

In the midst of rapid technological progress, legislators must ensure that workers continue to receive protection and prevent a backslide to pre-New Deal working conditions. Prop. 22 sets a dangerous standard going forward by classifying app-based drivers to specifications that TNCs and DNCs desire without input from its workers, and these companies now are trying to bring this model nationwide.[209] After the news that Prop. 22 passed, Uber's share closed up 14.59% for a new 52-week high, and Lyft shares increased by 10%.[210] Other companies are not naïve and have known that switching to "third way" models has the potential to save them money. Now, they have real evidence that "third way" models can be voter-friendly, even in blue states such as California. However, employee protection laws at the federal and state levels exist for a reason. Legislators need to stand up to technology companies instead of trusting that these companies always have the

[207] Edward Ongweso Jr., *Biden's Top Labor Advisor Helped Uber Gut Workers' Rights*, VICE (Mar. 3, 2021, 9:57 AM), https://www.vice.com/en/article/jgq3zx/bidens-top-labor-advisor-helped-uber-gut-workers-rights.
[208] THE WHITE HOUSE, *Statement by President Joe Biden on the House Taking Up the PRO Act* (Mar. 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/09/statement-by-president-joe-biden-on-the-house-taking-up-the-pro-act.
[209] Wilfred Chan, *Can American Labor Survive Prop 22?*, THE NATION (Nov. 10, 2020), https://www.thenation.com/article/politics/prop-22-labor; Ongweso Jr., *supra* note 153.
[210] Todd Haselton, Lauren Feiner & Jessica Bursztynsky, *Uber and Lyft Both Close up More Than 10% After California's Vote to Exempt Them From State Labor Law*, CNBC: TECH (Nov. 4, 2020, 8:18 AM), https://www.cnbc.com/2020/11/04/uber-and-lyft-stock-jump-after-californians-vote-to-pass-prop-22.html.

best interest of their labor force in mind. The workers that Prop. 22 affects are some of the most marginalized in American society, and they need the government to respect them and their rights as much as the demands of Silicon Valley companies. Beneath the gloss of million-dollar advertisement campaigns, the reality is that "third way" legal classification models have the potential promote inequality just as much as entrepreneurial opportunity.