UNBUNDLING EMPLOYMENT: FLEXIBLE BENEFITS FOR THE GIG ECONOMY

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ABSTRACT

Federal labor law requires employers to give employees a rigid bundle of benefits, including the right to unionize, unemployment insurance, worker's compensation insurance, health insurance, family medical leave, and more. These benefits are not free—benefits cost about one-third of wages—and someone must pay for them. Which of these benefits are worth their cost? This Article takes a theoretical approach to that problem and proposes a flexible benefits solution.

Labor law developed under a traditional model of work: long-term employees depended on a single employer to engage in goods-producing work. Few people work that way today. Instead, modern workers are increasingly using multiple technology platforms (such as Uber, Lyft, TaskRabbit, Amazon Flex, DoorDash, Handy, Moonlighting, FLEXABLE, PeoplePerHour, Rover, Snagajob, TaskEasy, Upwork, and many more) to provide short-term service-producing work. Labor laws are a bad fit for this "gig economy." New legal paradigms are needed.

The rigid labor law classification of all workers as either "employees" (who get the entire bundle of benefits) or "independent contractors" (who get none) has led to many lawsuits attempting to redefine who is an "employee" in the gig economy. This issue grows larger as more than one-fifth of the workforce is now categorized as an independent contractor. Ironically, the requirement to provide a rigid bundle of benefits to employees has resulted in fewer workers receiving any benefits at all.

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This Article argues for unbundling employment benefits so workers in the gig economy can obtain a more optimal mix of benefits and wages. This Article also provides a framework for a more flexible system of employee benefits. It thus makes three contributions. First, this Article demonstrates how a rigid requirement of employment benefits can harm workers. Second, it shows how labor law should incorporate advances in economic theory that it has heretofore generally ignored. Third, this Article presents a flexible framework to solve the refractory problem of rigid worker categorization.

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INTRODUCTION

The way people work has drastically changed, and labor law has not kept pace. This Article proposes necessary modernizations to labor law for the new economy. The main problem is that the National Labor Relations Act of 1935 requires all workers to fit into one of two categories: employees or independent contractors.[1] Many scholars in law and economics have recognized tensions between this rigid

1. 29 U.S.C. §§ 151–169 (2018).

classification and the flexible way people work today.[2] This Article contributes to that conversation, first, by elaborating on why old labor law concepts do not fit with the way people work in the new economy. Second, it points out how labor law fails to account for modern economic theory. It proposes that market concentration—a concept borrowed from antitrust law—could remedy this failure. Third, inspired by securities law, this Article proposes implementation of a flexible new labor classification that works for the new economy.

Our current labor laws crystallized eighty years ago under the pressure of the Great Depression, when over half the workforce labored in factories.[3] Double-digit unemployment and sustained deflation soon galvanized Congress to strictly regulate the nature of work.[4] Our labor laws were rigidly forged in this crucible of economic despair. Yet much has changed since the Great Depression. America first evolved from a manufacturing economy to a predominately service economy. Then the gig economy emerged—reflected by technology platforms like Handy, Uber, and Airbnb that allow people to offer untapped and underutilized labor to each other—which in turn moved the economy even further away from the manufacturing model of work. This new economy reflects a modernized way of working that does not fit with the old dichotomy of staffing up versus contracting out. More and more Americans now perform various gigs in the sharing economy.[5] Regardless, labor law continues to bifurcate workers into two categories: employees, who are entitled to the entire

2. *See, e.g.*, Liya Palagashvili, *Disrupting the Employee and Contractor Laws*, 2017 U. CHI. LEGAL F. 379, 379–82 (2018) (recognizing that the current employee-independent contractor labor law structure does not accurately capture the status of workers providing services in the on-demand economy).

3. Donald M. Fisk, *American Labor in the 20th Century*, 6 COMPENSATION & WORKING CONDITIONS 3, 5 (2001).

4. Robert A. Margo, *Employment and Unemployment in the 1930s*, 7 J. ECON. PERSPS. 41, 42, 45 (1993).

5. *See* Palagashvili, *supra* note 2, at 379–80 (noting the "rapid growth" of this new emerging economy).

bundle of employment benefits, and independent contractors, who are not entitled to any.[6]

This Article argues that neither category properly protects or even accurately describes how people work in the sharing economy. Moreover, merely adding a rigid third category will not solve the problem. This Article thus proposes a new and flexible framework for redefining worker classifications and unbundling the benefits from work: the gig worker.

Under this proposal, each firm that creates technology platforms for the sharing economy would be permitted to register its own definition of "gig worker" with the Department of Labor (DOL) by filing a new type of registration statement that this Article calls a "Form GW." The Form GW would stipulate which employment benefits (e.g., health insurance, retirement plan contribution, and unemployment insurance) would be offered, and which benefits would not. The DOL would review each Form GW to ensure that the proposed benefits comply with laws that apply to all workers (such as minimum wage) and that the form is clear enough to be easily understood by a reasonable worker. Aside from these minimum standards, however, the DOL would not review the merits of the proposal as offering a good or bad work opportunity. Rather, the DOL would simply determine whether the definition complies with labor laws.

Firms that successfully register a Form GW would be able to offer gig worker jobs accordingly. The term "offer" is used deliberately here to suggest parallels between this new labor-law proposal and the established securities-law paradigm for offering stock. This Form GW process is designed to mirror the most successful elements of the Securities Act of 1933. Often called the "truth-in-securities law," the 1933 Act has two primary objectives: first, providing necessary information to investors, and second, prohibiting deceit, misrepresentation, and fraud in the offering of investment opportunities.[7] Under

6. 29 U.S.C. §§ 151–169.

7. *The Laws that Govern the Securities Industry*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/answers/about-lawsshtml.html (last modified Oct. 1, 2013).

the 1933 Act, firms must file a Form S-1 with the Securities and Exchange Commission (SEC) before selling stock on a stock market through an initial public offering (IPO).[8] The SEC reviews the disclosures in that S-1 for compliance with securities law and will hold offerors criminally liable for false or misleading statements in the disclosures. It does not, however, determine the merits of the offering as a good or bad investment opportunity. Similarly, the goals of the Form GW process would be, first, to ensure that potential workers would have the information they need to decide whether to participate on a sharing-economy platform, and second, to hold the platform liable for false or misleading claims about work on its platform or the benefits obtained thereby.

Unbundling the benefits from work—allowing firms to define the set of benefits that gig workers on their platforms receive—will create competition among platforms to offer the mix of pay and benefits that is most desirable to gig workers. Competitive labor markets can provide powerful solutions to many employment problems, but markets do not always function properly. In particular, the market condition of labor monopsony—a market structure where a single buyer controls the labor market as the major or only purchaser of a certain type of labor services—can lead to lower wages and fewer benefits for workers.[9] It would be abominable if the law were to facilitate exploitation of powerless workers by powerful firms. Therefore, the gig worker proposal also borrows concepts from antitrust and competition law: the DOL could deny a Form GW proposal based on particular market conditions, such as monopsony, collusion, or concentration.

Other scholars have proposed that there should simply be a third category of worker.[10] These proposals are, however,

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8. 15 U.S.C. § 77f(e)(1) (2018).

9. COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 2–3 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

10. *See generally* Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017) (concluding that the definition of "employee" should be expanded to include a hybrid category of workers known as

fundamentally insufficient because they do not account for the myriad new ways people might work as the economy continues to change. Moreover, legislating a singular new category with strict criteria for inclusion has been demonstrated to do little to solve the problems that currently exist in a two-category system.[11] Therefore, we must do more than simply add a third category that fits within the existing labor law framework. Instead, we must reconceptualize labor law under a more flexible paradigm that is better prepared for the future of work. The gig worker process offered herein is intended to be such a paradigm. Some may be concerned about the costs of instituting a flexible process such as the one proposed here, but there is precedent in both securities law and antitrust law that shows how a proposal of this nature might pay for itself, and then some.[12]

At the outset, it is important to recognize that this gig worker proposal does not take a position regarding whether individuals should have freedom of contract. The argument for freedom of contract is essentially that individuals should have the right to form any nonviolent contract without government restrictions.[13] Some have argued that Article I, section 10 of the U.S. Constitution prohibits states from impairing the obligations of contracts that were freely entered into.[14] Others have challenged the market paradigm from a moral perspective

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"dependent contractors"); Brett Harris, *Uber, Lyft, and Regulating the Sharing Economy*, 41 SEATTLE U. L. REV. 269 (2017) (exploring regulatory issues concerning the "gig economy"); SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, BROOKINGS INST., A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 2 (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf (suggesting the establishment of an "independent worker" category).

11. *See* Cherry & Aloisi, *supra* note 10, at 675–76; Chelsea Fitzgerald, *When Tech Startups Outgrow the 1099 Model: Moving Firms Out of the Kiddie Pool*, 18 VAND. J. ENT. & TECH. L. 629, 632–35 (2016); Mark J. Loewenstein, *Agency Law and the New Economy*, 72 BUS. LAW. 1009, 1036–37 (2017).

12. *See infra* Part IV.

13. Stephanie Drotar, *Breaking "Too Darn Bad": Restoring the Balance Between Freedom of Contract and Consumer Protection*, 59 N.Y. L. SCH. L. REV. 603, 604–05 (2014).

14. *See, e.g.*, DAVID E. BERNSTEIN, FREEDOM OF CONTRACT 8 (2008), https://www.law.gmu.edu/assets/files/publications/working_papers/08-51%20Freedom%20of%20Contract.pdf (arguing Supreme Court cases throughout American history support this finding).

by, for example, asking whether people should be allowed to sell their organs or sexual favors.[15] But this Article does not opine on these broader issues. Rather, it more narrowly focuses on whether participants in sharing-economy platforms, who can have varied careers, jobs, and tasks available online and in person, fit into one of two buckets: employees or independent contractors. The findings show they do not, and this Article accordingly offers a flexible third classification.

This proposal also does not address tax issues. It is worth mentioning, however, that tax issues often drive labor law classifications.[16] For example, if a worker is classified as an employee, then the employer withholds payroll taxes. It is much easier for the tax authorities to collect from a few large employers than from several individual employees. But this is a story of the tail wagging the dog. Rather than focus on collecting taxes from work, we should focus on creating more jobs and better benefits. First, we must unleash the potential of the sharing economy to help people find the work and services they need; then, the government can contemplate and implement an appropriate tax structure.

The fundamental problem with labor laws is their inflexible adherence to the outdated codification of all workers as either employees or independent contractors. As a result of this rigidity, many workers' benefits and protections are suboptimal. However, this unhappy circumstance can be improved by unbundling the benefits from work. This unbundling will allow firms to compete for workers by offering them the best mix of benefits: the gig worker solution. To argue for its gig worker solution, this Article proceeds as follows. First, the Article describes the Depression-era economy and the labor laws created in response thereto, and contrasts this with the new economy to show how labor law is generally ill-suited for gig work. Second, it analyzes several particularly thorny

15. *E.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 35–38 (1997).

16. Susan C. Allen, *Employee or Independent Contractor?: The Worker Classification Dilemma*, TAX ADVISER (Oct. 1, 2015), https://www.thetaxadviser.com/issues/2015/oct/employee-or-independent-contractor.html.

problems that arise when trying to apply these old laws to the new economy. Finally, the Article expands on its gig worker solution to these problems and addresses some criticisms to its proposed approach.

I. LABOR AND THE LAW, THEN AND NOW

Labor law as it exists today was largely conceived and codified when over half of Americans worked in manufacturing.[17] It is vital to understand the zeitgeist of the manufacturing economy and its most critical failure, the Great Depression, in order to understand the legislative history and political economy that gave rise to labor law. It then becomes apparent that the sharing economy—and, indeed, the entire social and political climate—is quite different today.

The manufacturing economy is based on resource extraction: raw materials are mined from the earth, ore is smelted, and products, like cars, are assembled. In business terms, value in the manufacturing economy moves from left to right, as each step in the manufacturing process adds value to consumers.[18] This is called a value chain.[19]

To understand the manufacturing value chain, consider the manufacture of a car. First, coal is mined to make steel. This steel has more value than the coal in the ground did. Second, the steel is transported to a car assembly-line factory, where it has more value as a car door panel. Third, the door panel is incorporated with other inputs from other upstream producers, such as glass windshields and electronic components, to create a functional car. A whole car that can drive is worth more than the sum of its static parts. Fourth, the finished product (our new car) is transported from a centralized manufacturing facility in Indiana to retail auto dealers all over America, where it is more convenient for prospective buyers to test and acquire that car.

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17. *See infra* Section II.A.

18. *Porter's Value Chain: Understanding How Value Is Created Within Organizations*, MINDTOOLS, https://www.mindtools.com/pages/article/newSTR_66.htm (last visited Dec. 16, 2018).

19. *Id.*

Fifth, salespeople at those dealerships inform buyers about the car's features, help buyers secure financing, and teach them to use the technical features on the vehicle. Sixth, independent aftermarket car maintenance and repair service providers help keep the car running. Each step in this process, which can be visualized as a river upon which inputs flow from upstream supply to downstream sales, adds value to the product. For a visual illustration of the value chain in the manufacturing economy, see Figure 1 in the Appendix. It is most important to recognize that the labor laws were formed with a manufacturing economy, not a gig economy, in mind.

A. *Origins of Modern Labor Law*

In 1929, only about 20% of gainfully employed Americans worked in the service sector and 22% worked in agriculture, forestry, and fishing.[20] Meanwhile, more than half of all gainfully employed Americans worked in or for factories, with jobs in extraction of minerals, manufacturing, construction, transportation, and trade.[21] The unemployment rate was less than 1% of gainful workers.[22]

Then, the Great Depression powerfully manifested on October 29, 1929. On this date, known as Black Tuesday, stock markets crashed. People made runs on bankrupt banks, and panic erupted in the streets. Surviving banks substantially curtailed their lending.[23] Factories dramatically reduced output by over 30%, and total factory productivity decreased by 18%.[24] Millions of Americans who worked in these factories were laid off, and the unemployment rate spiked to over 22% from 1933

20. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 1, at 137–38 (1975), https://fraser.stlouisfed.org/files/docs/publications/histstatus/hstat1970_cen_1975_v1.pdf.

21. *Id.* at 138.

22. *Id.* at 135.

23. Charles W. Calomiris, *Financial Factors in the Great Depression*, 7 J. ECON. PERSP. 61, 69 (1993) ("Surviving banks substantially curtailed their lending, with loan-to-deposit ratios falling from 0.85 in 1929 to a low of 0.58 in January 1933.").

24. *See* Lee E. Ohanian, *Why Did Productivity Fall So Much During the Great Depression?*, 91 AM. ECON. REV. 34, 34 (2007).

to 1935.[25] The masses of unemployed and underemployed Americans had less money to spend because they were not earning enough income.[26] This put additional pressure on the remaining manufacturers, who had to further decrease output in light of decreased demand.[27] The vicious cycle of scarcity and inflation disrupted the entire international economy and changed the way people felt about work and the subsequent role of government.[28]

Meanwhile, there were also thinkers coming up with new ideas about how to understand the economy. John Maynard Keynes argued that the cause of this depression was insufficient spending power.[29] His solution to this crisis and proposition to prevent similar ones in the future was for the government to create policies that ensure the average person has more money in his or her pocket.[30] In other words, Keynes believed the federal government could solve the insufficient spending power that led to the Great Depression by the government itself spending more. He argued that government expenditures, especially on infrastructure, would solve this problem.[31]

In 1932, at the height of the Great Depression, when Franklin Delano Roosevelt ran against incumbent President Herbert Hoover, they both campaigned on an orthodox economic platform.[32] For example, FDR originally promised to balance the budget.[33] Hoover was not that popular at the time, given

25. U.S. BUREAU OF THE CENSUS, *supra* note 20, at 135.

26. *See id.* at 146–61.

27. *See id.*

28. BARRY EICHENGREEN & KEVIN H. O'ROURKE, A TALE OF TWO DEPRESSIONS 1 (2009), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.520.3990&rep=rep1&type=pdf ("The Great Depression was a global phenomenon.").

29. *See generally* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (Harcourt Publ'g Co. 1964) (1953) (arguing that reduced purchasing power leads to diminished economic output).

30. *Id.*

31. *Id.*

32. *A President's Evolving Approach to Fiscal Policy in Times of Crisis*, FDR LIBR., https://fdrlibrary.org/budget (last visited Dec. 15, 2018) [hereinafter *A President's Evolving Approach*] ("FDR began his 1932 campaign for the presidency espousing orthodox fiscal beliefs. He promised to balance the federal budget, which Herbert Hoover had been unable to do.").

33. *Id.*

that during his presidency formerly working-class people became dependent on food from notorious gangster Al Capone's soup kitchens.[34] FDR won the 1932 presidential election in a landslide, but he changed his economic approach once in office. Even though his 1932 campaign included both conventional and orthodox balanced budget promises, he said in his 1936 campaign that it would have been a crime against the American people to have balanced our budget in 1933, 1934, or 1935.[35] Instead, FDR promised "a new deal with the American people."[36]

FDR's New Deal included many policies that provided the government with much more control over labor wages and the pricing of goods and services. For example, the National Recovery Act authorized FDR, in his executive capacity, to regulate wages and prices directly.[37] Such direct wage control by the federal government was unprecedented in American history.

Many people were concerned by these policies, including economists. Even Keynes, the economist who argued that the government should spend money on infrastructure to help America recover from the Great Depression, wrote a letter to the White House effectively saying that FDR had gone too far with these policies.[38] Regardless, FDR actually went further and

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34. *See, e.g.*, Ian Harvey, *Al Capone Started One of the First Soup Kitchens During the Great Depression*, VINTAGE NEWS (May 19, 2017) ("Al Capone's soup kitchen . . . served over 120,000 meals to hungry people. The free soup kitchen kept regular working hours, serving breakfast, lunch, and dinner and fed thousands every day despite only having a few employees.").

35. *See A President's Evolving Approach*, *supra* note 32 ("FDR answered in 1936 at a campaign speech in Pittsburgh: 'To balance our budget in 1933 or 1934 or 1935 would have been a crime against the American people. To do so we should either have had to make a capital levy that would have been confiscatory, or we should have had to set our face against human suffering with callous indifference. When Americans suffered, we refused to pass by on the other side. Humanity came first.'").

36. *Acceptance Speech to the 1932 Democratic Convention*, FDR LIBR., https://fdrlibrary.org/dnc-curriculum-hub (last visited Dec. 15, 2018) ("I pledge you, I pledge myself to a new deal for the American people.").

37. *See* 15 U.S.C. § 703 (1934) (repealed 1935).

38. John Maynard Keynes, *From Keynes to Roosevelt: Our Recovery Plan Assayed*, N.Y. TIMES, Dec. 31, 1933, https://www.nytimes.com/1933/12/31/archives/from-keynes-to-roosevelt-our-recovery-plan-assayed-the-british.html ("I do not mean to impugn the social justice and social expediency of the redistribution of incomes aimed at by the NRA and by the various schemes

created what some scholars have referred to as the most radical piece of legislation in American federal history: the National Labor Relations Act of 1935 (NLRA).[39]

The radical nature of the NLRA is best understood in its historical context. At the time, there seemed to be a war brewing—not a war between nations, but a war between capitalism and communism. The NLRA was an olive branch, extended to the striking masses and their increasingly organized labor organizations to achieve an industrial peace.[40] It offered collective bargaining for its "therapeutic impact on industrial conflict."[41] Its express goal was to increase wages.[42] By its plain terms, the NLRA "apparently accorded a governmental blessing to powerful workers' organizations that were to acquire equal bargaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy."[43] In other words, the NLRA was one of the most socialist pieces of legislation ever passed by the U.S. Congress. Critics even worried that the NLRA would "out-S[oviet] the Russian Soviets."[44]

The NLRA thus emerged from populism and protest, applying Keynesian economic theory piecemeal and to its socialist extreme. The NLRA established that the official policy

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for agricultural restriction. The latter, in particular, I should strongly support in principle. But too much emphasis on the remedial value of a higher price-level as an object in itself may lead to serious misapprehension of the part prices can play in the technique of recovery. The stimulation of output by increasing aggregate purchasing power is the right way to get prices up and not the other way around.").

39. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978) ("When passed, the National Labor Relations (Wagner) Act was perhaps the most radical piece of legislation ever enacted by the United States Congress.").

40. *Id.* at 281.

41. *Id.* at 282.

42. 29 U.S.C. § 151 (2018) (stating that unequal bargaining power "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners").

43. Klare, *supra* note 39, at 285.

44. *Id.* at 286 (quoting ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 405 (1961)).

of the United States was to promote labor unions.[45] It did not just legalize union activity, but it actively created an affirmative duty on the part of employers to bargain with union representatives.[46] The NLRA also created the National Labor Relations Board (NLRB), which was an entity designed to protect workers, primarily by supporting unionization.[47]

It was not initially certain that such radical legislation would be found constitutional, but a pivotal opinion written by Supreme Court Chief Justice Charles Evans Hughes, who was nominated by Herbert Hoover, validated the NLRA.[48] In *NLRB v. Jones & Laughlin Steel Corp.*,[49] the NLRB sought sanctions against Jones & Laughlin on the grounds that the company was discriminating against union employees who wanted to join the Amalgamated Association of Iron, Steel, and Tin Workers of America, a labor organization.[50] The NLRA prohibits discrimination against workers on the basis of union membership, and the NLRB (whose administrative function is to enforce the NLRA) ordered Jones & Laughlin to rehire and give back pay to ten employees who were fired after they voted to unionize.[51] Jones & Laughlin refused, arguing that the NLRA was unconstitutional.[52] Writing for the majority in a 5-to-4 decision, Justice Hughes wrote, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be

45. *Introduction to the NLRB*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/nlrb-introduction (last visited Dec. 15, 2018) ("Congress enacted the National Labor Relations Act . . . in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.").

46. 29 U.S.C § 158(a)(5).

47. *See id.* §§ 153–156.

48. Charles E. Hughes, OYEZ: BODY POLITIC, https://www.oyez.org/justices/charles_e_hughes (last visited Dec. 16, 2018).

49. 301 U.S. 1 (1937).

50. *Id.* at 22.

51. *Id.*

52. *Id.* at 25.

denied the power to exercise that control."[53] This expansive reading of the Commerce Clause effectively validated the NLRA and declared it constitutional.[54] Justice James Clark McReynolds dissented, questioning Congress's enhanced power under the Commerce Clause,[55] but over the next few years an emboldened Congress passed additional New Deal legislation that expanded the federal government's control over labor relations.[56]

The NLRA was succeeded by the Fair Labor Standards Act of 1938 (FLSA).[57] The FLSA legislated many popular sentiments. For example, the FLSA established the forty-hour workweek.[58] Employers must pay overtime if a worker works for more than forty hours in one week.[59] The contemporary concept of time-and-a-half pay comes from the FLSA.[60] Many scholars have questioned whether these populist Depression-era laws were helpful to workers at the time,[61] but it is even more doubtful that these policies, rigidly applied, provide optimal working conditions for workers in our current gig economy.

B. *The New Economy*

The concerns that stimulated the development of labor law are not major issues today. Politically, we no longer face a "Red Scare." A violent socialist revolution does not seem to be on the horizon. Economically, the concerns raised by the advent of the sharing economy are very different from the problems with manufacturing jobs during the Great Depression. Thus, the

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53. *Id.* at 37.
54. *Id.* at 36–37, 43.
55. *Id.* at 76–78 (McReynolds, J., dissenting).
56. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2018).
57. *Id.*
58. *Id.* §§ 202, 207.
59. *See id.*
60. *See id.* § 207(a)(1).
61. *See* Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 126 (2003) ("The key provisions that led to such great hopes by unions and their supporters remain in force, but after many years of working with the NLRA, optimism has given way to cynicism and despair about the law's ability to protect workers and enhance collective bargaining.").

laws designed to address labor concerns do not adequately represent the interests of employees today. Most Americans are not deeply concerned about powerful employers in one-factory towns because most Americans do not work in such factories or live in such towns anymore. Looking back with 20/20 hindsight, the demand for a forty-hour workweek seems out of place. Today people are no longer demanding a forty-hour workweek: they are looking for a four-hour workweek.[62] Nowadays, people hope to use the internet to leverage their labor productivity to earn more while working less.[63] Studies show that reduced workweeks can result in increased productivity and increased happiness.[64] Americans' expectations about work have changed as the reality of work has changed. The laws have not.

Macro labor conditions changed radically after the labor laws were enacted. In 1935, when labor laws were emerging, more than 50% of America's labor force was involved in the production of goods.[65] Over 90% of these workers labored in factories that manufactured different commodities.[66] Work meant making stuff, often on an assembly line in a centralized location like a factory. But that is not how most people work today. In 2013, 83% of total employment was in the service sector.[67]

The nature of work—and the protections workers need thereby—has radically changed in the past seventy years. In 2017, only 8% of the non-farm workforce (12.2 million of 150.1

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62. *See generally* TIMOTHY FERRISS, THE 4-HOUR WORKWEEK (2007) (advocating for a four-hour workweek, as well as several other lifestyle changes).

63. *Id.*

64. Charlotte Graham-McLay, *A 4-Day Workweek? A Test Run Shows a Surprising Result*, N.Y. TIMES (Jul. 19, 2018), https://www.nytimes.com/2018/07/19/world/asia/four-day-workweek-new-zealand.html.

65. U.S. BUREAU OF THE CENSUS, supra note 20, at 137 (showing the following labor statistics for the year 1935: (1) 27,035,000 non-farm workers, (2) 897,000 mining employees, (3) 912,000 construction employees, (4) 9,069,000 manufacturing employees, (5) 2,786,000 transportation employees, (6) 5,431,000 trade employees, (7) 1,335,000 finance employees, (8) 3,142,000 employees in other services, and (9) 3481 government employees).

66. *Id.*

67. Giuseppe Berlingieri, *Outsourcing and the Shift from Manufacturing to Services*, CENTREPIECE, Winter 2013–2014, at 16, http://cep.lse.ac.uk/pubs/download/cp413.pdf.

million) labored in manufacturing,[68] whereas 29.1% (14.3 million out of 49.1 million) worked in manufacturing in 1947.[69] Likewise, far fewer Americans today work in resource-extraction jobs: in 2017, less than 0.5% of non-farm workers (678,000) labored in mining and logging,[70] whereas 2% of non-farm workers (976,000) worked in mining and logging in 1944. In other words, not only have the total number of workers in mining, logging, and manufacturing jobs decreased as an absolute number over the past seventy years, but so has the percent of our population engaged in these jobs. Unfortunately, while the nature of work has changed, the nature of worker protection laws has not kept pace.

Seventy years ago, work for most people meant making stuff. By the turn of the millennium, however, work for most people meant performing services. Now, more and more Americans are participating in a new economy that is made possible by technological advancement. The new economy—often called the gig economy or the sharing economy—is not based on resource extraction but upon resource reallocation. That resource can be human labor or capital. One might, for example, have a car sitting in the garage four days a week. Before internet technology such as platform apps reduced transaction costs, it was often too expensive to find a short-term renter, so the car would sit unused four-sevenths of the time. Likewise, it is difficult in the traditional economy to repurpose underused labor. Now, internet technology has transformed the way assets are utilized. The internet has substantially decreased the cost of finding goods and services.[71] The internet has also decreased

68. Manufacturing: Employment, Hours, and Earnings, U.S. BUREAU LAB. STAT., https://data.bls.gov/timeseries/CES3000000006?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last visited Dec. 15, 2018).

69. U.S. BUREAU OF THE CENSUS, supra note 20, at 137.

70. Mining and Logging: Employment, Hours, and Earnings, U.S. BUREAU LAB. STAT., https://data.bls.gov/timeseries/CES1000000001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last visited Dec. 16, 2018).

71. Fabio Ancarani, *Pricing and the Internet: Frictionless Commerce or Pricer's Paradise?*, 20 EUR. MGMT. J. 680, 680 (2002) ("Not only do customers have lower search costs for information about pricing, but firms and retailers also have lower search costs for information about their

the cost of getting information about goods and services.[72] The economist Michael C. Munger defines the cost of finding and getting information about goods and services as a "triangulation cost." In his book *Tomorrow 3.0: Transaction Costs and the Sharing Economy*, Munger argues that web platform app technologies greatly reduce triangulation costs and create new possibilities for more efficient allocation of labor and assets.[73] Technology—specifically, platform apps—has thereby unlocked the ability to economically transfer short-term labor and short-term leases of goods. This has created a new economy that reallocates underutilized labor and capital.

Today's technology-enhanced economy has many names. The most general term is simply the "new economy," a term coined in the late 1990s to describe the dramatic increase in economic growth due to the internet.[74] This Article focuses primarily on one internet-powered technology: online platforms. Online platforms are digital matchmakers or marketplaces, where people can offer goods or services. While "platform economies" technically predate the internet—think about flea markets where you can shop or rent a storefront, or classified ads in the newspapers where you offer or find work—the internet supercharges matchmaking. Critically, platform economies are distinguishable from traditional economies because, in a traditional economy, the value chain moves from left to right, or from production to consumption; in a peer-to-peer economy, however, the value chain is triangular, with a hosting platform at the apex and users on either side.[75]

It is also important to note that platform economies are complementary to traditional economies. Platform economies

customers."); *see also* Leyland F. Pitt et al., *Pricing Strategies and the Net*, 44 BUS. HORIZONS 45, 45–47 (2001).

72. Florian Zettelmeyer et al., *How the Internet Lowers Prices: Evidence from Matched Survey and Automobile Transaction Data*, 43 J. MARKETING RES. 168, 168–81 (May 2006).

73. *See* MICHAEL C. MUNGER, TOMORROW 3.0: TRANSACTION COSTS AND THE SHARING ECONOMY, at vii (2018).

74. James Surowiecki, *The New Economy Was a Myth, Right?*, WIRED (July 1, 2002), https://www.wired.com/2002/07/myth-2/.

75. Thomas Eisenmann et al., *Strategies for Two-Sided Markets*, 84 HARV. BUS. REV. 1, 2 (2006).

are based on resource reallocation.[76] The resources that were extracted and sold in the traditional economy may be underused, but a matchmaking service can put those resources to better use.

For example, consider a vacant home. This home is built from goods extracted via the traditional economy. The home was sold to someone who no longer has much use for it, but it is not a good candidate for resale due to tax or other reasons. This vacant home is an underused asset. The platform economy provides technological solutions to make better use of this asset; it could be rented out by the day or month via an online platform. Thus, the platform economy value chain moves both left to right and right to left, with a platform at the center.[77] For a visual illustration of the value chain in the sharing economy, see Figure 2 in the Appendix.[78]

Platform economies may be further divided into two sub-categories: sharing economies and gig economies. The difference between these economies pertains to whether goods or services are being offered and sought on the platform. This can also be thought of as the divide between capital and labor. I use the term "sharing economy" to indicate an internet platform that offers matchmaking services or a technological framework for offering the use of underutilized goods. For example, Airbnb allows people to offer up their spare rooms for rent.[79] Turo and Getaround enable people to rent their cars to their neighbors.[80] LendingClub allows people to lend each other

76. Nina Gass, *What the Emergence of the Platform Economy Means for Business*, DUE.COM (Sept. 8, 2017), https://due.com/blog/the-platform-economy/.

77. Press Release, DHL, DHL Reveals the Sharing Economy Is Shaking Up Logistics, (May 9, 2017), http://www.dhl.com/en/press/releases/releases_2017/all/dhl_reveals_the_sharing_economy_is_shaking_up_logistics.html.

78. BEN GESING, DHL TREND RESEARCH, SHARING ECONOMY LOGISTICS: RETHINKING LOGISTICS WITH ACCESS OVER OWNERSHIP 3 (2017), https://www.logistics.dhl/content/dam/dhl/global/core/documents/pdf/glo-core-sharing-economy.pdf.

79. *Earn Money as an Airbnb Host*, AIRBNB, https://www.airbnb.com/host/homes (last visited Dec. 16, 2018).

80. *How It Works*, GETAROUND, https://www.getaround.com/tour (last visited Dec. 16, 2018); *How Turo Works*, TURO, https://turo.com/how-turo-works (last visited Dec. 16, 2018).

cash.[81] The common feature of all these sharing economy platforms is that they feature a rental-like model for goods which are traditionally difficult to rent. Sharing economy platforms deal with the reallocation of capital, typically on a short-term basis.

"Gig economy" indicates an internet platform that offers matchmaking for services (i.e., labor).[82] The term has its roots in musical performance, i.e., the band will play a gig tomorrow at Joe's Bar. This connotes a short or temporary job. Gig is also an abbreviation for gigabyte,[83] and this term thus also has technological connotations that are appropriate for describing internet platforms. Examples of gig economy platforms abound today: Rover matches pet sitters with dog owners.[84] Uber and Lyft match drivers with riders.[85] TaskRabbit matches handymen with homeowners.[86] The common element in gig economy platforms is that they match someone who wants to offer up some of her underused labor with another person who wants to pay the former for her efforts.

Gig economies are the focus of this Article. They are technological frameworks for offering services; thus, they implicate labor laws. However, work on these platforms is quite different from work in a factory in 1930. Recall that gig economy platforms primarily offer matchmaking services, so, strictly speaking, people do not work for the platform, but rather use the platform to find work. In this way, platforms are like classified ads. It would be silly to assert that someone "works

81. *About LendingClub*, LENDINGCLUB, https://www.lendingclub.com/company/about-us (last visited Dec. 16, 2018).

82. *Gig Economy*, INVESTOPEDIA, https://www.investopedia.com/terms/g/gig-economy.asp (last updated May 24, 2018).

83. *Gigabyte*, TECHTERMS, https://techterms.com/definition/gigabyte (last updated Feb. 26, 2013).

84. *About the Dog People*, ROVER, https://www.rover.com/about-us/?ref=footer (last visited Dec. 16, 2018).

85. *How Uber Works*, UBER, https://www.uber.com/ride/how-uber-works/ (last visited Dec. 16, 2018); *Why Lyft*, LYFT, https://www.lyft.com/driver/why-drive-with-lyft (last visited Dec. 16, 2018).

86. *Revolutionizing Everyday Work*, TASKRABBIT, https://www.taskrabbit.com/about (last visited Dec. 16, 2018).

for" the *Pittsburgh Post-Gazette* because he found a roofing job by placing a classified ad in that newspaper.

However, gig economy platforms have extra features that do make them appear more like employers. For example, if you find a dog walker on Rover, you will also pay for that service via Rover's payment portal. And if you have a complaint about the service rendered, you will use Rover's dispute resolution process. Rover conducts background checks on potential dog walkers, and a dog walker who gets too many negative reviews will be removed from the platform.[87] This level of control over the nature of the work goes far beyond a mere classified ad. But flexible work on a gig economy platform is also quite different from a nine-to-five job smelting ore in a steel factory. Moreover, the work on these platforms is rapidly evolving, as the new economy continues to rapidly grow.[88] Unfortunately, these new platforms remain subject to old laws, which constrain their business models in unintended and undesirable ways.[89]

II. PROBLEMS APPLYING OLD LABOR LAW TO THE NEW ECONOMY

Modern labor law mainly concerns employees, so the definition of employee is fundamental to understanding modern labor law. Workers can be classified as either employees or independent contractors; these are the only two options, and neither fits the gig economy model of work. Some have argued that the use of independent contractor labor is being abused by employers who want to avoid providing benefits.[90] Others point out that gig economy business models cannot function if all laborers must receive all the protections

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87. *About the Dog People*, supra note 84.

88. *Adapting to the Gig Economy as Technology Continues to Evolve*, MARKETPLACE PLATFORM (Mar. 14, 2018), https://www.marketplaceplatform.com/adapting-to-the-gig-economy-as-technology-continues-to-evolve/.

89. 29 U.S.C. §§ 151–169 (2018).

90. *See generally* SHERROD BROWN, WORKING TOO HARD FOR TOO LITTLE: A PLAN FOR RESTORING THE VALUE OF WORK IN AMERICA (2017), https://www.brown.senate.gov/download/working-too-hard-for-too-little (arguing some employers prefer classification of workers as independent contractors to reduce employment costs including payroll taxes, labor standards, and workers' rights).

and benefits that are needed by steel workers in one-factory towns.[91] As a result, some courts and legislators have attempted to eviscerate the utility of independent contractors.[92] Recent court decisions expanding the joint employer doctrine could render the independent contractor label meaningless.[93] This Article argues that the tension is not resolvable in today's economy because it emerges from outdated ideas about work and workers. Instead, a new and flexible definition of "gig worker" is necessary to resolve the tension. But first, this Article highlights contemporary problems courts have had in applying the distinction between employees and independent contractors to the new ways people work in the sharing economy. These cases reveal that the tensions between old law and new work cannot be resolved without creating a novel worker classification.

A. *Employees and Independent Contractors*

The fundamental tension between the labor laws and the sharing economy arises doctrinally in the legal distinction between an employee and an independent contractor. These two distinct categories of workers emerge out of necessity from the NLRA because many of the protections afforded by the NLRA only flow to employees and not to independent contractors.

The NLRA defines the terms employment and employee extremely broadly.[94] In fact, the legislative history indicates that

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91. William M. Boal, *Testing for Employer Monopsony in Turn-of-the-Century Coal Mining*, 26 RAND J. ECON. 519, 522 (1995).

92. *See supra* Section II.B.

93. *See supra* Section II.B.

94. 29 U.S.C. § 152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . ., as amended

the goal of the NLRA was to protect anyone who might be an employee.[95] The Internal Revenue Service (IRS) has adopted a narrower definition of employee for tax purposes, which is also quite relevant in legal analysis even outside the domain of tax.[96] This Article will briefly address IRS categorizations of workers—employees who should file a Form W-2 versus independent contractors who file a Form 1099—because these tax categories have become intertwined and conflated with their respective labor law categories. However, this paper is designed to fundamentally address the labor law issues with regard to employment benefits, so it does not address tax consequences.

Unfortunately, the IRS definition of employee is more difficult to understand and apply than the NLRA definition, because the IRS calls for a twenty-factor test plus an analysis, which requires arbiters to consider all facts and circumstances on a case-by-case basis.[97] The Supreme Court has said that there cannot be one test to determine employment.[98] The task of classifying workers as employees is thus quite difficult, because there have been no clear and consistent tests promulgated by legislatures, agencies, or courts. This task becomes even harder and more uncertain when we try to apply eighty-year-old case law, statutes, agency opinions, and legislative history to the new sharing economy.

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from time to time, or by any other person who is not an employer as herein defined." (citation omitted)).

95. *Introduction to the NLRB*, *supra* note 45 ("Congress enacted the National Labor Relations Act . . . in 1935 to protect the rights of employees and employers . . . .").

96. *Employee (Common-Law Employee)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee (last updated Apr. 23, 2018).

97. JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES 3–5 (2007), https://www.irs.gov/pub/irs-utl/x-26-07.pdf.

98. United States v. Silk, 331 U.S. 704, 713 (1947) ("The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act . . . we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.'" (citation omitted)).

While the NLRA defines employee one way, the NLRB takes another position, the IRS offers a third (indeed, the IRS has taken different and even contradictory positions), and appellate courts in different circuits offer a fourth, fifth, sixth, and seventh approach, while the Supreme Court has held only that there cannot be any one test.[99] In other words, attempting to define "employee" under American law in the gig economy is a virtually impossible task. Regardless, it is not enough to say the law is a mess. It is better to try and sort it out. The twenty-factor IRS test is probably the best starting point for doing so, as it contains most, if not all, of the factors that courts and agencies might consider when determining whether a worker is an employee.

Since this Article invokes the IRS test, it will also use tax language to explain the consequences resulting from its application. If the IRS classifies a worker as an "employee," that person receives an IRS Form W-2.[100] On the other hand, if a worker is an "independent contractor," such person receives an IRS Form 1099.[101] This is why people refer to employee versus independent contractor analysis alternatively as the W-2/1099 discussion. To round out our tax analysis, a partner in a partnership or a member of a flow-through LLC receives an IRS Schedule K-1 (a result of the entity's filing of the Form 1065).[102] Therefore, W-2, 1099, and K-1 are the three main tax classifications for workers. However, K-1 partners are generally not pertinent to the matter at hand of categorizing workers in

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99. *Id.*

100. *About Form W-2, Wage and Tax Statement*, IRS, https://www.irs.gov/forms-pubs/about-form-w2 (last updated Nov. 1, 2018) ("Every employer engaged in a trade or business who pays remuneration, including noncash payments of $600 or more for the year (all amounts if any income, social security, or Medicare tax was withheld) for services performed by an employee must file a Form W-2 for each employee . . . .").

101. *About Form 1099-MISC, Miscellaneous Income*, IRS, https://www.irs.gov/forms-pubs/about-form-1099-misc-miscellaneous-income (last updated Nov. 1, 2018) ("File Form 1099-MISC for each person to whom you have paid during the year . . . [for] services performed by someone who is not your employee . . . .").

102. *About Schedule K-1 (Form 1065), Partner's Share of Income, Deductions, Credits, Etc.*, IRS, https://www.irs.gov/forms-pubs/about-schedule-k1-form-1065 (last updated Nov. 5, 2018) ("The partnership files a copy of this schedule with the IRS to report your share of the partnership's income, deductions, credits, etc.").

the sharing economy, as sharing economy platforms generally do not attempt to characterize workers as partners, and the workers likewise have not sought to be recharacterized as partners.

How a worker is classified has implications on how the worker gets paid. This is discussed in detail below, but for the present purpose of motivating what may otherwise seem like a dry overview of a twenty-factor test, it bears mentioning that employees receive many benefits, such as time-and-a-half overtime, Family Medical Leave Act (FMLA) protections, and the right to unionize.[103] But 1099 independent contractors do not receive these benefits.[104] The recent spate of lawsuits from workers seeking reclassification from 1099 independent contractors to W-2 employees comes from their desire to get these benefits.[105]

The IRS's twenty-factor test for defining "employee" is best understood as a signpost for what all the facts and circumstances might be when a court or agency evaluates the status of a worker.[106] It is not a strict test per se. The twenty factors involve: (1) instructions, (2) training, (3) integration, (4) personal services, (5) assistants, (6) continuing relationship, (7) set hours of work, (8) full time required, (9) employer's premises, (10) order or sequence test, (11) oral or written reports, (12) payment terms, (13) payment of expenses, (14) tools and materials, (15) significant investment, (16) profit or loss, (17) working for multiple firms, (18) services available to the public, (19) right to discharge, and (20) right to terminate.[107]

Addressing each of these factors in turn:

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103. *See Employee Rights*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/rights-we-protect/employee-rights (last visited Dec. 16, 2018).

104. *See* Jessica Lee, *Unionize Uber? Legal Fight Over Seattle Drivers Draws National Attention*, SEATTLE TIMES (Mar. 29, 2017, 6:30 AM), https://www.seattletimes.com/seattle-news/transportation/unionize-uber-legal-fight-over-seattle-drivers-draws-national-attention/.

105. *Id.*

106. JOINT COMM. ON TAXATION, *supra* note 97, at 1.

107. *Id.*.

(1) The "instructions" element asks the question: does the person who is working receive instructions directly from the purported employer? Or do they have some flexibility about what they do on a day to day basis?
(2) "Training" asks whether the purported employer provides training sessions.
(3) "Integration" asks how integral is the work? Is it a plug and play operation? Could you have one person doing the carpentry today and a different person doing the carpentry tomorrow with a similar result? Or is this something more fundamental? You cannot just swap out the CEO of Coca-Cola and expect the company to run well. That, therefore, has to do with the integration factor.
(4) "Personal service" means the workers are required to perform the work personally and cannot substitute someone else to do the work, which is a hallmark of employment.
(5) "Assistants" means the worker can hire, supervise, and pay other assistants to the employer, which is evidence of employment.
(6) A "continuing relationship" means that someone who shows up at work every day for an extended period is probably an employee under that factor. By contrast, someone who calls in each day and says, "Are you looking for me to come in tomorrow?" is more likely to be an independent contractor.
(7) "Set hours of work" means an employer controls when work is performed. An independent contractor has more freedom as to when the work is completed.
(8) "Full time required" is an important factor. Someone who is working forty hours a week, nine to five, and for a single firm is probably an employee.
(9) "Employer's premises" is another important factor. However, as employers and the federal government promote hoteling and the ability to work remotely, this factor seems less relevant.

(10) "Order or sequence" relates to how much control the putative employer has over the work. An independent contractor generally has more control about deciding the process of work than an employee does.

(11) The "oral or written reports" factor asks whether an employer or purported employer will ask for regular status report calls in the office: "What's going on this week?" Someone who is going to be called into the office weekly and talked to is more likely an employee.

(12) "Payment terms" looks to how often the worker is paid: if the worker is being paid on an invoice basis for fourteen days, she is more likely an independent contractor. If the worker receives a paycheck every second and fourth Friday of the month, she is more likely an employee.

(13) For "payment of expenses," generally, employees get reimbursed for business and travel expenses, although that practice has been diminishing in certain areas. Still, independent contractors are generally not reimbursed for their business and traveling expenses.

(14) For "tools and materials," independent contractors generally bring their own tools and materials to the job. A worker who has a laptop provided by a putative employer is probably an employee. Likewise, a construction worker using a putative employer's reciprocating saw, as opposed to the one she or he brought to work that day, evidences employment. Wearing a hard hat or a t-shirt that says the name of the construction company or staffing company also evidences employment.

(15) Making a "significant investment" to perform the work makes a worker seem more like an independent contractor. An employee is not expected to bear the risk of loss for an operation.

(16) The "profit or loss" factor is similar to the risk of loss concept. A worker who realizes she or he is able to potentially lose money is more likely to be an independent contractor.

(17) Working for just one company, especially one that requires exclusive work for that company, evidences employment. On the other hand, a worker who works for three different people will have a hard time saying they are all employers, although the joint employment doctrine is discussed below.
(18) Providing services to the general public, such as a lawyer who "hangs a shingle," where anyone who comes to that office can get legal advice, as opposed to solely being an adviser to a certain corporation, looks more like an independent contractor, whereas a person who works for just one company is more likely an employee of that one company.
(19) If the putative employer has the right to fire a worker, or seems to have the right to terminate, that is another factor generally evidencing employment.
(20) Similarly, a worker who has the right to terminate the relationship at any time, without incurring any liability, is more likely an employee because we know employees cannot be forced to work, whereas an independent contractor would breach a contract if she or he failed to complete a project.[108]

In addition to these twenty factors, the IRS will look generally at behavioral control, financial control, and the overall relationship between the parties.[109] Some of the twenty factors are no longer as relevant as they once were in our economy. Other factors are more relevant than they ever have been, and they are all based on individual circumstances.

Litigation that relates to these factors is generally initiated by an independent contractor who wants to be reclassified as an employee. Such a worker wants to be classified as an employee under this test to receive certain benefits. It is better for most

108. *Id.*

109. *Independent Contractor (Self-Employed) or Employee?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee (last updated Nov. 29, 2018).

people to be classified as an employee, rather than an independent contractor. While independent contractors gain flexibility, an employee is protected by a forty-hour, five-day workweek with time-and-a-half pay for overtime (unless exempt). Other benefits required by law include workers' compensation, part-time disability, and the FMLA.[110] Employees usually get health, dental, and vision insurance from employers, whereas independent contractors have to pay for that on their own. Employees are usually included in a retirement plan, often with an employer's matching contribution, such as a 401(k) or a 403(b). Employee pensions are now less common, but at one time they were quite common. Life insurance is not required by law, but employees often receive it as part of their package, plus paid vacation time. Those employee rights and benefits are reasons why a person might be happier to be classified as an employee as opposed to an independent contractor.

On the other hand, the classification of "employee" comes with some restrictions. One of those restrictions is that the employer can demand exclusive work. An employee cannot simultaneously work for a competitor and could be restricted from doing any other work. The employer can demand an employee show up for work at nine in the morning and stay until five in the evening. The employer will almost always retain all the intellectual property that the employee generates. This way of working does not accommodate an increasing number of workers in the modern economy.

Those strings also pull in the other direction regarding tort liability. The doctrine of *respondeat superior* (literally, "let the boss answer") holds a principal vicariously liable for torts committed by its agents.[111] Courts generally apply either the benefits test or the characteristics test to determine when an

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110. *Hire and Manage Employees*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/business-guide/manage-your-business/hire-manage-employees#section-header-6 (last visited Dec. 16, 2018).

111. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

employer is vicariously liable for the torts of an employee.[112] *Respondeat superior*, however, does not apply to independent contractors.[113] Of course, under common law, there is yet another test for determining whether a putative employee is an independent contractor for liability purposes.[114] The Third Restatement of Torts proffers an eleven-part test that is similar to, but not exactly the same as, the IRS test described above.[115] This additional test further illustrates the rampant confusion about the distinction between employee and independent contractor. The schisms in law around this distinction make it extremely difficult to avoid litigation and liability for misclassification. These potential issues present a virtually insurmountable challenge to sharing economy companies, as there is no precedent for the way they hire and work.

Uber will be exposed to less liability if its drivers are considered independent contractors rather than employees. Although the laws of agency and the laws of tort are not exactly aligned with the laws of employment, similar factors are generally applied to determine whether tort liability will impute to a principal. Companies that hire independent contractors have fewer responsibilities because generally: (1) they do not have to withhold independent contractors' taxes, (2) they are not responsible for their torts and contracts, (3) they are not liable for illegal conduct like making kickbacks or bribes, and (4) they have no obligation to pay for unemployment insurance and other worker benefits.[116]

As we saw with the Uber fiasco in 2017, however, there are some reputational liabilities that cannot be avoided, and there are many reasons why Uber and similar platforms would prefer that their workers be classified as independent contractors. But the law cannot give sharing economy platforms like Uber

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112. *Respondeat Superior*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/respondeat_superior (last visited Dec. 17, 2018).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; *Independent Contractors*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/independent-contractors#2 (last visited Dec. 16, 2018).

certainty about when a worker will be classified as an independent contractor.

Employers who wrongly classify employees as independent contractors are subject to a number of penalties.[117] In 2011, the DOL and the IRS signed a Memorandum of Understanding to work together to try to scourge out misclassification of employees.[118] Many states also ferret out misclassifications.[119] The penalties attached depend on the egregiousness of the misclassification.[120]

There are three categories of worker misclassification: unintentional misclassification, intentional misclassification, and fraudulent misclassification.[121] Fraudulent misclassification might subject an employer to criminal penalties up to $1000 per misclassified worker and a $50 fine per year.[122] The amount of tax that should have been withheld is owed with penalties, in the form of fines and interest.[123]

The DOL launched its misclassification initiative in 2010.[124] In 2014, the DOL awarded $10.2 million to nineteen state attorney general offices to assist in this initiative.[125] These states created an interagency task force, and there are now thirty-seven states

117. Christopher J. Cox et al., *Weil Discusses Risks of Classifying Employees as Independent Contractors*, CLS BLUE SKY BLOG (Oct. 19, 2017), http://clsbluesky.law.columbia.edu/2017/10/19/weil-discusses-risks-of-classifying-employees-as-independent-contractors/.

118. Press Release, U.S. Dep't of Labor, Labor Secretary, IRS Commissioner Sign Memorandum of Understanding to Improve Agencies' Coordination on Employee Misclassification Compliance and Education (Sept. 19, 2011), https://www.dol.gov/newsroom/releases/whd/whd20110919.

119. *Id.*

120. *Improperly Classifying Employees as Independent Contractors: What Are the Penalties?*, JUSTWORKS: JUSTBLOG (Dec. 28, 2017), https://justworks.com/blog/consequences-misclassifying-workers-independent-contractors.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See* DAVID WEIL, U.S. DEP'T LABOR, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 1–4 (2010), https://www.dol.gov/whd/resources/strategicEnforcement.pdf.

125. Press Release, U.S. Dep't of Labor, $10.2M Awarded to Fund Worker Misclassification Detection, Enforcement Activities in 19 State Unemployment Insurance Programs (Aug. 17, 2014), https://www.dol.gov/newsroom/releases/eta/eta20141708.

that have state laws against worker misclassification.[126] Misclassification can further result in owing money to the federal and state governments in addition to fines. There are also numerous agencies that have authority to come after employers.

But while much rides on being able to distinguish between employees and independent contractors, it is not that easy to apply the IRS twenty-factor test conclusively to gig economy jobs. Consider the gig economy platform TaskRabbit. TaskRabbit advertises handymen for small tasks.[127] For example, someone might like to shop at IKEA, but hate putting the furniture together. Another person might enjoy putting together IKEA furniture. One person, a "tasker," goes on TaskRabbit and offers her free time to put together IKEA furniture for $28 an hour. Another person goes on TaskRabbit and decides that paying $28 an hour to avoid putting together IKEA furniture is a good deal. TaskRabbit is an intermediary platform allowing these people to connect. One tasker named John has a 98% approval rating. He charges $28 per hour. He has a five-out-of-five star rating from TaskRabbit. Is he an employee of TaskRabbit or is he an independent contractor to TaskRabbit?

Generally, John looks like a contractor. He can refuse the job: he does not have to do that work. TaskRabbit is not going to tell him how to put that IKEA furniture together. But John receives instructions from TaskRabbit on where and when to do the job. It is hard to say whether he is integrated with TaskRabbit services: he has earned "elite" status on that platform, and he can charge more per hour because he is elite. Other factors are even more difficult to apply. Is John offering personal services to the public when he only offers IKEA building services through the TaskRabbit website? Is this a continuing

126. LISA A. TAVARES ET AL., VENABLE LLP, FOCUS ON MISCLASSIFICATION—ARE YOUR WORKERS "EMPLOYEES" OR "INDEPENDENT CONTRACTORS?" 1 (2011), https://www.venable.com/files/Publication/435f765d-a52e-4786-b22e-f45225aa10d0/Presentation/PublicationAttachment/5f52f7d2-b875-4871-9e96-fb0f101b3a52/EBEC_Alert_3-11.pdf.

127. *How It Works*, TASKRABBIT, https://www.taskrabbit.com/how-it-works (last visited Dec. 16, 2018).

relationship where John has forty-nine reviews that enable him to charge more than an average tasker? Does he incur a risk of loss where he has to bring his own tools and drive his own car to the job site?

The analysis of whether drivers for Uber, the ride-sharing service, are employees or independent contractors is even more complicated than TaskRabbit. Uber does not tell you to work eight hours per day or at any particular time, but Uber offers a lot of incentives to get drivers on the road. The company offers certain bonuses after four hours and extra pay for working during certain time periods.[128] A driver can refuse to make any pick up, but that will lower the driver's score, which makes it harder to get additional rides. If the score goes low enough, that driver can be automatically removed from the platform entirely. Does that constitute the ability of Uber to constructively discharge drivers? Drivers generally bring their own cars, but Uber now offers a driver car leasing program. Uber can deactivate drivers, and Uber must activate drivers to participate in the first place.[129]

Uber leasing is particularly problematic. A driver who is driving an Uber car, and not her own personal vehicle, starts to look a little different than a typical sharing-economy participant. The sharing economy reallocates underutilized assets, whereas the traditional economy requires obtaining new assets to offer a service. Renting a car that is sitting unused in someone's driveway getting rusty is different than deciding to lease or purchase a new vehicle.

Further, litigation on W-2/1099 issues is heating up. One attorney in particular is leading the charge against what she pejoratively calls the "1099 economy." Shannon Liss-Riordan recently negotiated a $100 million settlement from her employee characterization suit against Uber, although a federal

128. *How Surge Pricing Works*, UBER, https://www.uber.com/drive/partner-app/how-surge-works/ (last visited Dec. 16, 2018).

129. *Uber Driver Requirements: Do You Qualify to Drive?*, RIDESHARING DRIVER (May 14, 2018), https://www.ridesharingdriver.com/uber-driver-requirements-qualify/.

judge later ruled that deal to be unfair.[130] Her firm sued GrubHub.[131] GrubHub is a food delivery service that matches up three parts of a network: hungry people who want to eat, restaurants who want to sell food, and people who want to drive that food to hungry people.[132] Her firm sued Amazon, representing its "flex" delivery drivers who want to be reclassified as employees.[133] In all these cases, the analysis under traditional tests is complicated and inconclusive. Amazon flex drivers do not work specified hours, but they do have to meet many standards imposed by Amazon. A flex driver must wear a safety vest that says Amazon, drive a white van provided by Amazon with a sticker that says Amazon on it, and deliver Amazon packages to specified locations. Those are factors that counsel toward flex drivers having employee status. On the other hand, flex drivers do not expect a continuing relationship with Amazon, they can work for multiple people at once, and they can select whether to work on any given day. These factors make the classification much less clear.

The NLRB has also been involved in these lawsuits. Notably, the NLRB sued Handy Technologies for its worker classifications.[134] Handy provides a platform for home cleaning

130. *See* Michael Liedtke, *Judge Rejects $100 Settlement in Key Case with Uber Drivers*, GLOBE & MAIL (Aug. 19, 2016), https://www.theglobeandmail.com/report-on-business/international-business/us-business/judge-rejects-100-million-settlement-in-key-case-with-uber-drivers/article31462763/.

131. *See* Jon Steingart, *GrubHub Wage Case May See New Delivery: Worker Status Test Redo*, BLOOMBERG BNA (Jan. 25, 2018), https://www.bna.com/grubhub-wage-case-n73014474636/ ("Liss-Riordan is the lawyer for former GrubHub food delivery driver Raef Lawson, who says the online food ordering company incorrectly classified him as an independent contractor and that it owes him overtime and reimbursement for business expenses he'd be entitled to under state law if he had been classified correctly as an employee.").

132. *See About Us*, GRUBHUB, https://about.grubhub.com/about-us/overview/default.aspx (last visited Dec. 16, 2018).

133. *See* Angel Gonzalez, *Amazon Delivery Drivers Sue Company over Job Status*, SEATTLE TIMES (Oct. 5, 2016, 4:58 PM), https://www.seattletimes.com/business/amazon/amazon-delivery-drivers-sue-company-over-job-status/ ("The complaint, filed late Tuesday in U.S. District Court in Seattle, was brought forth by Shannon Liss-Riordan, the attorney who led two class-action lawsuits by discontented drivers against Uber.").

134. *See* Josh Eidelson, *U.S. Labor Board Complaint Says On-Demand Cleaners Are Employees*, BLOOMBERG (Aug. 31, 2017, 12:07 PM), https://www.bloomberg.com/news/articles/2017-08-31/u-s-labor-board-complaint-says-on-demand-cleaners-are-employees.

services.[135] While the market dictates the upper limit of prices for services on Handy, Handy never pays less than $18 an hour; they set a minimum rate and then let the market adjust it from there. Handy generally engages with low-skilled, low-income, low-education workers, and part of its corporate mission is to help these people climb the economic ladder. To do this, Handy encourages its workers to get bank accounts.[136] The NLRB claimed this was providing training, which aided its case for worker misclassification against Handy.[137] Most scholars probably recognize that having a bank account is better than putting the money under your mattress: workers can be paid more quickly, it helps people budget and understand the assets that they have, it builds credit, it is safer, etc. However, encouraging workers to do this, plus offering them job training, language skills, and other opportunities are factors that led the NLRB to reclassify Handy workers as employees.[138] Handy would reasonably respond by offering fewer services and less training for workers to avoid this risk of reclassification. The IRS, DOL, NLRB, state attorneys general, and plaintiffs' attorneys are also fighting for reclassification of workers in the sharing economy. As we see with Handy, many of these firms would rather help their employees lessen that risk of reclassification and all that comes with it.

Gig economy firms argue that their business model does not work if these workers are employees and not independent contractors.[139] And in today's economy there are many workers who depend on these firms. There are workers in the sharing economy who drive for Uber and Lyft, perform tasks for TaskRabbit, and clean for Handy. Such people cobbled together a full-time employment lifestyle for themselves out of working through three or four of these gig-based companies. What will

135. *About Us*, HANDY, https://www.handy.com/about (last visited Dec. 15, 2018).

136. NYU School of Law, *Tech Entrepreneurs and the Regulatory State: Keynote*, YOUTUBE (Apr. 5, 2016), https://www.youtube.com/watch?v=Qf33fbnUOQg&feature=youtu.be.

137. *Id.*

138. *Id.*

139. *Id.*

happen to them if there is reclassification? Will they be able to maintain the profits they earn and enjoy? On the other hand, what about people that are driving for Uber sixty hours a week, are totally dependent on that firm for sustenance, and might not have recourse if they are deactivated?

The problem with using the NLRA to protect sharing economy workers is that the sharing economy does not look like the traditional economy that existed when these laws were created. In the traditional economy, people were mining coal out of the ground, using that coal to produce energy, using that energy to produce glass, and selling that glass.[140] The traditional value chain moves from left to right.[141] In the sharing economy there is a value chain that moves in both directions toward a platform in the middle, forming a triangle.[142] Work, employment, productivity, and value creation are fundamentally different now.

B. *The Joint Employment Doctrine*

The joint employment doctrine, which was developed in the 1930s to prevent employers from circumventing the NLRA,[143] is likewise being stretched and distorted to cover the innovative ways people work today. Analysis under this doctrine is like the analysis for classifying a worker as an employee or an independent contractor: a worker must first and foremost be an employee in order for joint employment to attach, so it is susceptible to all the problems with applying the worker classification that were described in the prior section.[144] Additionally, the traditional analysis of joint employment is challenged by the change in how people work. Instead of having jobs, many people do jobs, and this makes joint employment analysis even harder.

140. *See supra* Part II.

141. *Id.*

142. *Id.*

143. *See generally* 29 C.F.R. § 791.2 (2018) (discussing the reasoning for introducing the joint employment doctrine under the Fair Labor Standards Act).

144. *See supra* Section III.A.

The joint employment doctrine is designed to prevent an employer from chiseling an employee out of overtime by forming two firms and having the employee work for each: work thirty-nine hours for one, thirty-nine hours for the other.[145] If two nominally separate but actually similar or related firms employ a worker in this way, the putative joint employer may be liable for thirty-eight hours of overtime (time-and-a-half) pay and other full-time employment benefits.[146] The term "joint employment" first appeared in the July 1939 DOL Interpretive Bulletin Number 13, which makes it clear that the DOL's policy rationale was to prevent an end-run around labor laws that protect full-time employees, as evidenced by the 1930s parlance of "wage chiseling."[147]

There are two distinct types of joint employment that have emerged from the common law: horizontal joint employment and vertical joint employment. Horizontal joint employment is older and simpler. Imagine that Capital Co. owns 51% shares in two different hotels, Hotel A and Hotel B. Hotel A hires Larry Labor to work thirty-five hours a week for $10 per hour, and Hotel B also hires Larry to work thirty-five hours a week for $10 per hour. Larry earns $700 per week and does not receive full-time employee benefits like health insurance. Larry sues Hotel A, Hotel B, and Capital Co. for $225 per week in unpaid overtime plus the value of employee benefits. Does Larry prevail?

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145. *See generally* 29 C.F.R. § 791.2 (explaining how joint employment is dealt with for both associated and disassociated employers).

146. *Id.*

147. Marc Linder, *The Small-Business Exemption Under the Fair Labor Standards Act: The "Original" Accumulation of Capital and the Inversion of Industrial Policy*, 6 IOWA L. REV. 403, 408 (1998). The Department of Labor originally formulated its position with regard to joint employment in its Interpretive Bulletin No. 13, which dealt with the "Determination of Hours for Which Employees Are Entitled to Compensation." Under the rubric "Employees Having More than One Job," the Wage and Hour Administrator illustrated the diametrically opposite outcomes that joint employment triggers under the minimum wage and overtime provisions of FLSA: whereas each joint employer can take credit for the wages paid by the other toward the minimum wage, each joint employer is made liable for overtime where the aggregation of hours worked for each exceeds the statutory threshold. U.S. Dep't of Labor, Wage & Hour Div., Interpretive Bulletin No. 13 (May 3, 1939) at 16–17.

According to the DOL Wage and Hour Division, Larry will prevail on his claim of horizontal joint employment if he can show the hotels are "sufficiently related to or associated with each other."[148] Courts will look at all the facts and circumstances, including but not limited to: who owns the putative joint employers, whether the employers have overlapping directors or managers, whether the employers share control over operations, whether one employer supervises the work of the other, whether the employers share authority over the employee, whether the employers treat employees as a pool of workers available to both of them, whether the employers share clients or customers, and whether there are any agreements between the employers.[149] Applying this to Larry's hypothetical, if Hotel B asks Hotel A to send over Larry specifically when Hotel B is understaffed, or if Hotel B commonly asks Hotel A to provide workers in general, that is evidence that the hotels are joint employers.

The doctrine of vertical joint employment developed more recently and has a different focus. Not only is vertical joint employment difficult to analyze factually, but the law is in a confusing state of flux. In January 2016, the DOL issued Administrator's Interpretation (AI) 2016-01.[150] This non-binding statement included the first instance where the DOL took an administrative position that distinguished between "horizontal" joint employment and "vertical" joint employment.[151] Previously, this distinction was made only by certain courts. Scholars saw this as a shift in the DOL's focus toward prosecuting vertical joint employers more vigorously. AI 2016-01 also set forth the DOL's "economic realities" test for vertical joint employment, which is described below.[152] But, on

148. *Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection*, U.S. DEP'T LABOR, https://www.dol.gov/whd/regs/compliance/whdfs35.htm (last updated July 2008).

149. *See id.*

150. *Administrator Interpretations Letter—Fair Labor Standards Act*, U.S. DEP'T LABOR, https://www.dol.gov/WHD/opinion/adminIntrprtnFLSA.htm#foot (last visited Sept. 5, 2018).

151. *See id.*

152. *See id.*

June 7, 2017, the DOL issued a three-sentence press release withdrawing AI 2016-01.[153] Scholars saw this move as a shift in the DOL's approach back to a more traditional theory of employment relationships.[154] Obviously, it is hard to build a solid foundation on shifting sand. This confusion is disruptive for employers and makes life difficult for the lawyers who advise them.

Moreover, courts can and do consider all the facts and circumstances in evaluating vertical joint employment claims. However, there is some DOL guidance as to what economic reality factors to consider: (1) whether the putative employer directs, controls, or supervises the work, (2) whether the putative employer has the power to hire or fire the employee or to change rate or method of pay, (3) permanence or length of the relationship between the putative employer and the employee, (4) whether the employee is performing low-skill (easily replaceable) services or performing tasks that require substantial training and integration, (5) whether the work is performed on the putative employer's premises, and (6) whether the putative employer generally performs functions that would ordinarily be performed by employees.[155] These factors evidence that the employee is "economically dependent" on the putative employer.

Imagine next that Louise Labor is employed by Smart Staffing Services (SSS). SSS could send Louise to any job site, but in reality, SSS has sent Louise to Data Entry Inc.'s (DEI) offices every working day for five years, where DEI tells her what data to enter and how to use its systems. DEI pays SSS for Louise's services, and SSS pays Louise's salary, for nine months. Then one day, SSS closes down suddenly, without paying Louise.

153. Press Release, U.S. Dep't of Labor, U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (June 7, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607.

154. Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, LITTLER (June 7, 2017), https://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance.

155. *See* 29 C.F.R. 500.20(h)(4)(i)–(vi) (2018).

Can Louise sue DEI for back wages because DEI is really her employer?

Applying the DOL factors to Louise, it may seem obvious that DEI is her vertical joint employer: she works on DEI premises, performs the tasks it gives her (which are similar to the work that DEI employees do), and has done so every day for nine months. However, this is also the norm in staffing agency relationships. To call Louise an employee of DEI would mean also reclassifying millions of people who are similarly engaged in work.

The test traditionally applied by most courts is from *Bonnette v. California Health & Welfare Agency*.[156] The *Bonnette* four-part economic reality test is "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[157]

But on January 25, 2017, the Fourth Circuit declined to apply the *Bonnette* test, and instead created a new test that dramatically increases the liability for putative vertical employers.[158] Some scholars say this new test renders the independent contractor concept meaningless.[159] In *Salinas v. Commercial Interiors, Inc.*, the Fourth Circuit considered six factors to determine "whether two or more persons or entities 'are not completely disassociated' with respect to the worker."[160] The *Salinas* test thereby makes vertical joint employment even easier to find than horizontal joint employment. Horizontal joint employment exists where the employee has two employment relationships with two or more employers, and where the employee can prove the employers are *sufficiently associated* or related such that courts impute

156. *See* 704 F.2d 1465, 1470 (9th Cir. 1983) (describing the four factors to consider when determining if workers are "employers" of chore workers).

157. *Id.*

158. Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 129 (4th Cir. 2017).

159. *See, e.g.*, N. Peter Lareau, 10 LABOR & EMPLOYMENT LAW § 261.06, LexisNexis (database updated 2018).

160. 848 F.3d at 141.

ownership of both to one. Vertical joint employment under *Salinas* seemingly shifts the burden of persuasion to employers who will have to prove they are *completely dissociated*.[161] In many traditional cases where vertical joint employment was not found, complete dissociation would have been very hard to prove.[162] On January 8, 2018, the Supreme Court denied certiorari and refused to review *Salinas*.[163] With a different test in almost all of the federal circuits, the state of the vertical employer doctrine is thus very much in flux in the courts today.

Legislators are also showing interest in strengthening the vertical joint employer doctrine. Senator Sherrod Brown of Ohio introduced the Fair Playing Field Act in 2015 to "crack down on employers who misclassify workers and cheat them out of earned benefits."[164] Brown's 2017 plan for restoring the value of work in America, titled "Working Too Hard for Too Little," would make it harder for employers to use independent contractors, as "[w]orkers are marginalized when they are hired as temps through a staffing agency instead of as direct employees."[165]

Clearly, there is a lot of tension and confusion about employment today. While independent contractor relationships are becoming more prevalent, they are also becoming more contentious. The sharing economy has changed employment relationships, and people's expectations about work seem to be changing as well. Battle lines are being drawn as workers want to be classified as employees, and firms, especially on the sharing economy platform, want to obtain labor through independent contractors. Many scholars have suggested how the definition of each, or the test for both, could or should be changed. This Article makes a different argument: neither employee nor independent contractor is the proper label

161. *See id.* at 133–35.

162. *Id.* at 137.

163. *See* Vin Gurrieri, *High Court Won't Review 4th Circ. Joint Employer Test*, LAW360 (Jan. 8, 2018, 11:27 AM), https://www.law360.com/articles/999254/high-court-won-t-review-4th-circ-joint-employer-test.

164. Fair Playing Field Act of 2015, S. 2252, 114th Cong. (2015).

165. BROWN, *supra* note 90, at 16.

for the way people work in the sharing economy. We need new definitions of work and worker that fit this new economy.

C. *The Real Problem of Monopsony*

The distorted and contorted legal doctrines necessitated by the NLRA and FLSA suggest that there is a more fundamental problem with labor law. This next section argues that the NLRA and FLSA fundamentally misunderstand a core problem in labor markets—monopsony—and thereby also fundamentally fail to solve labor problems. Thanks to modern economic thinking, we now understand that labor markets can be more or less fair depending on competitive pressures. Indeed, we can use econometrics to describe the competitiveness—or, its antithesis, monopsony—of labor markets. However, in 1938, the FLSA's supporters did not appreciate this critical nuance, and instead passed a bill that envisions a uniform standard in all industries and across all regions.[166] This is a crucial oversimplification error that has led to many harms in labor markets. This is the regulatory equivalent of using a sledgehammer to crack a nut, which causes many problems beyond those which it was intended to solve. This section explains the problem of monopsony and briefly describes how other areas of law (notably, antitrust) have taken a more nuanced approach to this concern.

Law has many ways to remedy market failures, but when these remedies are applied to healthy markets, maladies often result. Consider the human body as an analogy. If a person has cancer, unpleasant chemotherapy drugs can cure that person. Indeed, medical philosophers have argued that using experimental drugs in cancer therapy is a moral imperative.[167]

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166. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 466 (1939). Forsythe writes "that [Roosevelt] did not envisage a uniform raising of standards in all industries and for all regions." *Id.* This also shows how radical the labor laws of the 1930s were; not only did President Roosevelt go further than recommended by economist Keynes, but the FLSA itself went even further than President Roosevelt would have pushed it. *See id.*

167. Kenneth C. Micetich & David C. Thomasma, *The Ethics of Patient Requests in Experimental Medicine*, 34 CA: CANCER J. FOR CLINICIANS 118, 119 ("A physician is not justified

Sometimes, moral philosophers even argue for the use of experimental treatments on children, even when such treatments might produce serious side effects, where there is hope that doing so will treat the child's disease.[168] Conversely, it is morally repugnant to thrust such unpleasant medicines upon a healthy body, which would become sick. Indeed, foisting experimental drugs on a healthy person violates the fundamental axiom of medicine: do no harm.[169]

The economy, like our bodies, exists in a state of equilibrium. Opposing forces being in check with each other produces a state of economic health. When a force gets out of control, intervention may be required to restore a state of health. However, when an intervention is needlessly applied, it can have deleterious effects. We have developed potent medicines for intervening in economic maladies. We have also developed good assessments for when an intervention is required. The problem with labor law, however, is that it does not consider economic determinants of malaise when deciding whether to intervene in the labor market at large. NLRA and FLSA remedies apply regardless of whether there is that malignant condition of monopsony.

Monopsony is the key economic concept for understanding how different labor markets require different regulations. In short, a labor monopsony is a specific circumstance where there is only one firm employing a certain type of labor.[170] The classic example is a mining town, where the company who owns the

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in withholding experimental therapy, even that which he feels would not help in any measurable way or be any better for the patient than 'standard' therapy, provided that the patient will not suffer significant harm.").

168. Timothy F. Murphy, *The Ethics of Research with Children*, 5 VIRTUAL MENTOR 253, 253–54 (2003); *see also* Paul Ramsey, *The Enforcement of Morals: Nontherapeutic Research on Children*, 6 HASTINGS CTR. REP. 21, 21–22 (1976).

169. EDMUND D. PELLEGRINO & DAVID C. THOMASMA, A PHILOSOPHICAL BASIS OF MEDICAL PRACTICE: TOWARD A PHILOSOPHY AND ETHIC OF THE HEALING PROFESSIONS 170–91 (1981).

170. This concept comes from a more general understanding of monopsony as a market structure where there is only one buyer for a certain type of product. In general, that product can be either goods or services; but, for present purposes, this Article focuses on services because it regards labor laws.

mine is the only purchaser of mining services.[171] Miners who work in that town labor under conditions of monopsony to the extent that they cannot change the nature or location of their work.[172] Under these conditions, the mine can set low wages (and low benefits) because the mine does not face any competition for labor. When presented with the Hobson's choice of either being underpaid or not working at all, many miners would choose to work despite unfair conditions.[173] In this situation, the mine profits while society suffers, because some able workers choose not to work instead of working for low wages while others are under-paid for their efforts. This creates two problems. First, the mine uses its monopsony hiring power to extract welfare from workers. Second, since a number of able-bodied workers do not work, their labor represents a deadweight loss to society writ large.

Monopsony, therefore, is a type of theoretical market failure.[174] In a monopoly, the sole seller of a good offers the good at a high price in order to extract more money from the buyers who are willing to pay for it while cutting off the less eager buyer from the market.[175] Similarly, a monopsony allows for both wealth transfer from the powerless to the powerful and an according diminution of wealth to society.[176] Economist Joan Robinson, a member of the Cambridge school of economics and a post-Keynesian thinker, highlighted this problem of monopsony in her 1933 book *The Economics of Imperfect Competition*, wherein she coined the term monopsony.[177] Today, even anti-Keynesian economists generally agree that regulation is appropriate to prevent the problems of monopoly and

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171. *See generally* JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (2d ed. 1969) (discussing the problem of monopsony and first using the term in economic academia by explaining it in relatable terms).

172. *Id.*

173. *Id.*

174. *See* James Murphy Dowd, *Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets*, 76 B.U. L. REV. 1075, 1082 (1996) (stating that monopsony is "the failure of a market to operate at a competitive equilibrium").

175. *See* ROBINSON, *supra* note 171, at 47–52.

176. *Id.*

177. *Id.*

monopsony.[178] The area of law that addresses these concerns is called antitrust.

Antitrust recognizes that regulations are appropriate—indeed, regulations are necessary—where market power leads to abuse and social harm. For example, antitrust law prohibits competitors from colluding to agree to raise prices or lower wages.[179] In fact, antitrust conspiracy is a federal crime.[180] Such collusion creates an unnatural monopoly, whereby competitors extract high prices or pay low wages, which in turn creates a deadweight loss to society. This conspiracy decreases social welfare without producing any countervailing social benefit. Thus, we intrinsically understand that antitrust conspiracy is "cheating" and ought to be a crime.

Additionally, antitrust law sometimes intervenes in private ordering where market conditions could allow one firm, acting alone, to exert market power. This is not conspiracy or collusion, which necessarily require more than one actor; rather, monopolization occurs when one actor has enough power to offer high prices or low wages without fear that another firm could enter the market and offer lower prices or higher wages.[181] Such durable monopolies and monopsonies are actually quite rare. Rarely does one firm corner an entire market and hold its 100% share for an indefinite time.[182] Rather, markets are said to be relatively concentrated when there are a few powerful actors with similar interests who might tacitly collude even if they do not outright agree not to compete.[183] Antitrust theory thus gets much more complicated when applied to the nuances of power dynamics in real markets over

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178. *See* Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 309 (1991).

179. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (2018).

180. *Id.*

181. *Id.*

182. *See generally* ADAM SMITH & BRUCE YANDLE, BOOTLEGGERS AND BAPTISTS: HOW ECONOMIC FORCES AND MORAL PERSUASION INTERACT TO SHAPE REGULATORY POLICIES (2014) (positing that the only situation where firms are likely to hold onto durable monopolies or monopsonies for an indefinite period of time is when government regulation has eviscerated competitive forces).

183. *Id.*

time. Antitrust law has thereby evolved (in ways that labor law has not) to recognize the spectrum of competitive dynamics.[184]

Antitrust laws recognize that monopoly and monopsony are not binary—not merely existing or absent—but, rather, they fall on a spectrum, which is commonly referred to as market concentration. In concentrated markets, only a few sellers or buyers wield immense market power. In competitive markets, there are many buyers and sellers. Market concentration is enumerated by its Herfindahl-Hirschman Index (HHI).[185] An HHI ranges from 0 to 10,000 points, calculated by the squared sums of the market shares of firms in a geographic industry, while giving more weight to larger firms.[186] According to the DOJ Antitrust Division, an HHI below 100 indicates a highly competitive industry, 100 =< HHI < 1500 indicates an unconcentrated industry, 1500 =< HHI < 2500 indicates modest concentration, and HHI >= 2500 indicates high concentration or market power.[187]

But labor law—and statutorily mandated employment benefits—generally apply regardless of whether there is high concentration or market power amid buyers of labor. For example, the legal right to unionize is the same for accountants,[188] whose industry HHI score is 725[189] (unconcentrated), as for healthcare support staff such as nurses, whose HHI is 7500[190] (highly concentrated).

184. *See generally* Thomas M. Jorde & David J. Teece, *Innovation, Dynamic Competition, and Antitrust Policy*, 13 REG. 35 (1990) (discussing how antitrust laws have changed over the past 150 years).

185. *Herfindahl-Hirschman Index*, U.S. DEP'T JUST., https://www.justice.gov/atr/herfindahl-hirschman-index (last updated July 31, 2018).

186. *Id.*

187. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 19 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

188. *See, e.g.*, *Union of Accountants and Auditors*, IFAC, https://www.ifac.org/about-ifac/membership/members/union-accountants-and-auditors (last visited Dec. 16, 2018) (listing accountants as unionized).

189. *The Herfindahl-Hirschman Index and Occupational Concentration by Industry*, U.S. BUREAU LAB. STAT. (Mar. 5, 2014), https://www.bls.gov/opub/ted/2014/ted_20140305.htm?view_full.

190. AUDREY WATSON, BUREAU OF LABOR STAT., MEASURING OCCUPATIONAL CONCENTRATION BY INDUSTRY 5 (2014), https://www.bls.gov/opub/btn/volume-3/pdf/measuring-occupational-concentration-by-industry.pdf.

Labor law's economic oversight is particularly problematic when applied to the gig economy, because the gig economy provides alternative ways to work and thus reduces concentration and lowers market power in labor markets. Taxi cab drivers, for example, can now work for Uber if they are not paid enough by Yellow Cab.[191] Handymen can work for themselves via Handy instead of being employed by a general contracting firm.[192] In addition, if a driver or handyman is not happy with Uber or Handy, she can seek work on the Lyft or TaskRabbit platform instead.[193] In other words, the gig economy has the power to ameliorate the market ailment of monopsony.

Indeed, the real power of the gig economy is to provide workers with alternative ways to work and derive benefits thereby. A worker classification system that rigidly lumps these gig workers into either employee or independent contractor classifications fails to unlock the true potential of this new economy. Therefore, a new and flexible third classification of worker is necessary.

III. THE GIG WORKER CLASSIFICATION

To effectuate meaningful change for workers in the gig economy, one must think beyond legacy notions of employee and independent contractor. These terms, and the legal framework that developed considering them, do not properly govern workers on platform economies, which this Article has termed "gig workers." That is not to say the legacy system is failing those that fit into the traditional mold, but that the old framework does not work for this new economy. Therefore, this Article proposes a framework for unbundling the benefits of work. This benefit unbundling would allow platforms to compete for gig workers by offering them the best mix of pay and benefits. First, the proposed framework begins from an

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191. *How Uber Works*, *supra* note 85.

192. *About Us*, *supra* note 135.

193. *Why Lyft*, *supra* note 85; *How It Works*, *supra* note 127.

understanding of what benefits gig workers want to receive from work today. Second, this Article more formally articulates the structure of this framework. Third, this Article addresses some potential criticisms.

A. *What Gig Workers Want*

As the above section makes clear, legally classifying gig workers as employees or independent contractors is an exercise in jamming round pegs into square holes. This rigmarole is not only futile for the courts, but also harmful to workers. It turns out that gig workers are not necessarily looking for the complete bundle of employment benefits that the NLRA and FLSA mandated in the 1930s,[194] but this does not mean that they do not want or need any employment benefits at all. For instance, so long as health insurance is tied to work, this benefit in particular may be essential for many (but not all) gig workers, and some gig workers might reasonably prefer a larger paycheck instead of a retirement plan contribution. Thus, a more flexible classification could help gig workers obtain a more optimal balance of pay and benefits from work.

A major problem with the employee versus independent contractor debate is that it fails to ask what gig workers actually want. This Article next explores this critical question, and it finds that variability and flexibility are essential for the gig worker.

When drivers on multiple ride-sharing and delivery platforms (including Uber, Lyft, Postmates, DoorDash, UberEats, and Juno) were surveyed by an independent third party about what matters most to them, 53.5% responded "pay" and 38.4% responded "flexibility."[195] Of course, taking advantage of pay incentives such as surge pricing requires flexibility, so to some extent pay is dependent on user

194. *See* National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69 (2018), Fair Labor Standards Act of 1938, 29 U.S.C. § 203 (2018).

195. Harry Campbell, *RSG 2017 Survey Results: Driver Earnings, Satisfaction and Demographics*, RIDESHARE GUY (Jan. 17, 2017), https://therideshareguy.com/rsg-2017-survey-results-driver-earnings-satisfaction-and-demographics/.

flexibility. Only 1.1% responded "benefits (health insurance, unemployment, etc.)."[196]

Contrast this with the fact that almost 100% of union contracts in the manufacturing sector require employers to provide life insurance and some sort of medical coverage.[197] Obviously, life and health insurance are not free, so employers will have to provide less pay if they have to provide more benefits. The Bureau of Labor Statistics found the average cost of employee benefits in September 2017 was $11.31 per hour worked, while the average wages were $24.33 per hour worked.[198] Why should Uber be required by law to allocate some 31.7% of employee compensation to benefits when only 1.1% of surveyed gig workers consider this to be the most important factor and 53.5% consider pay to be the most important factor?

One reason why sharing economy workers such as Uber drivers prefer pay over benefits is because these workers typically work for several platforms. For example, 67.7% of Uber drivers work for two or more on-demand driving or delivery services.[199] These workers may also work for additional sharing platforms in other sectors, and they may also work traditional jobs in the mainstream economy. While the incremental value of each additional dollar earned is obviously quite high (otherwise there would be no rational reason for people to work more at all), if a worker already has health insurance from one employer, the incremental value of a second, third, and fourth health insurance policy from additional employers has quickly diminishing returns.

Whatever the reason, sharing economy workers may have quite different preferences for the mix of pay, flexibility, and benefits provided from work than traditional economy workers. In fact, it seems quite apparent that gig economy

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196. *Id.*

197. *Medical Care Benefits: Access, Participation, and Take-Up Rates*, U.S. DEP'T LAB., https://www.bls.gov/news.release/ebs2.t01.htm (last modified July 20, 2018).

198. Press Release, U.S. Dep't of Labor, Bureau of Labor Stat., Employer Costs for Employee Compensation—September 2017 (Dec. 14, 2017), https://www.bls.gov/news.release/pdf/ecec.pdf.

199. *How Uber Works*, *supra* note 85.

workers prefer what gig economy platforms are offering from the simple fact that they are freely choosing to work for these platforms! Accordingly, the sensible regulatory framework must allow people to make the free and informed choice to work in the way they want to work, not to impose rigid work standards from a bygone era on a new generation of workers.

Additionally, the ethics of imposing certain benefits has recently come into question. For example, economist Todd Zywicki has asked whether it is ethical to nudge Americans to spend less and save more.[200] His empirical analysis indicates that, contrary to popular opinion,[201] there is actually a "tendency toward oversaving for retirement."[202] While it might seem obvious that saving is good and one cannot do too much of a good thing, the more complex reality is that there is an optimal amount of savings. As Zywicki points out, "We all say we want to save more. But we also want more time with our families, a functioning refrigerator, and less debt—what if these goals are in tension?"[203] Thus, labor laws that require or even nudge employees to save for retirement might actually harm the very workers they are intended to help.

The ethics of nudging workers and employers to provide certain benefits is even more problematic when you consider that different people have different preferences. To put that another way, "The optimal intertemporal allocation of work, leisure, and consumption will vary among different people depending on their subjective preferences."[204] For example, all else being equal, a one-hundred-year-old man has a shorter future life expectancy than a twenty-year-old man. The ethics of forcing or even nudging the older man to save for retirement

200. Todd J. Zywicki, *Do Americans Really Save Too Little and Should We Nudge Them to Save More? The Ethics of Nudging Retirement Savings*, 14 GEO. J.L. & PUB. POL'Y 877, 886 (2017).

201. *See* MELISSA A. Z. KNOLL, SOC. SEC. ADMIN., THE ROLE OF BEHAVIORAL ECONOMICS AND BEHAVIORAL DECISION MAKING IN AMERICANS' RETIREMENT SAVINGS DECISIONS 2 (2010), https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p1.pdf (reporting survey results showing that 60% of respondents do not think they are saving enough for retirement).

202. Zywicki, *supra* note 200, at 888.

203. *Id.*

204. *Id.* at 892.

instead of spending his money now is clearly dubious. The younger man also has a much lower risk of getting ill, which also raises serious questions about the ethics of requiring him to have health insurance. But that is exactly what the current, rigid binary labor law classification does. Under our current system, an employee will receive less pay and more benefits than an independent contractor, regardless of which benefits that employee actually needs or wants. The ethics of this rigid binary system are on shaky ground. Therefore, a framework for a new and flexible third classification is necessary.

B. *The Gig Worker Framework*

The sharing economy is valued by consumers and gig workers alike for its flexibility. Shared work must likewise be regulated both flexibly and with certainty. The current state of uncertainty about worker classification is only good for lawyers and academics who can generate fees and papers, while workers and platforms are harmed. But a blanket classification of all gig workers as either employees, independent contractors, or even the addition of a third category (thereby applying rigid standards to all workers regardless of skill, industry, and preference) would be folly. The DOL, IRS, and other regulators who govern employment should create a new and flexible definition of "gig worker" that is subject to an opt-in regime of disclosure and oversight.

The opt-in gig worker system would first require a sharing economy platform to submit a proposed definition of "gig worker" under that platform. This public filing with government agencies would define the mix of pay, benefits, and flexibility that the platform will offer. For example, Uber may propose that its gig workers will receive maximum pay and minimum benefits, while Lyft (its competitor) may propose a different blend that offers lower pay but more certainty of income. Handy could offer a minimum wage of $18 per hour and require attendance at monthly training sessions, while TaskRabbit could pay gig workers solely according to a market price and put no additional demands on them. This system could further promote competition, which in turn may lead to even better benefits for workers, as each firm competes for workers' time and effort on its platform instead of working on other platforms.

Under this proposal, each firm that creates technology platforms for the sharing economy would be permitted to register its own definition of "gig worker" by filing a Form GW. The Form GW would stipulate which employment benefits would be provided and which would not. The DOL would review each Form GW to ensure that it complies with laws that apply to all workers (such as minimum wage) and that it is clear enough to be easily understood by a reasonable worker. Aside from these minimum standards, however, the DOL would not review the merits of the proposal as creating a good or bad work opportunity; rather, the DOL would simply determine whether the definition complies with labor laws.

This Form GW process is designed to mirror the most successful elements of the Securities Act of 1933. Often called the "truth in securities law," the 1933 Act has two basic objectives: first, providing necessary information to investors, and second, prohibiting deceit, misrepresentation, and fraud in the offering of investment opportunities.[205] Under the 1933 Act, firms must file a Form S-1 with the SEC before selling stock on a stock market through an IPO.[206] The SEC reviews the disclosures in that S-1 for compliance with securities law, but it does not determine the merits of the offering as a good or bad investment opportunity.[207] It holds offerors criminally liable for false or misleading statements in the disclosures.[208] Similarly, the goals of the Form GW process would be, first, to ensure that potential workers would have the information necessary to decide whether to participate in a gig-economy platform, and

205. *The Laws that Govern the Securities Industry*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/answers/about-lawsshtml.html (last modified Oct. 1, 2013).

206. *See* 15 U.S.C. § 77f (2018).

207. *See id.* § 77h.

208. *Id.* § 77t.

second, to hold the platform liable for false or misleading claims about work on its platform or the benefits obtained thereby.

Of course, workers can only make an informed decision about whether to participate in a platform if there is indeed a choice to be made. Sometimes, working for a particular firm is a Hobson's choice—that is, a choice of taking what is offered or taking nothing at all. Indeed, the unfortunate circumstance of exploitive employers amid the rampant unemployment of the Great Depression is what prompted the NLRA, which created the rigid bundle of employment rights.[209] It would be abominable if the law were instead to facilitate exploitation of powerless workers by powerful firms. However, this Article previously argued that the gig economy increases competition for workers in the economy overall.

Furthermore, the DOL could grant or deny a Form GW proposal based on conditions of market failure such as monopsony—where there is only one firm employing a certain type of labor—or an otherwise highly concentrated market where the employer has substantial market power.[210] Based on evidence of market power, the DOL might not permit employers to offer a substantively unfair suite of benefits. For this analysis, the DOL could look to over one hundred years of antitrust jurisprudence that has likewise sought to encourage competitive markets.

Some may be concerned about the cost of implementing this Form GW process, but there is precedent showing how this proposal might pay for itself, and then some. For example, the median IPO in 2016 was $94.5 million.[211] The median registration fee for a Form S-1 in 2016 was thus $11,765.25,

209. *See* 29 U.S.C. § 151 (2018).

210. COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES AND POLICY RESPONSES 2–4 (2014), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

211. David A. Westenberg, *2016 Year-End IPO Market Review*, WILMERHALE (Feb. 2, 2017), https://www.wilmerhale.com/en/insights/blogs/the-road-to-ipo-legal-and-regulatory-insights-into-going-public/2016-year-end-ipo-market-review.

according to the SEC's fee calculator.[212] Antitrust merger review generates even more fees, ranging from $45,000 to $280,000, depending on the size of the transaction.[213] In short, a firm that wants non-standard definitions for its workers can pay for the regulatory apparatus necessary to do so.

Government agencies would thus be tasked with reviewing the platform's proposed definition of gig worker according to basic principles of fairness and compliance, at least with the minimum standards that independent contractors should expect to receive under the law. Through a review and comment period, agencies would work with platforms to refine the definition and clarify it so it would be easily understood by a person of ordinary skills. Other requirements, such as translating the gig worker definition into multiple languages and posting it on a public website, could also be imposed on the platform by the government agencies. Once approved, the platform could be required to maintain the published standards for gig workers unless the government agency approves an amendment, and fraud liability could result if the platform fails to maintain the published standards.[214] The gig worker definition functions as a quasi-public contract between the platform and society that government agencies as well as private individuals would have rights to enforce.

There is precedent for such a plain-language requirement in consumer protection law. The European Union, for instance, recently passed the General Data Protection Regulation (GDPR),[215] requiring firms who handle personal data to use "clear and plain language" to make people "aware of the risks, rules, safeguards[,] and rights in relation to the processing of

212. *Registration Fee Estimator*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/ofm/registration-fee-estimator.html# (last modified Nov. 9, 2018).

213. *Id.*

214. This is similar to how laws require companies to create privacy policies and make them responsible for breaches and violations of those policies. *See, e.g.*, *Privacy Policies Are Legally Required*, PRIVACYPOLICIES.COM, https://privacypolicies.com/blog/privacy-policies-legally-required/ (last updated Nov. 20, 2018).

215. Council Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 119/1) 1.

personal data."[216] A declaration of consent for the use of personal data must "be provided in an intelligible and easily accessible form, using clear and plain language"; otherwise, consent will not be regarded as informed.[217] To make the terms clear, visualization should be used where appropriate, such that even children can easily understand the consent.[218] If the language of the consent form is found not to be clear and plain, then the consent form "constitutes an infringement of [the GDPR] and shall not be binding."[219] Similar requirements of clear and plain language could apply to the Form GW to ensure that ordinary workers of average capacity can easily understand the benefits they will receive from work.

The Form GW could thus give gig workers a clear choice as to what benefits they want to receive from work. So long as there is vigorous competition in the market for gig workers, platforms will constantly innovate and compete to offer workers the best mix of benefits to attract and retain the top talent. This will preserve the virtue of the sharing economy as a flexible and innovative working environment while pressuring companies to offer an optimal mix of benefits to gig workers and value to consumers.

In return for promulgating a gig worker definition, government agencies must put compliant platforms in a safe harbor where they are not at risk of employee reclassification. This would incentivize platforms to engage in this exercise of social contracting and curtail the deadweight loss to most of society that results from legal uncertainty and litigation. Employers who participate in the new opt-in gig worker system would benefit from the corresponding reduction in legal risk.

216. *Id.* at 39.
217. *Id.* at 42.
218. *Id.* at 58.
219. *Id.* at art. 7.

C. *Concerns and Criticisms*

While the gig worker solution proposed by this Article could solve many problems that exist today under the rigid binary worker classification system, it could also create other challenges that would need to be addressed.

Tax law is the elephant in the room regarding this proposal. As mentioned in the Introduction, this Article does not address the tax law issues. Nevertheless, it must be acknowledged that the worker classification system is also a tax classification system. It may be possible to divorce labor law and tax law, such that gig workers whose firms provide tax withholding services file a Form W-2, just as employees do, while gig workers who receive their full compensation up front file a Form 1099, just as independent contractors do. The merits of our current employment tax law are best addressed in another paper. However, as a matter of principle, there is no particular reason why employment benefits and tax status need to be intertwined.

Additionally, some scholars might criticize this proposal by claiming that the gig economy is just a smokescreen to hide exploitation of workers in the new economy. While it is not possible to anticipate and address all the potential concerns about exploitation here, the reader should be reminded that competitive and efficient markets are thought to produce the highest quality product at the lowest price.[220] With specific application to labor markets, where those markets are highly competitive (i.e., unconcentrated), market forces will drive employers to offer competitive pay and benefits.[221] Employers offering an optimal package of worker benefits will attract the best workers for the job who have the lowest propensity to

220. *See* HARRIS & KRUEGER, *supra* note 10, at 17.

221. David Lee & Emmanuel Saez, *Optimal Minimum Wage Policy in Competitive Labor Markets*, 96 J. PUB. ECON. 739, 741 (2012) ("If there is no minimum wage [or any other taxes, mandatory benefits, or other transfers], combining the demand side and the supply side defines the competitive equilibrium."); *see also* Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629, 629 (1976).

quit.[222] The gig worker classification proposal will create a new way for employers to compete for workers by offering them the most optimal mix of pay and benefits, which can increase both employer and employee welfare. Moreover, this allows for people with diverse needs to select which benefits they want most from work. However, this proposal is limited to competitive markets, so it cannot be used as a means of exploitation where workers have no real choice but to work for a certain employer.

Some scholars might object to this proposal based on their general distrust of gig economy platforms. These platforms are usually created by startups, whose corporate culture often leaves much to be desired.[223] An inhumane tone from upper management can lead coders to treat platform workers as "animals," as a recent *Vanity Fair* article suggested when describing the way Uber's coders manipulate bonuses to trick drivers.[224] Accordingly, some might criticize this Form GW proposal on the basis that it will be exploited by juvenile startups, who will in turn leverage it to gain an unfair advantage over traditional employers. But this criticism misses the main purpose of this proposal, which is to make gig

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222. Joanne Salop & Steven Salop, *Self-Selection and Turnover in the Labor Market*, 90 Q.J. ECON. 619, 620 (1976).

223. Insufferably sexist conditions and discriminatory hiring practices have rightfully given tech startups an unsavory and untrustworthy reputation. For example, Uber's founder and former CEO, Travis Kalanick, took his team of five Uber managers to an escort bar in Seoul, South Korea. *See* Ryan General, *Uber's CEO Once Went to an Escort Bar in South Korea with a Group of Workers*, NEXTSHARK, https://nextshark.com/ubers-ceo-went-escort-bar-south-korea-group-workers/ (last visited Dec. 16, 2018). One of the managers who attended was female, and she complained that "it made [her] feel horrible." *Id.* Unfortunately, this unacceptable behavior was not uncharacteristic for Kalanick, who also issued the infamous 2013 "sex memo." *See* Marco della Cava, *Uber's Travis Kalanick Offered Sex Rules for 2013 Party: Report*, USA TODAY (June 8, 2017), https://www.usatoday.com/story/tech/talkingtech/2017/06/08/ubers-travis-kalanick-offered-sex-rules-2013-party-report/102646050/. In other work, I have argued that this misogynistic tone from the top contributed to a "frat boy" culture and intolerable behavior by middle management, such as the sexist and discriminatory treatment reported by Susan Fowler. *See* Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER: BLOG (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

224. Susan Fowler, *"What Have We Done?": Silicon Valley Engineers Fear They've Created a Monster*, VANITY FAIR (Aug. 9, 2018), https://www.vanityfair.com/news/2018/08/silicon-valley-engineers-fear-they-created-a-monster.

platforms more transparent and accountable to their workers.[225] Presently, these platforms make concerted efforts to avoid characterizing their workers as employees so that their workers have the minimum set of benefits under the law.[226] If the law recharacterizes one platform's independent contractors as employees, the other platforms will most likely change their practices to ensure their workers are not characterized as employees. Some, like Handy, have even said that they will close down if the law requires that all participants on the platforms must be characterized as employees, and surely workers are better off having the option to work on Handy's platform instead of having no option at all.[227] Instead of this cat-and-mouse game, the Form GW proposal would encourage platforms to publish a clear and enforceable public contract for their workers, effectively reducing confusion and opportunities for abuse. This proposal encourages startups to be more transparent, mature, and accountable, which will improve conditions for workers who are currently confused and subject to manipulation. Further, the Form GW proposal hopes to provide a vehicle for more humane and egalitarian startups to enjoy more success than their less enlightened peers.

CONCLUSION

Sharing economy platforms are distinct from traditional employers in the way that they operate. Platforms are not "employers" in the conventional sense. Rather, they are matchmakers: they provide an on-demand base of workers willing to provide a service to consumers and then encourage consumers to use those services. Labor rules based on traditional manufacturing work and centralized production of goods for powerful or monopsonistic employers are a bad fit for the decentralized platform service economy, especially where platform economies enhance competition for labor.

225. *See supra* Section IV.B.
226. *See supra* notes 103–05 and accompanying text.
227. NYU School of Law, *supra* note 136.

Therefore, labor law should adopt concentration measures and apply legal remedies such as statutory benefits only where they are merited by economic conditions. Moreover, labor law should recognize that matchmaking platforms in the new economy are different from, and somewhat competitive with, traditional firms. The gig worker opt-in framework proposed in this Article would leverage the competitive pressures to improve working conditions for American workers, consumers, and firms in the new economy.

APPENDIX

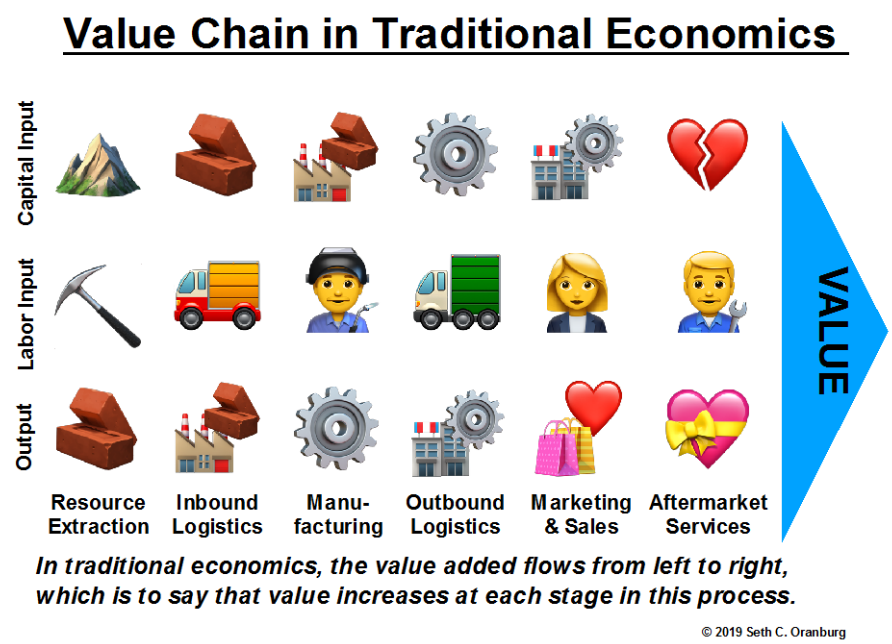

Figure 1. Value in the traditional economy moves from left to right, as value is created through extracting, processing, and servicing assets.

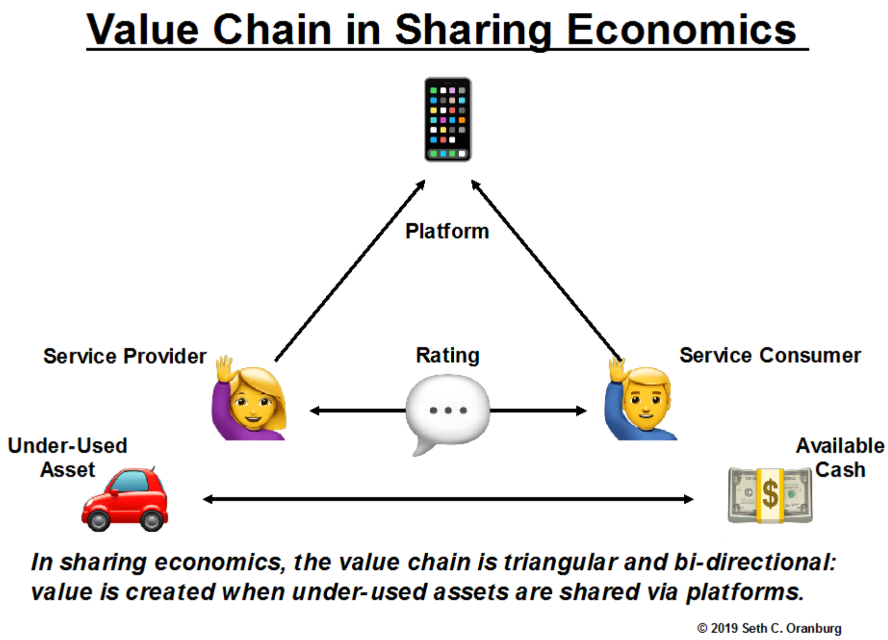

Figure 2. Value in the sharing economy is created when under-used resources (which were previously created in the traditional economy) are triangulated and shared via platform technologies.