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## Note

### **Killing the Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy**

*Emily C. Atmore\**

A college student trying to alleviate steep tuition costs in between an erratic class schedule. A single mother saving for a trip to Disney World with her five-year-old daughter. A salesman subleasing his empty condo while he travels across the country. A retiree looking for a productive activity to fill long days. A stay-at-home mom with a lucrative knack for knitting.

What do all of these people have in common? They are your Uber and Lyft drivers, Airbnb hosts, Instacart shoppers, and Etsy shop owners. They are your neighbors, friends, and family. They are the independent workforce. There are roughly fifty-four million of them (and counting) and they comprise the gig economy.<sup>1</sup>

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1. MCKINSEY GLOBAL INST., INDEPENDENT WORK: CHOICE, NECESSITY AND THE GIG ECONOMY 3 (Oct. 2016), <http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> (“Overall, our research suggests that there are 54 million to 68 million independent earners in the United States . . .”); Stephane Kasriel, *No, We Won't All Be Freelancers in the Future of Work*, FAST CO. (Oct. 24, 2017), <https://www.fastcompany.com/40484760/no-we-wont-all-be-freelancers-in-the-future-of-work> (“Over 57 million Americans took on freelance work in some capacity [in 2017]—that’s 36% of the U.S. workforce, up from 53 million in 2014.”).

The gig economy is the popular name given to the new world of work: flexible, exciting jobs that unleash innovation and promote economic growth.<sup>2</sup> These jobs are aptly labeled “gigs.”<sup>3</sup> They are characterized by their flexible, autonomous, and short-term nature.<sup>4</sup> The gig economy is also known for its innovative use of websites or mobile applications to connect gig workers directly with customers, producing better services at lower prices.<sup>5</sup>

Despite its growing appeal, the gig economy is threatened by a web of legal complications.<sup>6</sup> Most notably, gig workers are not often or easily classified as employees under federal and state employment laws.<sup>7</sup> When workers are not classified as employees, by default, they are classified as independent contractors. This classification limits these workers’ access to traditional employment benefits such as minimum wage and overtime pay, protection against discrimination, workplace safety regulations, payroll tax contributions, unemployment insurance, social security, disability insurance, Medicare, workers compensation insurance, health insurance, and retirement savings plans.<sup>8</sup> The difference in designation between an employee

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2. See John Gapper, *New ‘Gig’ Economy Spells End to Lifetime Careers*, FIN. TIMES (Aug. 5, 2015), <https://www.ft.com/content/ab492ffc-3522-11e5-b05b-b01debd57852> (“[The gig economy] is creating exciting economies and unleashing innovation . . .” (quoting Hillary Clinton)). The name sharing economy is also commonly used interchangeably with gig economy.

3. The term gig originated in popularity in the 1950s to refer to a job or task in which one was not necessarily invested, but simply took to pay the bills. This term was used in contrast to a real job, meaning the lifelong nine-to-five salaried desk job with a benefits package that became the prevalent form of employment in this era. Geoff Nunberg, Commentary, *Goodbye Jobs, Hello ‘Gigs’: How One Word Sums Up a New Economic Reality*, NPR (Jan. 11, 2016), <http://www.npr.org/2016/01/11/460698077/goodbye-jobs-hello-gigs-nunbergs-word-of-the-year-sums-up-a-new-economic-reality>.

4. See MCKINSEY GLOBAL INST., *supra* note 1, at 2.

5. Will Rinehart, *The Modern Online Gig Economy, Consumer Benefits, and the Importance of Regulatory Humility*, AM. ACTION F. (Nov. 19, 2015), <https://www.americanactionforum.org/research/the-modern-online-gig-economy-consumer-benefit-and-the-importance-of-regula> (“[C]onsumers have flocked to these networked services because of the added convenience, lower prices, and higher quality services.”).

6. See Gapper, *supra* note 2 (“[The gig economy] is also raising hard questions about workplace protections and what a good job will look like in [the] future.” (quoting Hillary Clinton)).

7. See Nunberg, *supra* note 3 (“[I]n the future, work will be less secure but lots more exciting. We can make our own schedule and hours, pick the projects that interest us, work from anywhere and try our hands at different trades.”).

8. See Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* 7 (The Hamilton Project, Discussion Paper No. 2015-10, 2015), <https://www.shrm.org/>

and an independent contractor hinges on employment classification tests that were drafted during the Industrial Revolution with the traditional worker in mind. Today's gig workers "do not seem to fit into either of the binary worker categories—though far from traditional employees, they also bear little resemblance to [the] independent, small-business-operating contractors" that were originally envisioned.<sup>9</sup> Gig workers are "square pegs" being forced to fit into employee classification tests consisting of "two round holes."<sup>10</sup> And existing employment law "provides nothing remotely close to a clear answer" to this problem.<sup>11</sup>

There is widespread value in resolving employee misclassification issues: when workers are incorrectly classified, all parties suffer.<sup>12</sup> Workers are potentially denied rights and benefits that legislators have always been extremely careful to protect.<sup>13</sup> Employers, though they may benefit from cost savings of misclassification,<sup>14</sup> are financially threatened by legal retribution.<sup>15</sup> Congress loses billions in tax revenue<sup>16</sup> and courts suffer from

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ResourcesAndTools/legal-and-compliance/employment-law/Documents/modernizing\_labor\_laws\_for\_twenty\_first\_century\_work\_krueger\_harris.pdf.

9. Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. TECH. L. REV. 341, 344 (2016).

10. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (2015) ("[T]he jury in this case will be handed a square peg and asked to choose between two round holes.").

11. *Id.* at 1082.

12. *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LAB., <https://www.dol.gov/whd/workers/misclassification> (last visited Nov. 30, 2017) ("The misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy.").

13. DEP'T FOR PROF. EMPLOYEES, MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS 1 (2016), <http://dpeaficio.org/wp-content/uploads/Misclassification-of-Employees-2016.pdf> [hereinafter MISCLASSIFICATION OF EMPLOYEES] ("The Internal Revenue Service (IRS) estimates that employers have misclassified millions of workers nationally as independent contractors.").

14. *Id.* at 3 ("[T]ax savings, as well as savings from income and Medicare taxes results in employers saving between 20 to 40 percent on labor costs."). For a list of other advantages, see *id.* For a breakdown of Uber's potential cost increases, see Stephen Gandel, *Uber-nomics: Here's What It Would Cost Uber to Pay Its Drivers as Employees*, FORTUNE (Sept. 17, 2015), <http://fortune.com/2015/09/17/ubernomics>.

15. Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST CO. (Feb. 17, 2015), <https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> ("This rising legal retribution is a huge threat to the gig economy.").

16. NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES

inefficiency and uncertainty.<sup>17</sup> The rise of the gig economy has exacerbated the detrimental effects of misclassification, making it imperative that employment statutes are reviewed and the confusing tests that define them are revised. Until this occurs, lawsuits will continue to be filed, gig workers will continue to be denied protections, and gig companies will go bankrupt.

This Note argues that current employment laws do not adequately embrace gig economy workers, and create dangerous obstacles to needed economic growth. It urges the necessary implementation of an immediate solution that properly balances and protects the interests of entrepreneurial business owners and independent workers. Part I presents a historical overview of employment law in the United States and outlines the development of the gig economy. Part II analyzes the improper application of employee classification factors to independent workers and discusses the underlying tension between promoting economic growth and protecting individual interests. Part III advocates for comprehensive legal reform to preserve economic opportunity, promote economic efficiency, and protect economic security. Ultimately, Part III proposes the implementation of a temporary safe harbor to protect gig companies from the detrimental liability of employee misclassification, while reexamining both existing employee classification tests and the long-term separation of welfare benefits from employment altogether.

## I. EXAMINING THE GIG ECONOMY'S CLASH WITH EMPLOYMENT LAWS

While employment law has been developing for several centuries and the modern gig economy is commonly considered to have only developed in the last decade,<sup>18</sup> the present difficulties in employee misclassification illuminate an unresolved funda-

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2 (July 22, 2015), <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf> (“State and federal governments lose billions in revenues annually.”). This impact will not be further discussed in this Note.

17. Alan B. Krueger, *Modernizing Labor Laws in the Online Gig Economy*, HAMILTON PROJECT 7 (Dec. 9, 2015), [http://www.hamiltonproject.org/assets/files/labor\\_laws\\_gig\\_economy\\_krueger\\_harris\\_transcript\\_12-9-2015.pdf](http://www.hamiltonproject.org/assets/files/labor_laws_gig_economy_krueger_harris_transcript_12-9-2015.pdf) (“[Gig] relationships fall into this gray area. And that’s creating a tremendous amount of legal uncertainty, inefficiency and costs in our system today . . .”).

18. See Harris & Krueger, *supra* note 8, at 10 box 2.

mental clash between employee protection and economic development.<sup>19</sup> This Part presents the current legal interaction between employment laws and the modern economy. Section A examines the origin of the employer-employee relationship, describes the development of employment law, and outlines the modern day employee classification tests: the common law control test and the economic realities test. Section B provides an in-depth introduction to the gig economy and its central differences from the traditional workforce model. Section C reviews historic and current clashes between employment law and economic development. This Part establishes that existing employment laws are unable to effectively support the gig economy.

#### A. ORIGIN AND DEVELOPMENT OF EMPLOYEE CLASSIFICATION TESTS

Employment law developed as a result of a legislative push for employee protections that became most prominent during the Industrial Revolution.<sup>20</sup> It was at this time that the historical master-servant relationship was complicated by an “explosion of new occupations and ways of organizing work [which ultimately] shattered this simplicity.”<sup>21</sup> Industrialization created what has been deemed the traditional workforce: salaried workers with a forty-hour work week in lifetime-long manufacturing careers. This refined work structure created an array of social and legal complications for vulnerable employees and gave immense power to employers.<sup>22</sup> In response, legislators became chiefly concerned with elevating individual workers’ rights and curtail-ing employer power amidst the rampantly growing industrial landscape.

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19. See Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1514 (2016) (“The current context may be new, but the difficulty of classifying workers long predates the on-demand economy. More than seventy years ago, the Supreme Court concluded that, ‘[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.’” (quoting *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 121 (1944))).

20. Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 301 (2001).

21. *Id.* at 303.

22. *Id.* at 306 (“[Worker insecurity] became more obvious as employment relations became less domestic and paternalistic, and grew more industrial, complex and impersonal.”).

Since that time, numerous laws have been implemented to restrain employer power over employees, protect employees from employer discrimination, and serve to entice workers to remain employed with their employers.<sup>23</sup> These laws provide access to fair wages and pay, unemployment insurance, social security benefits, disability insurance, workers insurance, health insurance, and retirement savings plans.<sup>24</sup> Because these laws are intended to govern the employer-employee relationship, they are activated only upon creation of an employer-employee relationship. This dynamic has created a critical difference between the definition of employee and nonemployees, or independent contractors. Independent contractors are distinguished from employees by their autonomous nature; they contract with employers to perform work under a specific set of conditions (that is, for a specific task, duration, or intended result) but “retain independence and self-management over their performance.”<sup>25</sup> The distinction between employee and independent contractor has become vital to determining to whom many legal protections and benefits are owed.<sup>26</sup> Definitions vary between statutes, but are frequently written so broadly as to provide no worthwhile definition at all.<sup>27</sup> Legislative ambiguity left the task of defining the scope of employment to the courts.<sup>28</sup>

In an attempt to create applicable distinctions between employees and independent contractors, courts initially sought guidance from the original master-servant relationship.<sup>29</sup> Two

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23. See generally Carlson, *supra* note 20, at 304 (outlining the development of employment law).

24. Harris & Krueger, *supra* note 8, at 7.

25. Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 663 (1996); see Harris & Krueger, *supra* note 8, at 7 (“Independent contractors control the methods and means of the work they perform for others, make significant capital investments, possibly employ others, and retain the opportunity for profit or loss.”).

26. Carlson, *supra* note 20, at 301.

27. See *Irizarry v. Catsimatidis*, 722 F.3d 99, 103–04 (2d Cir. 2013) (“[The Act contains] no definition that solves problems as to the limits of the employer-employee relationship.” (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947))).

28. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (“We have often been asked to construe the meaning of ‘employee’ where the statute containing the term does not helpfully define it.”).

29. Carlson, *supra* note 20, at 304.

tests emerged: the control test,<sup>30</sup> followed eventually by the economic realities test.<sup>31</sup> While there are many factors that courts consider as a part of each of these tests, the central focus of each test is clearly control and independence: the control the employer has over the worker versus the level of independence the worker has from the employer.<sup>32</sup> Some courts have argued that these tests are so similar that “there is no functional difference between the . . . formulations.”<sup>33</sup> Over time, courts at both the state and federal level have also applied hybrid analyses that combine the elements of each of these tests.<sup>34</sup> A myriad of judicial interpretations, along with statutory vagueness, has created significant confusion as to the correct employment classification of workers and the existence of related legal rights.

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30. See Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 662 (2013) (“The common law ‘control test’ comes out of the original conceptions of master and servant from pre-industrial English law, and the Supreme Court has used this test as the default definition of the term ‘employee’ in federal statutes.”); see also RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (defining a servant as essentially synonymous with an employee).

31. For detailed charts laying out the differences between the common law control test and the economic realities test, see Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, 125 MONTHLY LAB. REV. 3, 6 exhibit 1 (2002).

32. The more control a company has over a worker and the more dependent the worker is on the company, the more likely a worker will be classified as an employee. Control and independence are the two main factors that this Note will analyze in Part II, *infra*.

33. *Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 945 (9th Cir. 2010); see also *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 n.3 (9th Cir. 1999); *Loomis Cabinet Co. v. Occupational Safety & Health Review Comm’n*, 20 F.3d 938, 941–42 (9th Cir. 1994).

34. See *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979) (describing the analysis that has become known as the hybrid test); see also *Frankel v. Bally, Inc.*, 987 F.2d 86, 89–90 (2d Cir. 1993) (recognizing the “wider trend” to apply the hybrid test); *Mares v. Marsh*, 777 F.2d 1066, 1067 (5th Cir. 1985) (applying the hybrid test). For a more thorough explanation of the hybrid test, see Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 250–52 (1997). Because use of hybrid control and economic realities tests varies significantly between jurisdictions, these variations will not be explored in detail in this Note.

### 1. Common Law Control Test

The control test is based on agency law.<sup>35</sup> Courts have created a presumption that this interpretation applies unless Congress specifically indicates otherwise.<sup>36</sup> This test is focused on defining an employer's "right to control" the work of his employees.<sup>37</sup> It consists of ten factors, none of which are to be emphasized more than any other.<sup>38</sup> These factors are: (1) control; (2) supervision; (3) integration; (4) skill level; (5) continuing relationship; (6) tools and location; (7) method of payment; (8) intent; (9) employment by more than one company; and (10) type of business.<sup>39</sup> A court will use these factors to determine whether the relationship is that of an employee or an independent contractor: "an employer controls the *details* of an employee's work, but only the *results* of a[n independent] contractor's work."<sup>40</sup>

35. See Bodie, *supra* note 30, at 713.

36. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 318 (1992) ("Where a statute containing that term does not helpfully define it, this Court presumes that Congress means an agency law definition unless it clearly indicates otherwise.").

37. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) ("This right of control need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains 'all necessary control' over the worker's performance."); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 415 (1989) ("The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship.").

38. See *Nationwide Mut. Ins. Co.*, 503 U.S. at 324 ("Since the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" (citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968))).

39. Pinsof, *supra* note 9, at 347; see also Muhl, *supra* note 31, at 7, exhibit 7 (2002). There are many versions of the common law Control Test: The IRS has adopted a twenty-factor "Right to Control" test that includes additional factors beyond those in common law. Many state courts have developed their own versions of the common law test with other added factors. For more information on common law test variations, see Pinsof, *supra* note 9, at 347 n.3.

40. Carlson, *supra* note 20, at 339 (emphasis added); see *Quintanilla v. Comm'r of Internal Revenue*, 111 T.C.M. (CCH) 1017 (T.C. 2016) ("An independent contractor is one who works for another but according to his own manner and method, free from direction or right of direction in matters relating to performance of work save as to results."); RESTATEMENT (SECOND) OF AGENCY, § 220 cmt. e (1958); MISCLASSIFICATION OF EMPLOYEES, *supra* note 13, at 1 (2016) ("An independent contractor provides a good or service to another individual or business, often under the terms of a contract that dictates the work outcome, but the contractor retains control over how they provide the good or service. The independent contractor is not subject to the employer's control or guidance except as designated in a mutually binding agreement. The contract for a specific job usually describes its expected outcome.").

The control test applies to several federal statutes, including (but not limited to): the Employee Retirement Security Act (ERISA),<sup>41</sup> which “establishes minimum standards for retirement, health, and other welfare benefit plans, including life insurance [and] disability insurance” for employees;<sup>42</sup> the National Labor Relations Act (NLRA), which affords employees a right to unionize and permits collective bargaining;<sup>43</sup> and the Federal Unemployment Tax Law (FUTA) and Federal Insurance Contributions Act (FICA), which govern employer and employee tax obligations for unemployment insurance, social security, and Medicare benefits.<sup>44</sup> These statutes rely on this test to determine when a worker is deemed an employee and thus is entitled to certain benefits from their employer.

## 2. Economic Realities Test

The economic realities test was created as an alternative to the common law control test. Courts utilize this test when Congress clearly intended the statute in question to be applied more broadly than the control test permits.<sup>45</sup> Although both this test and the control test consider the employer’s control over its employees, the economic realities test is focused less on the “tech-

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41. Or some version of the control test, as described above. *See* discussion *supra* note 39; *see also* *Nationwide Mut. Ins. Co.*, 503 U.S. at 323 (noting the circular nature of ERISA’s definition of “employee” and thus “adopt[ing] a common-law [control] test for determining who qualifies as an ‘employee’ under ERISA”).

42. *ERISA Plan*, TOTAL ADMIN. SERV. CORP. (2016), <https://www.tasconline.com/biz-resource-center/plans/erisa-plan>; *see also* *Nationwide Mut. Ins. Co.*, 503 U.S. at 323 (interpreting the definition of employee under ERISA).

43. *Rights We Protect: Employee Rights*, NAT. LAB. REL. BD., <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Nov. 30, 2017).

44. *Federal Unemployment Tax*, INTERNAL REVENUE SERV., <http://www.irs.gov/individuals/international-taxpayers/federal-unemployment-tax> (last visited Nov. 30, 2017); *Employers’ Responsibility for FICA Payroll Taxes*, BIZFILINGS, <https://www.bizfilings.com/toolkit/research-topics/managing-your-taxes/payroll-taxes/employers-responsibility-for-fica-payroll-taxes> (last visited Nov. 30, 2017).

45. *See* *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008) (“The Supreme Court has observed, however, that the ‘striking breadth’ of the FLSA’s definition of ‘employ’ ‘stretches the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles . . . .”); *United States v. Rosenwasser*, 323 U.S. 360, 362–63 (1945) (“The use of the words ‘each’ and ‘any’ to modify ‘employee,’ which in turn is defined to include ‘any’ employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.”).

nical concepts” than on the “economic realities” of the relationship, as the name suggests.<sup>46</sup> The focal point of the analysis is “whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself.”<sup>47</sup> The factors of this test, which should be weighed equally,<sup>48</sup> include: “(1) the degree of control exerted by the alleged employer over the worker; (2) the worker’s opportunity for profit or loss; (3) the worker’s investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer’s business.”<sup>49</sup>

Courts have applied the economic realities test to a number of federal statutes, including (but not limited to): the Fair Labor Standards Act (FLSA), which sets minimum wage and overtime pay requirements for employees;<sup>50</sup> the Family Medical Leave Act (FMLA), which provides certain protections for eligible employees in the event of necessary health or family leave;<sup>51</sup> and Title VII of the Civil Rights Act of 1964, which prevents employers

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46. See *Irizarry v. Catsimatidis*, 722 F.3d 99, 103–04 (2d Cir. 2013) (“[T]he determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in ‘economic reality rather than technical concepts.’” (quoting *Goldberg v. Whitaker House Coop. Inc.*, 366 U.S. 28, 33 (1961))).

47. *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (internal quotations omitted); see David Weil, *Administrator’s Interpretation No. 2015-1*, U.S. DEP’T OF LAB. (July 15, 2015), [http://www.blr.com/html\\_email/AI2015-1.pdf](http://www.blr.com/html_email/AI2015-1.pdf); MISCLASSIFICATION OF EMPLOYEES, *supra* note 13, at 3 (“An employee who only invests time in one enterprise and who sells his or her services to only one ‘customer,’ the employer, is economically dependent upon that work. An independent contractor is in business for him or herself, invests in his or her own equipment and supplies, and has a broad customer base.”).

48. See Weil, *supra* note 47 (“The factors should not be analyzed mechanically or in a vacuum, and no single factor, including control, should be over-emphasized. Instead, each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee).”).

49. *Flint Eng’g & Const. Co.*, 137 F.3d at 1440 (citing *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988)); Muhl, *supra* note 31, at 8 exhibit 3.

50. *Coverage Under the FLSA*, FLSA, <http://www.flssa.com/coverage.html> (last visited Nov. 30, 2017); see, e.g., *Sec’y of Lab. v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987) (using the economic realities test to interpret employee in the context of the FLSA).

51. *FMLA (Family & Medical Leave)*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/benefits-leave/fmla> (last visited Nov. 30, 2017) (including up to twelve weeks of unpaid protected leave).

from discriminating in hiring, firing, and paying of employees on the basis of “race, color, religion, sex, and national origin.”<sup>52</sup> These statutes use this broadly written test to determine when a worker is owed these fundamental protections.

#### B. THE RISE OF THE GIG ECONOMY AND THE INDEPENDENT WORKFORCE

Courts developed employee classification tests during an era when the employer-employee relationship was the most prevalent work arrangement.<sup>53</sup> Although independent contractors existed, they were far from legislative focus and, consequently, contractors received little legal attention. Thus statutory benefits and protections were only established for employees, who were considered the center of the workforce, and did not apply to the much smaller subset of independent contractors.<sup>54</sup> Nevertheless, in the last decade independent work has grown significantly more popular, leaving an increasing share of the workforce without the legal protections that were intended to cover them.<sup>55</sup>

The gig economy is the label given to describe this recent increase in supply and demand for independent work arrangements.<sup>56</sup> Companies have embraced gig work and are able to facilitate these job opportunities based on a very lean business

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52. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Nov. 30, 2017).

53. *See, e.g., Carlson, supra* note 25, at 663. (“Most labor and employment laws assume a paradigmatic relationship between an ‘employer’ and ‘employee.’ The employer in this model contracts directly with an individual employee to perform an indefinite series or duration of tasks, subject to the employer’s actual or potential supervision over the employee’s method, manner, time and place of performance. This model describes most workers well enough, but there has always been a large pool of workers in alternative relationships with recipients of services.”).

54. *See id.* (stating that there is valid concern that many alternative workers are not included in protective regulations).

55. *See Joseph Shuford, Note, Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution*, 16 N.C. J.L. & TECH. ONLINE 301, 309–12 (2015), <http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1295&context=ncjolt> (comparing the extensive reach of companies such as Uber, Lyft, and Airbnb).

56. *See Nunberg, supra* note 3. (“It’s been called the on-demand economy, the 1099 economy, the peer-to-peer economy and freelance nation [among other things including the sharing economy]. But over the past year, investors, the business media and politicians seem to have settled on ‘the gig economy.’”). Though there are small differences between each of these names, for purposes of this Note, they will be treated as synonymous and the ideas generally encap-

model wherein “companies fissure jobs into discrete tasks, or ‘gigs,’ to be performed by contracted workers on a temporary basis.”<sup>57</sup> Gig companies use technology to provide a mutually beneficial platform that connects workers and customers on demand: workers with a profitable service, skill, or good are instantly connected with customers that are in need of such service, skill, or good.<sup>58</sup> These companies have developed in many different forms. They are rideshare companies like Uber and Lyft,<sup>59</sup> which allow drivers to use their own cars to offer taxi-like rides to passengers; accommodation companies like Airbnb, which permits people to monetize their homes by renting them to travelers; delivery companies like Instacart, which provides instant shopping and delivery of grocery-store goods; and entrepreneurial marketplaces like Etsy, which offers a worldwide platform for designers, inventors, and other creators to showcase their goods in their own virtual shop.<sup>60</sup> Gig workers are given the opportunity to work independently, free from the typical restrictions of a nine-to-five desk job.<sup>61</sup> These jobs are extremely

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sulated in the term gig economy. For more information on some of the differences, see Megan Carboni, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 11 (2016).

57. Scott M. Prange, *Managing the Workforce in the Gig Economy*, HAW. B.J., June 2016, at 4.

58. See Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <https://www.time.com/4169532/sharing-economy-poll>; Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU OF LAB. STATS. (May 2016), <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm>.

59. See ROBERT HAHN & ROBERT METCALFE, BROOKINGS INST., THE RIDESHARE REVOLUTION: ECONOMIC SURVEY AND SYNTHESIS (2017), <https://www.brookings.edu/wp-content/uploads/2017/01/ridesharing-oup-1117-v6-brookings1.pdf> (describing and defining the growth of rideshare companies).

60. For a list of several prominent gig companies, including a description, the date formed, and data on size, see Harris & Krueger, *supra* note 8, at 28–33. Each company has a slogan that highlights the creative and efficient nature of gig work. See *generally About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Nov. 30, 2017) (“Airbnb is the easiest way for people to monetize their extra space and showcase it to an audience of millions.”); *Mission & Values*, ETSY, <https://www.etsy.com/mission> (last visited Nov. 30, 2017) (“Our mission is to reimagine commerce in ways that build a more fulfilling and lasting world.”); INSTACART, <http://careers.instacart.com> (last visited Nov. 30, 2017) (“[D]eliver[ing] the future of food to millions of customers.”); *Lyft Launches 50+ Cities in Biggest Expansion Yet*, LYFT BLOG, <https://blog.lyft.com/posts/lyft-launches-biggest-expansion-yet> (Feb. 23, 2017) (“[I]mprov[ing] lives by creating the first peer-to-peer ridesharing community.”); UBER, <https://www.uber.com/our-story> (last visited Nov. 30, 2017) (“Finding the way: Creating possibilities for riders, drivers, and cities.”).

61. See *supra* text accompanying note 3; Kasriel *supra* note 1 (“[M]any of today’s workers are swapping long commutes, outdated workplace hierarchies,

versatile and can be a lucrative alternative for different people for different reasons.<sup>62</sup> Sometimes these jobs fill in gaps between full-time employment, but more often than not they offer a different way of life that has been embraced by modern society.<sup>63</sup>

While an independent workforce has always existed in some form (independent contractors, freelancers, and the self-employed), these arrangements multiplied as traditional employment disappeared during the economic crisis of 2008.<sup>64</sup> Even as economic conditions improve, companies still rely on independent workers, and workers continue to embrace their newfound independence. As of 2015, more than forty percent of adult workers in the United States have performed gig work.<sup>65</sup> This number is expected to surpass fifty percent by 2020.<sup>66</sup> Not only is gig work prevalent, it is also profitable. In 2013, the industry generated fifteen billion dollars and is predicted to increase by an

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and the nine-to-five grind for the freedom to be their own boss and set their own hours . . .”).

62. See *supra* pp. 887–88 (providing examples, including Uber and Lyft drivers, Airbnb hosts, Instacart shoppers, and Etsy shop owners); Zeninor Enwemeka, *What the Booming Gig Economy Means for the Future of Work*, WBUR: BOSTONOMIX (Nov. 2, 2017), <http://www.wbur.org/bostonmix/2017/11/02/gig-economy> (interviewing Aaron Ennis, “a super gig guy,” who prefers performing gig work than to having a full-time job and who has made six figures doing so, almost three times the amount he made running a computer center).

63. Nunberg, *supra* note 3; see Diane Mulcahy, *Reasons To Embrace the Gig Economy, Not Fear It*, FORBES (Nov. 10, 2016), <https://www.forbes.com/sites/kauffman/2016/11/10/reasons-to-embrace-the-gig-economy-not-fear-it> (“Like any change, it will be welcome for some and painful for others, but mostly what the gig economy does is give us the chance to take our lives—both professional and personal—away from employers and back into our own hands. That’s a change worth embracing.”).

64. See TERESA CARROLL, KELLY SERVICES INC., AGENTS OF CHANGE: INDEPENDENT WORKERS ARE RESHAPING THE WORKFORCE 6–8 (2015); MCKINSEY GLOB. INST., HELP WANTED: THE FUTURE OF WORK IN ADVANCED ECONOMIES 1 (2012). Today’s well-known gig companies were born during this time: Uber was created in 2008; Lyft was created in 2012; Airbnb was created in 2008; Etsy was created in 2005.

65. See Prange, *supra* note 57 (“According to a nascent poll by TIME . . . these practices by companies have become so widespread that 44% of United States adults, or roughly 90 million workers, have at some time performed gigs.”).

66. See Scott G. Grubin, *The Legal Lowdown On Employee Classification: An Interview with Employment Lawyer Scott Grubin of Wigdor LLP*, WIGDOR LLP EMP. LIT. DIGEST (Mar. 9, 2015), <https://www.wigdorlaw.com/employee-classification-interview-scott-grubin>; see also Enwemeka, *supra* note 62 (“[B]etween 2005 and 2015 over 90 percent of net employment growth in the U.S. was in the gig economy.”).

astounding 2200% to \$335 billion by 2025.<sup>67</sup> Gig work is “remaking our industries, economy, and society[,] just as steam, electricity, and internal combustion did before them.”<sup>68</sup> Scholars proclaim that the rise of the gig economy is the “industrial revolution of our times”<sup>69</sup> and are confident it is here to stay.<sup>70</sup>

### C. HOW THE MODERN WORKFORCE INTERACTS WITH EXISTING EMPLOYEE CLASSIFICATION TESTS

Although independent work has only recently become more popular,<sup>71</sup> issues around correctly classifying independent workers are not new.<sup>72</sup> Worker misclassification lawsuits have been disputed in courts for over 100 years.<sup>73</sup> In 1914, a coal company argued before Judge Learned Hand that it was “not in the business of coal mining” and therefore did not employ miners, nor owe them employment benefits.<sup>74</sup> Instead, the company claimed the miners were independent contractors who utilized the company’s property and sold the company the coal they collected.<sup>75</sup> Judge Hand held that the workers were in fact employees, “stating it would be ‘absurd to class[ify] such a miner as an independent contractor’ given that miners alone ‘carr[y] on the company’s

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67. Shuford, *supra* note 55, at 310 (“PricewaterhouseCoopers, a company that does financial consulting among other things, found that the sharing economy generated \$15 billion in 2013, and projects that annual revenue will increase to \$335 billion in 2025, a staggering 2,200 percent increase in 12 years.”).

68. Erik Brynjolfsson, *Open Letter on the Digital Economy*, MIT TECH. REV. (June 4, 2015) <https://www.technologyreview.com/5/538091/open-letter-on-the-digital-economy>.

69. Nunberg, *supra* note 3.

70. See Mulcahy, *supra* note 63 (“The gig economy is here to stay, is growing, and is fundamentally changing the way we work.”); LIBBY REDER, ASPEN INST., DATA ON THE SHARING & ON-DEMAND ECONOMY: WHAT WE KNOW AND DON’T KNOW 7 (2016) (“The quick pace of business growth in the sharing/on-demand economy coupled with the dramatic growth of this area of the labor market suggest that both consumers and workers value these platforms, and they are likely here to stay.”).

71. See Shuford, *supra* note 55, at 301–02.

72. See Pinosof, *supra* note 9, at 342–43 (“While employment classification is an old legal conundrum, the rise of the ‘gig-economy’ is now pushing America’s broken system to the forefront of policymakers’ and courts’ agendas with new force.”).

73. *Id.* (“For over 100 years, America has classified workers into these two categories, yet the law continuously fails to do so in a uniform, predictable, and purposeful way.”).

74. *Id.* (citing *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914)).

75. *Id.*

only business.”<sup>76</sup> Today, gig companies have caused fundamental changes in traditional business structures and substantive work, creating new challenges not so easily resolved in court.<sup>77</sup>

Worker misclassification lawsuits have been filed against almost all major gig companies.<sup>78</sup> Plaintiff workers seek relief for lost benefits and protections due to misclassification as independent workers.<sup>79</sup> Defendant companies hope to prevent or swiftly resolve these costly disputes. However, most suits end in a sizable settlement agreement, which leaves worker-classification issues unresolved and companies financially damaged.<sup>80</sup> For example, in 2014, Uber drivers in California and Massachusetts filed class-action lawsuits against Uber seeking reimbursement for business expenses.<sup>81</sup> The drivers claimed they were incorrectly classified as independent contractors under California labor law,<sup>82</sup> and consequently were owed compensation for certain expenses.<sup>83</sup> The parties decided to settle this suit for \$100 million in April 2016.<sup>84</sup> This resolution has been touted as “historic” and “one of the largest ever [settlements] achieved on behalf of

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76. *Id.*

77. See DAVID WEIL, U.S. DEP'T OF LAB., ADMR'S INTERPRETATION NO. 2015-1 (2015) (“Misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States, in part reflecting larger restructuring of business organizations.”); see also MISCLASSIFICATION OF EMPLOYEES, *supra* note 13, at 3 (describing the “seven factors the [Supreme] Court has considered significant” in distinguishing between employees and independent contractors).

78. Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 584–85 tbl.1 (2016).

79. See Kessler, *supra* note 15.

80. *Id.*

81. Second Amended Class Action Complaint & Jury Demand at 2, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (No. 13-3826-EMC) (“Plaintiffs bring this action on behalf of Uber drivers who have been misclassified as independent contractors and thereby required to pay business expenses (such as for their vehicles, gas, and maintenance).”).

82. *O'Connor*, 82 F. Supp. 3d at 1138 (“For the purpose of determining whether an employer can rebut a prima facie showing of employment, the Supreme Court’s seminal opinion in *Borello* ‘enumerated a number of indicia of an employment relationship.’”).

83. *Id.*

84. Hannah Levintova, *Uber Agrees to Pay \$100 Million to Drivers in Historic Class Action Settlement*, MOTHER JONES (Apr. 22, 2016), <http://www.motherjones.com/politics/2016/uber-announces-it-will-pay100-million-drivers-historic-class-action-settlement>. This ongoing settlement has not yet been approved by the court.

workers who alleged that they were improperly classified as independent contractors.”<sup>85</sup> However historic, this settlement, and all those like it, has little legal significance except to further underscore the law’s continuing inability to properly classify workers. As the next Part of this Note demonstrates, the gig economy poses a unique set of challenges that make it especially difficult to properly classify workers with existing tests. This results in denied workers’ rights and dangerous limits on economic growth. It is therefore imperative that an immediate resolution is implemented to protect workers and the gig economy the damaging effects of outdated employment laws.

## II. EXISTING EMPLOYEE CLASSIFICATION TESTS DO NOT ADEQUATELY EMBRACE GIG ECONOMY WORKERS AND CREATE DANGEROUS OBSTACLES TO ECONOMIC GROWTH

Although many of the concerns about the employer-employee relationship that necessitated the development of employment laws during the Industrial Revolution are still present today, certain principles that underlie these laws have become ill-suited to properly regulate the modern economy. This Part analyzes the failure of employment law to adequately protect the gig economy’s independent workforce and the dangerous limits it places on economic growth. Section A discusses the challenge of accurately analyzing the control and independence factors in existing employee classification tests as they apply to gig workers, using the recent Uber lawsuit as an example. Section B explores the underlying fundamental tension between existing employee classification tests and the gig economy. This Section also assesses how the existing legal regime ultimately harms both workers and companies in the gig economy. This Part demonstrates the necessity of updating existing employment laws to preserve the gig economy.

### A. GIG WORKERS: AN AMBIGUOUS CLASSIFICATION

The decision whether to classify gig workers as employees or independent contractors has perplexed state, federal, and foreign courts.<sup>86</sup> In many ways, gig workers appear similar to independent contractors because they have significant flexibility

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85. *Id.*

86. See Cherry, *supra* note 78, at 579–94 (discussing lawsuits addressing this classification issue and noting that “[w]hile many lawsuits have been filed,

over the time, place, and manner of their work.<sup>87</sup> However, gig companies still retain a measure of control and power over their workers that is reminiscent of traditional employment.<sup>88</sup> This business model has left the gig economy conflicted over what the proper classification should be.

Gig companies often declare their workers to be independent contractors due to their high level of flexibility and autonomy over their work, while gig workers, desiring the rights and benefits of employment, seek to be classified as employees. In asserting their respective positions, both sides of the debate rely on the central factors in existing classification tests: control and independence.<sup>89</sup> An employer has significant control over its employees and these employees are dependent on the employer, while a company has little control over its independent contractors and these contractors are, as the name suggests, fundamentally independent from the company.

Gig workers do not neatly align with either of the available classifications. Gig work is characterized by its independence, offering the flexibility to accept or decline work at one's leisure, in one's own location, and by one's own method.<sup>90</sup> On the other hand, gig companies often implement policies and requirements that seek to limit the freedom of workers to set their own terms of service and control their professional behavior.<sup>91</sup> Yet the relationship between gig workers and gig companies does generally remain temporary and detached, and as such, does not seem to justify burdening the company with the responsibility of full employee status.<sup>92</sup> Thus gig work is forced into a legal gray area that tends to provoke conflict.<sup>93</sup>

The controversy in classifying gig workers has been most prominently debated in the context of the recent Uber misclassification class-action lawsuit, *O'Connor v. Uber Technologies*,

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there have been no definitive resolutions, binding precedent, or guidance.”); Sarah O'Connor et al., *Uber Drivers Win UK Legal Battle for Workers' Rights*, THE FINANCIAL TIMES (Oct. 28, 2016), <https://www.ft.com/content/a0bb02b2-9d0a-11e6-a6e4-8b8e77dd083a>.

87. See Cherry, *supra* note 78, at 582.

88. See *id.* (“Control may be high given that companies like Uber use customer ratings to maintain almost a constant surveillance over workers, with consumers deputized to manage the workforce.”).

89. See *supra* Part I.A.

90. See Harris & Krueger, *supra* note 8, at 9.

91. *Id.* at 8.

92. *Id.* at 8–9.

93. *Id.*

*Inc.*<sup>94</sup> Uber drivers contended that they were employees because of the control exerted over them by Uber.<sup>95</sup> They cited Uber's detailed requirements which include "rules regarding their conduct with customers, the cleanliness of their vehicles, their timeliness in picking up customers and taking them to their destination, what they are allowed to say to customers, etc."<sup>96</sup> Drivers claimed that the failure to abide by these requirements made them subject to termination.<sup>97</sup> Additionally, the drivers argued they are not independent from Uber because they were economically dependent on Uber for business and Uber was equally dependent on drivers as the integral function of its business.<sup>98</sup>

In contrast, Uber defended its classification of drivers as independent contractors by reasoning that Uber is not an employer of drivers but simply provides a platform that facilitates an independent business arrangement between driver and customer.<sup>99</sup> Consequently, Uber denied having meaningful control over drivers' time, place, and manner of work.<sup>100</sup> The overarch-

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94. In 2014, Uber drivers brought a lawsuit against Uber for misclassifying them as independent contractors. *See supra* text accompanying notes 81–83; *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1133 (N.D. Cal. 2015).

95. Second Amended Class Action Complaint & Jury Demand at 5, *O'Connor*, 82 F. Supp. 3d at 1133 (No. 13-3826-EMC) ("[Drivers] are required to follow a litany of detailed requirements imposed on them by Uber and they are graded, and are subject to termination, based on their failure to adhere to these requirements.").

96. *Id.*

97. *Id.*

98. *Compare id.* ("The drivers' services are fully integrated into Uber's business, and without the drivers, Uber's business would not exist."), and Plaintiffs' Opposition to Defendant Uber Techs., Inc.'s Motion for Summary Judgment at 6, *O'Connor*, 82 F. Supp. 3d at 1133 (No. 13-3826-EMC) ("Uber's system relies on drivers to function because, without drivers, there would be no one to pick up passengers, and no way for Uber to derive revenue by taking a percentage of the fare."), with *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914), and *supra* discussion Part I.C.

99. *O'Connor*, 82 F. Supp. 3d at 1141 ("Uber passes itself off as merely a technological intermediary between potential riders and potential drivers."); Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. POL'Y J. 619, 619 (2016).

100. *O'Connor v. Uber Technologies, Inc.*, UBERLITIGATION.COM, <http://www.uberlitigation.com/faq.php> (last visited Nov. 30, 2017) [hereinafter UBERLITIGATION.COM] ("Uber's position is that it never sets drivers' schedules, never requires them to log into the Uber App for any minimum amount of time, never requires them to accept any particular trip request received via the Uber App, never assigns them a geographic territory, never restricts them from engaging

ing point of Uber's argument was that Uber is a software company, not a rideshare company.<sup>101</sup> It does not rent office space for its drivers, own any cars, or offer any of the driver training typical of transportation companies.<sup>102</sup> Instead, its entire infrastructure is a mobile-phone application. Drivers freely contract to utilize this technology.<sup>103</sup> Thus, Uber contended, drivers were independent from Uber, and Uber exercised little control over their actions.<sup>104</sup>

From a legal standpoint, both Uber and its drivers make plausible arguments for the proper classification.<sup>105</sup> Uber drivers exhibit characteristics of both employees and independent contractors. In some ways, Uber drivers are independent and autonomous.<sup>106</sup> In other ways, they depend on and are controlled by Uber.<sup>107</sup> Like independent contractors, drivers have control over their work.<sup>108</sup> They are free to set their working hours and location.<sup>109</sup> They accept trips according to their own method and provide rides in their own manner, in addition to providing their own car to give rides.<sup>110</sup> They are not subject to direct supervision from Uber.<sup>111</sup> They are not economically dependent on Uber, as they can hold other jobs and perform services for other companies, including rideshare competitors.<sup>112</sup> They can also accept

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in another occupation or business, and never restricts them from simultaneous use of other apps like Lyft and Sidecar.”).

101. Prassl & Risak, *supra* note 99, at 637 (noting that in the United States, “the terms and conditions a customer must accept in order to download the required software (‘app’) . . . inform[s] customers in capital letters that they [must] ‘ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER.’”).

102. Kessler, *supra* note 15 (“Gig economy companies do not own cars, hotels, or even their workers’ cleaning supplies. What they own is a marketplace with two sides. On one side are people who need a job done—a ride to the airport, a clean house, a lunchtime delivery. On the other are people who are willing to do that job.”).

103. UBER, <https://www.uber.com/drive> (“Drive when you want, earn what you need.”).

104. See UBERLITIGATION.COM, *supra* note 100.

105. See Carlson, *supra* note 20, at 338–53.

106. See Cherry, *supra* note 78, at 582.

107. *Id.* at 583.

108. *How to Use the Uber Driver App*, UBER, <http://www.uber.com/drive/resources/how-to-use-the-driver-app> (last visited Nov. 30, 2017).

109. *Id.*

110. *Id.*

111. *Id.*

112. See Scott Van Maldegiam, *How to Drive for Uber and Lyft at the Same Time*, RIDESHARE GUY BLOG & PODCAST, (July 28, 2016), <https://www>

or reject rides, permitting them to control their opportunity for profit or loss.<sup>113</sup>

However, in many ways Uber exerts employer-like control over drivers. Drivers are given a guidebook that offers advice on the manner and method of optimal service. Drivers are also supervised in part by the use of the Uber app, which monitors their driving activity and permits riders to give feedback.<sup>114</sup> This customer feedback can lead to termination if it becomes cumulatively negative.<sup>115</sup> Drivers are also required to accept a certain number of rides per month or will be disconnected from the app, permitting Uber to have further control over drivers' activity.<sup>116</sup>

The only thing that is clear in this controversy is that the proper classification is ambiguous. Uber retains some control and power over its drivers, yet drivers benefit from a significant amount of flexibility and autonomy. This relationship falls within an un contemplated space somewhere between employment and an independent-contractor relationship. This analysis parallels classification conflicts in most other gig companies—"highlight[ing] the outdated nature of workers' laws."<sup>117</sup>

Ultimately, it appears Uber and its drivers are likely to reach a settlement agreement in the *O'Connor* matter, or proceed to individual arbitration.<sup>118</sup> Either result prevents an op-

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.therideshareguy.com/how-to-drive-for-uber-and-lyft-at-the-same-time (explaining that many rideshare drivers utilize both companies and instructing listeners how to do so efficiently).

113. See Catherine Tucciarello, *The Square Peg Between Two Round Holes: Why California's Traditional Right to Control Test Is Not Relevant for On-Demand Workers*, 13 SETON HALL CIR. REV. 351, 359–60 (2017); see also *O'Connor v. Uber Techs. Inc.*, 82 F. Supp. 3d 1135, 1138 (N.D. Cal. 2015) ("The 'most significant consideration' is the putative employer's 'right to control work details.'").

114. Tucciarello, *supra* note 113, at 366.

115. *Id.*

116. See *O'Connor*, 82 F. Supp. 3d at 1149 ("Uber considers '[r]ejecting too many trips' to be a performance issue that could lead to possible termination from the Uber platform.").

117. Steven Davidoff Solomon, *Uber Case Highlights Outdated Worker Protection Laws*, N.Y. TIMES (Sept. 15, 2015), <http://www.nytimes.com/2015/09/16/business/dealbook/uber-case-highlights-outdated-worker-protection-laws.html> ("This case truly highlights the outdated nature of workers' laws in America . . .").

118. Uber and its drivers reached a proposed settlement agreement in 2016, but the court declined to approve the settlement. The case is now stayed pending several appeals regarding the enforcement of the arbitration clause. Due to a ruling by the Ninth Circuit Court of Appeals, it appears this case may be forced to proceed to individual arbitration. See Paresh Dave, *In Stinging Decision for*

portunity for the court's consideration on the proper classification of Uber drivers. Despite there being no expectation for a final conclusion as to worker classification, the court has importantly recognized the ambiguities in classifying rideshare drivers. The court acknowledged "there were sufficient allegations . . . to make the existence of an employment relationship plausible . . . [but also] a number of factors [that] weigh against finding an employment relationship."<sup>119</sup> The court noted that "numerous factors point[ed] in opposing directions,"<sup>120</sup> reasoning that "many of [these] factors . . . appear outmoded in this context" because "Uber's business model creates significant challenges" to the "application of the traditional test of employment" which "evolved under an economic model very different from the new [gig] economy."<sup>121</sup> This court correctly identified the heart of the issue in classifying drivers and other gig workers: there is an underlying conflict between the modern gig economy and outdated employment laws.

#### B. A FUNDAMENTAL TENSION BETWEEN EMPLOYMENT LAW AND THE GIG ECONOMY

The reason that gig workers are not easily classified as employees or independent contractors is due to a fundamental tension between the conventional notion of employment and gig work. In drafting employment laws, twentieth-century legislators seemed to rely on an incorrect belief that business and individual interests are entirely at odds.<sup>122</sup> Thus legislators at the

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*Uber Drivers, Appeals Court Says They Must Go to Arbitration*, L.A. TIMES (Sept. 7, 2016), <http://www.latimes.com/business/technology/la-fi-tn-uber-lawsuit-20160907-snap-story.html>. For more details on this ongoing case, see <http://www.uberlawsuit.com> (last visited Nov. 30, 2017). For more details on the proposed settlement agreement, see Harry Campbell, *Breaking News: Uber Settles Employee Misclassification Lawsuit in California*, RIDESHARE GUY BLOG & PODCAST (Apr. 21, 2016), <https://therideshareguy.com/breaking-news-uber-settles-employee-misclassification-lawsuit-in-california>.

119. *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6354534, at \*6 (N.D. Cal. Dec. 5, 2013).

120. *O'Connor*, 82 F. Supp. 3d at 1153.

121. *Id.*

122. See Prange, *supra* note 57, at 7–8; *supra* Part I.B; see also Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1077–78 (2009) ("When Congress passed the Fair Labor Standards Act (FLSA) in 1938 to help relieve the downward spiral of wages in the Great Depression, America's workers commonly showed up to an employer's place of business, leaving little doubt if they were 'working' and thus entitled to the statute's minimum wage. Times, and technologies, have changed. With modern computers, individuals often perform

time could not have conceived of a mutually beneficial business model that successfully operates on minimal operating costs, a remote technological marketplace, and international demand. Nor could they have anticipated that a workforce might value autonomous, short-term, flexible work over lifetime job security. Thus existing employment laws cannot possibly be expected to effectively apply to, let alone support, this type of economy.

Even modern scholars often fail to understand the gig economy's business model and criticize it as an example of abusive, greedy businesses taking advantage of vulnerable, victimized employees.<sup>123</sup> However, the controversy is not nearly this simple. This business model is intended to be mutually beneficial.<sup>124</sup> Gig companies use technology to create a marketplace that connects individuals in need of work with individuals in need of services.<sup>125</sup> It is true that businesses benefit financially from the independent contractor classification, but this also benefits workers by creating job opportunities. By employing a lean business model, gig companies can operate efficiently and pass on savings to customers—simultaneously increasing demand for their services and generating a need for workers to fill this demand, to the benefit of workers. Gig workers desire these job opportunities for the ability to set their own schedules, govern their own work methods, and freely choose and reject projects from

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work on someone else's behalf while sitting at home, using not their employer's factory machinery, but rather a computer they purchased for themselves, as well as their own Internet connection. The work is often engaging and is far more pleasant than operating a drill press of the 1930s. In ways, some of this online 'labor' can even feel creative, or be part of a game or a competition.”).

123. Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 91 (2015) (“Uber has faced criticism along at least six dimensions.”); Douglas Holtz-Eakin et al., *Washington Should Harness the Power of the Gig Economy*, HILL (Jan. 10, 2017), <http://www.thehill.com/blogs/pundits-blog/economy-budget/313512-washington-should-harness-the-power-of-the-gig-economy> (“Policymakers often assume that the rapid growth in the gig economy is leaving workers vulnerable, and they have sought to constrain the independent nature of these jobs.”).

124. See Kessler, *supra* note 15 (“But it's safe to say that there are advantages to being an employee (security, safety laws, minimum wage, benefits) and that there are also advantages to being an independent contractor (freedom, independence). Similarly, there are advantages to hiring employees (quality control, dependable workers) and hiring contract workers (cheaper, don't need to guarantee work).”).

125. See Rogers, *supra* note 123, at 86–87 (“Uber's business model is actually quite simple: its smartphone-based app connects drivers offering rides and passengers seeking them, passengers pay mileage-based fees through credit cards that the company keeps on file, and Uber then takes a percentage of each fare and gives the rest to drivers.”); *supra* Part I.B.

one or many companies.<sup>126</sup> The gig business model allows individuals to work free from “structures of the traditional employment relationship.”<sup>127</sup> More importantly, it creates an opportunity for individuals to avoid unemployment and poverty by providing a necessary work alternative to disappearing manufacturing and other industrial-era jobs.<sup>128</sup> The gig economy is financially lucrative for both the individual and the workforce as a whole, and harnesses innovation and creativity to deliver better, faster, cheaper services to customers.

As the gig business model benefits both gig companies and workers in theory, criticism is more properly directed at the laws that regulate these relationships. Existing employment laws force an unsuitable choice between classifying a worker as an employee or independent contractor, a binary choice that results in workers receiving all of the benefits and protections of employment laws or none of them.<sup>129</sup> Additionally, the employee classification places an extreme financial burden on emerging companies to provide benefits to workers, while the independent contractor classification lets companies avoid responsibility for workers altogether. These classifications effectively harm both

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126. Michelle M. Lasswell, Note, *Workers' Compensation: Determining the Status of a Worker as an Employee or an Independent Contractor*, 43 DRAKE L. REV. 419, 422 (1994) (“From the worker’s viewpoint, being classified as an independent contractor also has advantages. An independent contractor is an entrepreneur who can take on several specialized projects. The independent contractor has the freedom to choose the method for accomplishing the job and is free from the structures of the traditional employment relationship. The independent contractor can also deduct expenses that employees cannot, such as meals and entertainment, and taxes are not withheld from the wages.”).

127. *Id.*

128. Holtz-Eakin et al., *supra* note 123 (“[E]vidence indicates that the gig economy may be countercyclical in nature, and its rapid growth in the years following the Great Recession provided already struggling workers a flexible way to earn additional income where traditional payroll jobs failed. . . . The gut instinct that gig economy workers are vulnerable is correct, but for the wrong reasons. Gig economy workers are vulnerable because traditional payroll jobs failed to deliver sufficient job growth and pay increases during the recession. Without the gig economy, these struggles very well could have been a lot worse.”).

129. Full protections and benefits are given to workers classified as employees, whereas these are not given to independent contractors. This begs the question why there is not a more feasible middle ground that would target middle-ground workers like gig workers. See *infra* Part III.B.2 for a proposed answer to this question. See also Enwemeka, *supra* note 62 (“[I]f you look at our labor market, it’s very clear that it’s set up to essentially penalize anybody that doesn’t have a full-time job . . . .’ [S]o . . . what’s really needed is a good hard look at the entire structure of our labor market.” (quoting Dane Mulcahy)).

gig workers and gig companies by forcing a choice between protecting workers and promoting economic growth.

If classified as an independent contractor, workers have limited access to fair wages, overtime compensation, unemployment insurance, social security benefits, disability insurance, health insurance, workers compensation, retirement savings plans, and many other benefits that employees are entitled to.<sup>130</sup> The growing popularity of nontraditional employment relationships has revealed the inherent unfairness in the independent contractor classification. As an important part of the modern workforce, gig workers are indeed owed at least some of the rights and protections of traditional employment, and gig companies ought to be held responsible for providing these rights. Without these rights, workers have no financial security or social safety net to fall back on.<sup>131</sup> However, because the outdated laws that govern employee classification force a rigid choice between the two classifications, gig companies do, more often than not, choose the independent contractor classification, as it creates embedded cost savings which are crucial to their lean business model. In some ways, these savings can be deemed unjustifiable, as they are the result of avoiding many responsibilities for their workers' rights and benefits.<sup>132</sup> This choice is merely the lesser of two evils for these companies. Gig companies are exposed to the risk of costly and damaging class-action litigation in choosing the independent contractor classification.<sup>133</sup> They are also limited from imple-

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130. Pinosof, *supra* note 9, at 353.

131. *Id.*

132. Davey Alba, *Instacart Shoppers Can Now Choose to be Real Employees*, WIRED (June 22, 2015), <http://www.wired.com/2015/06/instacart-shoppers-can-now-choose-real-employees> ("According to calculations by the National Employment Law Project, businesses stand to save up to 30 percent of their payroll tax costs by choosing to classify workers as independent contractors."); Kessler, *supra* note 15 ("Not being responsible for employees' taxes and benefits allows companies like Handy to operate with 20% to 30% less in labor costs than the incumbent competition, leading to eye-popping numbers like Uber's \$40 billion valuation . . .").

133. SUSAN N. HOUSEMAN, U.S. DEP'T OF LAB., FLEXIBLE STAFFING SOLUTIONS § 9 (Aug. 1999), [http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/9\\_standards.htm](http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/9_standards.htm) ("In the absence of clear legal language, employee coverage and employer liability is being determined by the courts, which often apply different standards to different laws and sometimes even different standards to the same law. Such ambiguity causes considerable confusion and legal expense for businesses."); Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 98 (2013) ("The 'uncertainty can become a

menting efficient and protective employee and workplace policies for fear of crossing into employer-like territory.<sup>134</sup> The uncertainty of the correct classification for their workers forces companies to operate in a legal gray area that has financial and reputational consequences for the companies, even if they are acting reasonably in the best interests of their business.<sup>135</sup>

The only present alternative—classifying workers as employees—is equally problematic. Though this classification would provide workers with the legal benefits and protections intended to cover them, it creates significant issues for gig companies. Forcing employer status on fledgling gig companies threatens their financial stability, as employee-based social programs are extremely costly.<sup>136</sup> These companies are built so as to require minimal operating expenses, and the costs of providing the full range of employee benefits to workers would capsize this lean business model.<sup>137</sup> This added expense would make it

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breeding ground for litigation.”); Noam Scheiber, *A Middle Ground Between Contract Worker and Employee*, N.Y. TIMES (Dec. 10, 2015) <https://www.nytimes.com/2015/12/11/business/a-middle-ground-between-contract-worker-and-employee.html> (“Many start-ups can’t withstand a lawsuit even if a company is in the right.”).

134. Kessler, *supra* note 15 (“They are going to have a choice between taking actions that make them more marketable, and thus becoming vulnerable as employers under these laws, and remaining completely hands off.”); Scheiber, *supra* note 133 (“Under an employment model, by contrast, the company has a much more reliable and knowledgeable work force, one that can be held to a specific standard of quality and a more consistent schedule.”).

135. See Leslie Hook, *Uber and Airbnb’s Business Models Come Under Scrutiny*, FIN. TIMES (Dec. 30, 2016), <https://www.ft.com/content/381e27ee-c685-11e6-8f29-9445cac8966f> (“[O]ver the past 12 months, these two icons . . . have clashed again and again with courts and lawmakers, and found their businesses constrained by increasing regulation.”).

136. Julie Verhage, *An Expert in Valuation Says Uber Is Only Worth \$27 Billion, Not \$62.5 Billion*, BLOOMBERG: TECH. (Aug. 17, 2016), <https://www.bloomberg.com/news/articles/2016-08-17/an-expert-in-valuation-says-uber-may-have-already-peaked> (claiming Uber’s financial worth is threatened by the risk of operating getting more expensive as this would necessarily reduce its business valuation and deter investors); Douglas MacMillan et al., *Uber Drivers Settle with Ride-Hailing Company in Labor Dispute*, WALL ST. J. (April 21, 2016), <https://www.wsj.com/articles/uber-drivers-settle-with-ride-hailing-company-in-labor-dispute-1461292153> (“Concerns over the status of gig workers have caused tech investors and entrepreneurs to become more cautious about on-demand businesses. Some startups . . . have been unable to secure new funding and were forced to shut down . . .”).

137. Hook, *supra* note 135 (“In the US, many so-called sharing economy companies that rely on independent contractors could see their business models upended if courts determine that their workers should be treated as employees.”); Kessler, *supra* note 15 (“If we continue to not see reform, then it will probably

likely that these companies are unable to provide the benefits they are known for: flexibility for workers and affordability for customers. For workers, employee status would revoke many of the most positive qualities of gig work: it would limit the flexibility, freedom, and control available to independent contractors, as employers are granted a significant amount of control and supervision over their employees.<sup>138</sup> These added costs would also increase the low prices most valued by customers and in turn reduce demand and need for gig workers. Many scholars warn that employer status could financially destroy many gig companies and predict that the gig economy may cease to exist altogether under this classification.<sup>139</sup>

This seemingly unsolvable controversy is a result of the ideological dichotomy that founded existing employment laws. Employment laws heavily regulate businesses in order to protect traditional worker rights and benefits, but this is accomplished at the cost of economic prosperity. Because these laws are based on principles that pit businesses against individuals, they make it impossible to guarantee both worker rights and promote economic growth. This is demonstrated by employment law's binary employee-classification system.<sup>140</sup> The rigid structure of this system creates an unnecessary choice between classifying workers as independent contractors, which facilitates efficient business and spurs economic growth but fails to fully protect workers, and classifying workers as employees, which protects worker rights and benefits but limits economic growth. Thus the classifications require a choice that either eliminates necessary protections for

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cut out a lot of services and opportunities, because not everybody can put people on full-time or part-time paid benefits. It just wouldn't make sense.").

138. Employers *may* supervise their employees more than independent contractors and *must* do so for purposes of collecting certain required information for applying employee benefits. It is relevant to note that the collection of this information creates practical difficulties in quantifying this information. See Harris & Krueger, *supra* note 8, at 13 ("The boundary between work and non-work for independent workers is largely indeterminable.").

139. JAMES SHERK, HERITAGE FOUND., THE RISE OF THE "GIG" ECONOMY: GOOD FOR WORKERS AND CONSUMERS 28 (Oct. 7, 2016); see Holtz-Eakin et al., *supra* note 123 ("[T]he shoot first, ask questions later attitude taken by local policymakers could be a big mistake. It could end up hurting the very workers that the policies are intended to help."). Many of the arguments presented in this paragraph are focused on gig companies in their beginning development stages. Once these companies are off the ground they may become profitable enough to afford at least some employee benefits. Uber has likely progressed to this stage by now and thus is being used in this Note as an example because of its notoriety, not because it is the gig company most at risk.

140. See *supra* notes 9–11 and accompanying text.

gig workers or eliminates necessary gig jobs altogether. Neither option is suitable for the gig economy.<sup>141</sup> The gig economy misclassification issues have revealed that employment law's existing dual-classification system no longer effectively governs the employer-employee relationship.<sup>142</sup>

Worse than ineffectiveness, these limited classifications are likely to regulate the gig economy to death. As the world modernizes and industrial jobs inevitably disappear, the gig economy presents a vital opportunity to embrace change and stimulate long-term economic prosperity.<sup>143</sup> Without this opportunity, the future of the workforce is unclear. Therefore, it is in the best interest of the future of the workforce, businesses, and economy as a whole to develop new laws that prevent the destruction of the gig economy.

### III. IMMEDIATE, COMPREHENSIVE, AND SUSTAINABLE LEGAL REFORM IS NEEDED TO PRESERVE THE GIG ECONOMY

A prosperous gig economy requires a modernized legal structure that promotes both economic growth and worker security. Gig companies need legislative support that encourages entrepreneurial innovation, embraces changing business structures, and fosters economic security. Gig workers need legislative action that stimulates the creation of new jobs, protects worker rights, and equalizes access to employee benefits. The fundamental question is then: “[H]ow can we protect workers in this new environment, while, at the same time, reaping the benefits

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141. Harris & Krueger, *supra* note 8, at 8 (“Forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy.”).

142. Scheiber, *supra* note 133 (“[M]any workers in the so-called online gig economy should have more rights and protections than most do now. At the same time, . . . forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work.”).

143. See Andrei Hagiu, *Work 3.0: Redefining Jobs and Companies in the Uber Age*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Sept. 29, 2015), <http://hbswk.hbs.edu/item/work-3-0-redefining-jobs-and-companies-in-the-uber-age> (“[W]hen many Americans remain underemployed and most workers feel time crunched, the last thing we want to do is squander labor market opportunity and flexibility.”).

of change and innovation?”<sup>144</sup> This Part will suggest a comprehensive answer to this question. Section A will briefly review existing remedies and explain why they are insufficient. Section B will propose a three-step reform proposal based on the most important components of a satisfactory resolution. This Part advocates for a remedy that provides both short- and long-term relief, and fairly balances protections for the gig economy and its workers.

#### A. INSUFFICIENCY OF PREVIOUSLY PROPOSED REMEDIES

As illustrated above,<sup>145</sup> worker classification in the gig economy has produced a delicate legal conflict. Resolving this issue requires immediate yet sustainable action. Although the federal government has identified this as a central issue to be examined in the near future, a specific solution has yet to be disclosed.<sup>146</sup> In the absence of official action, scholars have advanced many possible theories on this topic. These theories range from a simple reinterpretation of existing employee classification tests,<sup>147</sup> to the creation of a third category of worker,<sup>148</sup> to resolution by contract,<sup>149</sup> to simply maintaining the status quo.<sup>150</sup> However

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144. Krueger, *supra* note 17, at 2; *see* Holtz-Eakin et al., *supra* note 123 (“Instead of trying to limit independent work in favor of traditional work, policy-makers should look for ways to harness the strengths of the gig economy so that it can continue to provide a buffer for workers who fall on hard times.”); *see also* Gapper, *supra* note 2 (“The new world of work must chart a course between the twin dangers of corporate conformism and worker exploitation.”); Hagi, *supra* note 143 (“We are on the cusp of a sea change in how we view employment. If we manage this shift well, we’ll be creating an engine for economic growth. Mess it up and we’ll stifle a major driver of innovation, business creation, and jobs.”).

145. *See supra* Part II.

146. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN: FISCAL YEARS 2017–2021 2, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf> (“The commission adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.”).

147. Carlson, *supra* note 20, 368; Maltby & Yamada, *supra* note 34, at 274; Means & Seiner, *supra* note 19, at 1545–46; *see* Bodie, *supra* note 30; Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1674 (2016).

148. Tucciarello, *supra* note 113, at 369; Harris & Krueger, *supra* note 8, at 27.

149. *See* Carboni, *supra* note 56, at 38–40 (noting that the FLSA’s understanding of a dependent contractor could be helpful in the creation of a third type of worker).

150. *See supra* Part I.C (explaining how modern workers are classified within the existing employee classification framework).

promising and well conceived, these stand-alone suggestions are inadequate on their own. Reinterpretation will only perpetuate legal uncertainty by continuing to permit inconsistent application of the already ambiguous employee classification tests. And, as discussed above,<sup>151</sup> these tests emerged from legal principles that are now outdated and problematic in a modern context. While one of the better suggestions, the theory of creating a third classification will require a long, slow legislative process, leaving the future of the gig economy open to the immediate risks of forced employee classification. A contractual resolution is an entirely impractical suggestion, as it fails to recognize or rectify the existing inequitable bargaining power between worker and company and would increase worker vulnerabilities and limit worker legal protections. And this Note has already demonstrated that existing tests only offer insufficient remedies.<sup>152</sup> Therefore, at this point, there has not been a fully adequate solution proposed.

#### B. A COMPREHENSIVE REMEDY

Ultimately, a comprehensive remedy is required.<sup>153</sup> Most importantly, this action ought to harness the unique benefits of the gig economy.<sup>154</sup> It must implement durable changes that resolve present legal ambiguities. It must also strive to establish a more reasonable balance between business and individual interests than currently exists. Thus the proposed reforms should achieve three main objectives: preserve economic opportunity, promote economic efficiency, and protect economic security. Congress can carry out these objectives by: (1) passing immediate legislation that develops a legal safe harbor for gig companies, which will preserve economic opportunity; (2) reexamining employee classification tests to minimize legal uncertainty and promote economic efficiency; and (3) creating benefit equality among all individuals by detaching certain benefits from employ-

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151. See *supra* Part II.B.

152. See *supra* Part II.

153. This Note's three-step proposal expands on, and combines, solutions proposed in a brief article written by economic analyst James Sherk at the Heritage Foundation and a discussion paper entitled *The Hamilton Project* written by Seth D. Harris and Alan B. Krueger at the Brookings Institution. See SHERK, *supra* note 139; Harris & Krueger, *supra* note 8.

154. Holtz-Eakin et al., *supra* note 123 ("Instead of trying to limit independent work in favor of traditional work, policymakers should look for ways to harness the strengths of the gig economy so that it can continue to provide a buffer for workers who fall on hard times.").

ment and requiring basic rights for all workers, which will protect future economic security.

### 1. Implement Immediate Safe Harbor

Congress should temporarily protect gig companies from legal uncertainty and the potentially fatal effects of forced adoption of the employee classification through enacting a safe harbor law that statutorily permits gig companies to classify workers as either employees or independent contractors.<sup>155</sup> This statute would effectively shield gig companies from damaging litigation battles and future court orders that interpret the control or economic realities tests to force employer status on gig companies.<sup>156</sup> This step is imperative to preserve job growth and promote economic opportunity. By insulating emerging gig companies from this significant financial burden during their early periods of survival and development, such legislation would allow these companies to reach rapid growth and stable maturity.<sup>157</sup> During this process, these companies can focus on innovation and job creation, benefitting workers and consumers. Once better established, these companies will be prepared and financially strong enough to withstand the burden of providing more rights and benefits to workers.<sup>158</sup> Though this proposal limits worker protections in the near future, this short-term handicap is far better than the alternative, which would permanently eliminate these jobs altogether. This step seeks to put business interests first in the short term, so that individual and business interests can both be met in the long term.

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155. See SHERK, *supra* note 139, at 7–8 (noting that many workers are drawn to companies such as Uber because of the work's independent and flexible nature).

156. See *id.* (“Congress should ensure that litigation does not stifle the gig economy.”); Carlson, *supra* note 20, at 298. (“Our employment statutes, however, rarely accept the challenge posed by this problem. The real work of identifying ‘employees’ and their employment relationships has always been in the courts. Statutory non-definitions, such as those in the FLSA, might well be viewed as mandates for the courts to continue in this mission.”).

157. See generally Neil C. Churchill & Virginia L. Lewis, *The Five Stages of Small Business Growth*, HARV. BUS. REV. (May 1983), <https://hbr.org/1983/05/the-five-stages-of-small-business-growth> (identifying the early stages of a business as the most financially unstable).

158. Without the second step of this proposal, at this time these companies would likely be required to classify some of their workers as employees and take on those costs. With the second step of this proposal, these companies would likely need to classify some workers as full employees, but the majority of gig workers would be classified as the middle-ground third classification, to be introduced *infra* Section III.B.2.

Unlike much of the existing academic literature on this topic, this step of the proposal admittedly favors protecting gig companies. However, this pro-business and pro-technological strategy has been adopted by Congress in the past. In 2012, Congress implemented the JOBS (Jumpstart Our Business Startup) Act, which relaxed SEC-imposed registration requirements for IPOs for emerging growth companies.<sup>159</sup> Before that, in 1998, Congress enacted the Internet Tax Freedom Act, which protected the informational potential of the Internet from federal, state, and local governments imposing discriminatory Internet-only taxes.<sup>160</sup> These laws were passed to protect emerging businesses and harness technological advances in an effort to promote beneficial long-term growth, just as this step's safe-harbor provision seeks to do. Fortunately, the deregulatory agenda of the United States' current political leaders also make this type of legislative action uniquely plausible at this time.<sup>161</sup>

Logistically, this legislation should set limits on the legal shelter so as to avoid indefinite immunity for gig companies. Both a five-year time limit and a monetary ceiling could be implemented to allow for companies to reach stable growth before subjecting them to full employer status. These dual limitations would prevent companies from taking advantage of the safe harbor beyond a true need for it. Those that oppose this idea might still contend that this safe harbor would last indefinitely, effectively neglecting gig workers permanently. However, in addition to the proscribed financial ceiling, the next step of this proposal would effectually end the safe harbor for gig companies and provide needed relief to gig workers.

## 2. Reexamine Employee Classification Tests

With a safe harbor in place to protect the gig economy, Congress should use the intervening time to thoughtfully modify the

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159. Jamie Farrell, *The JOBS Act: What Startups and Small Businesses Need to Know*, FORBES: WORK IN PROGRESS (Sept. 21, 2012), <https://www.forbes.com/sites/work-in-progress/2012/09/21/the-jobs-act-what-startups-and-small-businesses-need-to-know-infographic>. This proposal suggests using the JOBS Act to develop parameters to define emerging gig companies.

160. JEFFREY M. STUPAK, CONG. RESEARCH SERV., THE INTERNET TAX FREEDOM ACT: IN BRIEF (Apr. 13, 2016), <https://fas.org/sgp/crs/misc/R43772.pdf>.

161. See Anita Balakrishnan, *Trump's Labor Pick Will Be a Big Win for 'Gig Economy' Start-Ups Like Uber*, CNBC: TRUMPONOMICS (Dec. 8, 2016), <https://www.cnbc.com/2016/12/08/trumps-labor-pick-will-be-a-big-win-for-gig-economy-start-ups-like-uber.html>; Frank Chaparro, *The Wave of Wall Street Deregulation Is Upon Us*, BUS. INSIDER (Feb. 3, 2017), <http://www.businessinsider.com/the-wave-of-financial-deregulation-is-upon-us-2017-2>.

boundaries of existing employee classification tests to better encompass gig workers. During this time, Congress can additionally clarify the factors most important in the application of these tests so as to resolve long-existing judicial uncertainty.<sup>162</sup> This process would likely lead to the development of a third worker classification, which would serve to fill the existing gap in the employee classification tests.

A middle-ground classification, creatively labeled by others as the “dependent contractor” classification,<sup>163</sup> would operate to encompass the legal gray area between employee and independent contractor where gig workers seem to fit best. This classification could be defined by building off of, and differentiating from, the existing classifications. Whereas employees have little independence and employers have significant control, and independent contractors have significant independence and companies have little control over them, dependent contractors fall somewhere in the middle of the spectrum. They are characterized by increased worker independence and decreased company control from traditional employees, while not quite reaching the level of independent contractors. Whatever the exact parameters of this classification, it is important that Congress not simply create another classification with ambiguous boundaries, further complicating worker classifications.

As to the effect of this third classification, the benefits and rights could be crafted around the implied breakdown between legal benefits versus fundamental rights in the existing tests. Under existing tests, employees receive both benefits and rights, and independent contractors receive neither. Thus the third classification, situated between these two ends of the spectrum, would receive fundamental rights, but not benefits. This would mean that the middle classification would receive many of the protections afforded to employees under the economic realities test, including minimum and fair pay, health and family leave, and protections from discrimination under Title VII, which can

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162. The tests will likely focus more on the factors of independence and control and reduce some of the extraneous factors so as to create a more uniform application of the tests.

163. Tucciarello, *supra* note 113, at 369. While this is an appropriate title, it may create confusion if the definition of dependent is not carefully explained. For example, gig workers are not always dependent on one company. Often Uber drivers double as drivers for their competitor, Lyft, in order to maximize their productivity. These workers would not necessarily be dependent but should be included among this middle-ground classification.

be best defined as rights.<sup>164</sup> However, unlike employees, this new classification would not be owed the benefits applied under the control test, including retirement, health, and welfare benefit plans, unionization and tax withholding. This allocation will provide gig workers with the fundamental rights that they are owed, but, in exchange for the flexibility and independence offered by gig work, not the greater economic benefits of full employment. This creates a fair balance between gig worker and gig company and seamlessly fills the gap between the existing classifications.<sup>165</sup>

These amendments would require a long-term, thoughtful effort to understand and draft laws that embrace the changing nature of the workforce in the twenty-first century. It is true that this could take a significant amount of time, but if implemented as part of a multi-step plan, in conjunction with the safe harbor addressed in step one of this proposal, Congress would be able to implement a reasonable timeline for completion. Additionally, the strong political incentive to further create protections for gig workers to offset the effects of the safe harbor would hopefully force partisan compromise. Regardless of the length of time this legislation would take to implement, this step is vitally important for the longevity of gig work, as well as all future forms of nontraditional work. This step enhances economic efficiency by diminishing legal uncertainty.

This step of the proposal is only effective in preserving the gig economy if preceded by the safe harbor discussed in the first step. Alone it could not be implemented quickly enough to protect gig companies. It is also best followed by the final step of this proposal, which seeks to universalize employee benefits so that they are readily available to all workers, no matter the classification.

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164. See Caroline Fredrickson, *Op-Ed: Is Your Uber Driver an Independent Contractor or an Employee? It Makes a Difference*, L.A. TIMES (June 5, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-fredrickson-are-uber-drivers-independent-contractors-or-employees-20150605-story.html> (“[These are] ‘basic needs,’ not bonuses: ‘They should be part of our bottom line as a society.’”).

165. See Carboni, *supra* note 56, at 37 (“This third category of worker, or the ‘dependent contractor,’ seeks to lessen the burden on both the employers and the workers in the sharing economy.”).

### 3. Create Benefit Equality for All

As a very long-term goal, Congress should seek to separate social benefits from employment, creating equal benefit opportunity for all individuals.<sup>166</sup> This ideal would seek to strengthen the social safety net for all individuals by guaranteeing equal access to certain traditional employee-only benefits.<sup>167</sup> This would ensure that nontraditional work forms are not disadvantaged simply because they do not fit the traditional notion of employment. Universalized benefits would help alleviate the consequences of a reduced workforce due to further technological advances.<sup>168</sup> This action would also neutralize many of the key advantages and disadvantages between existing worker classifications, which would increase legal flexibility and reduce financial incentives.<sup>169</sup>

Undoubtedly, this step of the proposal would be extremely complex and drawn out. Getting Congress to organize, draft, and agree on universalized benefits will likely be a development unseen for many years.<sup>170</sup> However, this is an important step that

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166. These benefits would include retirement, health and insurance benefits, as well as equalized tax treatment. SHERK, *supra* note 139, at 29 (“[Congress should] create equal benefits between the self-employed and formal employees.”); Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms*, 37 COMP. LAB. L. & POL’Y J. 653, 686 (2016) (“[T]oo much of the welfare state is delivered through employers . . . [it] should be tied to the individual and made portable.’ Policy makers need to focus on a potential extension of social protection and develop new tools for ‘delivering core labor rights.’”).

167. Kristen V. Brown, *How Much Would It Cost Uber to Make Drivers Employees? (Hint: It’s a Lot)*, SPLINTER (June 19, 2015), <http://www.splinternews.com/how-much-would-it-cost-uber-to-make-drivers-employees-1793848516> (“Rather than forcing full-time employment on on-demand work firms, we should instead pursue a policy direction that creates a comparable safety net for workers who are not full-time employees[.]”); James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), <https://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits> (“The big[est] issue here, though, is the outdated nature of our social safety net. It’s still dependent on the idea of the full-time employee, who gets health care, a pension, unemployment insurance, and so on from one company. That worked fine in a world of stable employment, but lots of Americans no longer live in that world and plenty more will be joining them.”).

168. This is already being explored in other countries. See, e.g., Ivana Kottasova, *Finland Is Giving 2,000 Citizens a Guaranteed Income*, CNN: MONEY (Jan. 3, 2017), <http://money.cnn.com/2017/01/02/news/economy/finland-universal-basic-income>.

169. Harris & Krueger, *supra* note 8, at 15.

170. However, legislators have begun moving in this direction with the proposal of a new bill that would set aside funds for a grant program to help local governments innovate their employment benefit systems. While this action is

would revolutionize employment law for the betterment of the workforce. It would permit the workforce to adapt to and sustain any future economic changes, which will likely include an increase in innovative and nontraditional jobs. This step seeks, in the long term, to carry out the overarching goal of this Note: to change the dichotomous nature of the law, shifting the legal focus away from traditional employment and towards new forms of work. Laws must embrace the future, not cling to the past.<sup>171</sup>

### CONCLUSION

The gig economy developed from a simple entrepreneurial vision: to directly connect supply and demand. This idea has created an economic structure that transforms the way businesses, workers, and customers interact. It has utilized technology and creativity to provide better services for consumers and flexible opportunities for workers. And it has fundamentally changed the way society views employment. It has empowered workers of all demographics by giving them a chance to provide for themselves on their own schedule, under their own terms, and in their own manner. It also has provided crucial economic relief by creating job opportunities to replace disappearing traditional jobs. It has brought necessary change to a struggling and stagnant economy.

However, the twentieth-century legal framework has posed significant challenges to this change and threatens the existence of the gig economy. Employment law was developed in a bygone era when the employer-employee relationship was new and rapidly growing. Legislators were extremely concerned about employers overpowering vulnerable employees. Laws were implemented to protect these workers' legal rights and benefits. But they were drafted such that business interests were incompatible with individual interests. This framework is unsuitable for the gig economy, which seeks to align business and individual

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small, it is an important first step that acknowledges the need for change to accommodate different forms of work. See Melissa Locker, *A Bill That Makes It Easier for Gig Economy Workers to Get Benefits Was Just Introduced in Congress*, FAST COMPANY (May 26, 2017), <https://www.fastcompany.com/4038971/bill-that-makes-it-easier-for-gig-economy-workers-to-get-benefits-is-with-the-senate>.

171. See Gapper, *supra* note 2 (“The task is to limit the downside of the new economy without curtailing job growth or preventing people from working in the way they prefer. There is a danger of romanticising the past benefits of permanent full-time employment and fixed-job contracts when many now want alternatives.”).

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interests. It forces an unsatisfactory choice between worker classifications that either protect worker rights and benefits or promotes economic growth, but cannot accomplish both.

Unsurprisingly, this has created conflict between workers and businesses. The worker classification controversy has played out in extensive litigation, most prominently in the recent Uber lawsuit. While the Uber case offers a single straightforward example, this issue affects millions of workers and many promising gig companies. Often, other affected companies are smaller and significantly more fragile than Uber, making them more susceptible to this issue. This widespread conflict has forced to the forefront of legal discussion a single question: how can laws best protect workers, while at the same time harnessing the benefits of the gig economy?

This Note has proposed a comprehensive answer to that question. The answer provides a sustainable three-step approach that protects the future of the gig economy in the short, long, and very long term. Together, these three proposals compose a legal regime that reasonably balances business and individual interests. The initial proposal requires swift action to prevent permanent financial damage to the gig economy, securing job opportunities, and supporting technological innovation. The second proposal asks for a diligent review and redrafting of employment laws and classification tests in light of changes in the modern workforce. The final proposal advocates for a transformation of the social welfare system that guarantees economic security for all individuals and reduces corresponding financial incentives for businesses. These three proposals seek to confront the legal challenges raised by the gig economy in such a way that embraces innovation and growth without exploiting workers.

At a time when courts are struggling to classify gig workers, gig companies are unsure of their future, and gig workers are demanding answers, it is critical now, at this crucial point, that next steps taken efficiently and effectively support the future of the gig economy. The success of the gig economy depends on it. If we are not careful, we will kill the goose that has laid the golden egg.