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## The Legal Backdrop: A Maze of Confusion

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# Symposium – California Dreaming: Regulating the Gig Economy

## The Legal Backdrop: A Maze of Confusion

Francis J. Mootz III\*

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### I. INTRODUCTION

A disaggregated mode of production that is organized through numerous short-term contracts rather than stable employment relationships has disrupted labor economies around the world.<sup>1</sup> This emerging model includes the “platform economy,” in which a company creates an app to connect those seeking services with workers providing them. The most common example are platforms that connect people with a driver who will transport them somewhere (e.g., Uber) or will deliver food and other products to them (e.g., DoorDash). The relationship between the worker and the person paying for the service is fleeting and potentially a singular event. Just as a band will arrange to play a “gig” at a bar for a few hours without becoming employees of the bar, an Uber driver will accept connections through the Uber app for discrete driving “gigs” without becoming an employee

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1. Nationwide, the United States has experienced a shift from relatively high earning independent contractors who garner large wages (such as lawyers and business consultants) to a fast-growing segment of the economy in which independent contractors are low paid. See KATHERINE LIM ET AL., DEP’T OF TREASURY, INDEPENDENT CONTRACTORS IN THE U.S.: NEW TRENDS FROM 15 YEARS OF ADMINISTRATIVE TAX DATA 1 (2019).

of the riders or of the Uber platform. Many applaud this new reality; many others decry it. But one thing is certain: the “gig economy” is here to stay, and the only real question is how best to foster and regulate this new reality.<sup>2</sup>

During the past several years, California has acted more aggressively than most states to regulate the emerging gig economy, and the platform companies have launched a strong counter-attack. The result is a confusing combination of court decisions, legislation and a Proposition enacted directly by the people. This Article provides a short overview of this convoluted legal backdrop whose importance is clear. This is the next great moment in the centuries-old contest between management and labor, fought under the competing rhetorical ideals of “freedom of contract” and “worker protection.”

This Article describes the growth of regulatory structures in California that govern the gig economy by tracing the legal battles surrounding them. Beginning with the traditional common law test for employee status, the Article tracks the revision of the definition of employee by the California Supreme Court, to expansive legislation by the California Legislature, the enactment of Proposition 22 directly by the people in last November’s election, and the ensuing litigation that continues today.

## II. REGULATING THE GIG ECONOMY IN CALIFORNIA UNDER COMPETING DEFINITIONS OF “EMPLOYEE”

Under both federal and state law, many protections and social benefits for workers are expressly imposed on “employers” for the benefit of “employees.” As a result, the worker’s status as an employee is prerequisite for invoking protections under statutes that seek to limit the economic power of the employer. For example, the Fair Labor Standards Act requires certain employers to pay their employees a minimum wage per hour, and to pay an overtime premium for more than forty hours in a week. But if a homeowner hires an electrician to install new lighting fixtures, the homeowner is almost certainly dealing with an independent contractor and need not ensure that the contractor or its employees earn minimum wage and overtime during the project. Only an employee can avail herself of the protections of employment law and secure the benefits of employment law, and the homeowner does not employ the electrician.

As explained by Professor Provenzano this morning, the platform economy was originally built on the ability of the platform to treat workers as independent contractors who are connected through the app with people seeking their services.<sup>3</sup>

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2. Two professors recently argued that the “essential” status of gig workers during the Covid-19 pandemic may be a step toward eliminating the precarious nature of gig work that is premised on regarding it as a short-term source of supplemental income. Miriam A. Cherry & Ana Santos Rutschman, *Gig Workers as Essential Workers: How to Correct the Gig Economy Beyond the COVID-19 Pandemic*, 35 A.B.A. J. LAB. & EMP. L. 1, 11–16 (2020).

3. Susan E. Provenzano, *Worker Classification Conundrums in the Gig Economy*, 54 U. PAC. L. REV. 66, 66 (2022).

The business model of the platform is premised on avoiding the costs and complexity of having continuing employees. In Part A I describe the complex questions for platform workers that arise under the traditional common law test for determining who is an “employee.” In Part B I explain how this uncertainty was dramatically resolved for purposes of California wage orders under a new definition of “employee” adopted by the Supreme Court of California in the *Dynamex* case. In Part C I describe how the California Legislature expanded the *Dynamex* definition to apply to statutes beyond the state regulation of hours and wages. In Part D I discuss the adoption of Proposition 22 by the people in a direct vote, overriding the legislative definition of rideshare workers as putative employees. Finally, the Article concludes by assessing the ongoing constitutional litigation in the wake of Proposition 22.

#### *A. The Common Law Multi-Factor Control Test*

Federal and state courts generally have adopted the common law test of “agency” to determine if a worker is an “employee” for purposes of employment law protection. The United States Supreme Court emphasized that the degree of “control” exercised by the hiring entity was central to the determination, but acknowledged that there are a number of additional considerations: the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business; the provision of employee benefits; and the tax treatment of the hired party.<sup>4</sup>

As with all multi-factor tests, the court must engage in a detailed inquiry to determine how the test applies in each particular case. For example, in *Perez v. Super Maid LLC*,<sup>5</sup> the court determined that maids hired by a cleaning business were employees of that business because it exercised extensive control over their work performed for individual homeowners. SuperMaid provided the workers with vehicles, uniforms, cleaning supplies and tools. The cleaning business trained them how to clean houses and monitored their performance. SuperMaid’s home office scheduled their work, and the maids did not manage their own workflow; indeed, the business monitored the maids with GPS tracking and told them to hurry up if they were falling behind the established schedule. The maids could not increase their income by performing faster or more efficiently because their schedules were set the day before, in many cases the jobs assigned took longer than allotted, and maids faced pay deductions if rushed work resulted in complaints by clients. The business did not permit them to hire others to do their work or to assist them. Maids

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4. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992).

5. 55 F. Supp. 3d 1065, 1077 (N.D. Ill. 2014).

were not paid for time spent traveling to pick up fellow workers, driving to each jobsite, and returning the workers. Maids testified that it generally took about one hour to travel between jobs, though it could take as little as thirty minutes or as much as two hours. SuperMaid also did not provide maids with paid breaks or meal periods. Maids were required to eat meals in the vehicle between jobs or when they get home, and they were not entitled to take lunch breaks during the day. On the basis of all these facts, the court concluded that the hiring entity retained extensive control over the work and that the maids should be considered “employees” rather than independent contractors.

The common law multi-factor test that centers on control has been applied differently for claims brought under the Fair Labor Standards Act, given the broader definition of “employee” under that statute. Instead of focusing on “control” over the workers, the courts have looked to the “economic realities” of the relationship to determine if the workers have the “opportunity to earn a profit or a loss.” A leading example is *Secretary of Labor v. Lauritzen*,<sup>6</sup> a case considering the status of migrant farmworkers who harvested pickles (cucumbers) from the defendant’s fields. The court articulated the “economic realities” test as follows:

In seeking to determine the economic reality of the nature of the working relationship, courts do not look to a particular isolated factor but to all the circumstances of the work activity. . . . Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.

Among the criteria courts have considered are the following six:

- 1) the nature and degree of the alleged employer’s control as to the manner in which the work is to be performed;
- 2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee’s investment in equipment or materials required for his task, or his employment of workers;
- 4) whether the service rendered requires a special skill;
- 5) the degree of permanency and duration of the working relationship;
- 6) the extent to which the service rendered is an integral part of the alleged employer’s business.<sup>7</sup>

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6. 835 F.2d 1529, 1532 (7th Cir. 1987).

7. *Id.* at 1534–35.

Although the migrant families had “negotiated” to harvest a particular plot on the property, the court found that, as a matter of economic reality, they lacked any genuine opportunity to profit or to risk losing investment in a business. Consequently, the court concluded: “We cannot say that the migrants are not employees, but, instead, are in business for themselves and sufficiently independent to lie beyond the reach of the FLSA. They depend on the defendants’ land, crops, agricultural expertise, equipment, and marketing skills. They are the defendants’ employees.”<sup>8</sup>

Professor Provenzano has explained the many benefits for the hiring entities when the government classifies the workers as independent contractors rather than employees. Businesses that developed platforms as part of the gig economy often have structured the relationship with the worker and customer in an attempt to ensure that the workers are not employees of the customer nor the platform. Under the “control” and “economic realities” tests, this attempt at classification was certainly plausible. Consider the meal delivery platform, Grubhub, which matches customers seeking delivery of food with drivers willing to make that delivery from a local restaurant. Grubhub strives to relinquish almost all control over the work to be done, ensuring that the driver is in charge of whether she makes a profit or suffers a loss. In a recent case, a California federal district court explained in detail why Grubhub did not control the manner and means of the work, and thereby did not “employ” its drivers:

Grubhub exercised little control over the details of Mr. Lawson’s work during the four months he performed delivery services for Grubhub. Grubhub did not control how he made the deliveries—whether by car, motorcycle, scooter or bicycle. Nor did it control the condition of the mode of transportation Mr. Lawson chose. Grubhub never inspected or even saw a photograph of Mr. Lawson’s vehicle. . . . Grubhub also did not control Mr. Lawson’s appearance while he was making Grubhub deliveries.

. . .

Grubhub did not require Mr. Lawson to undergo any particular training or orientation. He was not provided with a script for how to interact with restaurants or customers. . . . No Grubhub employee ever performed a ride along with Mr. Lawson; indeed, no Grubhub employee ever met Mr. Lawson in person before this lawsuit.

. . .

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8. *Id.* at 1538.

Grubhub had no control over whom, if anyone, Mr. Lawson wanted to accompany him on his deliveries.

...

Mr. Lawson, rather than Grubhub, controlled whether and when Mr. Lawson worked, and for how long. . . . Grubhub did not require Mr. Lawson to work a minimum number of blocks nor was there a maximum number of blocks; Mr. Lawson was not required to sign up for any particular number of blocks, or any blocks at all. If Mr. Lawson did not want to perform any deliveries for a particular week or month because he was busy with his acting career or simply preferred to do something else, Grubhub did not require him to sign up for any blocks. In sum, Grubhub had no control over what blocks, if any, Mr. Lawson chose to work. Mr. Lawson could decide not to work a block he signed up for right up to the time the block started.

...

Thus, at bottom, Mr. Lawson had complete control of his work schedule: Grubhub could not make him work and could not count on him to work. Even when he signed up for a block, he could cancel his engagement right up to the block start.

...

Grubhub also did not control how and when Mr. Lawson delivered the restaurant orders he chose to accept.

...

No one at Grubhub was Mr. Lawson's boss or supervisor.<sup>9</sup>

This selective excerpt of the extensive factual analysis in the case provides a sense of how workers in the platform gig economy would be regarded under the traditional multi-factor control test. If carefully structured by the platform's lawyers, the platform can avoid the legal entanglements of having employees.

The costs and benefits of the platform approach are apparent. On one hand, when platforms consciously structure the relationship with workers to relinquish control, they are providing an important option to workers who seek highly flexible opportunities with minimal entry barriers. For example, if Mr. Lawson needed to attend to a sick pet on a particular day, he is free to cancel his driving block with Grubhub at his option. He literally has no "boss or supervisor." On the other hand, the lack of an employment relationship gives rise to potential abuse. Mr. Lawson

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9. *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1084–86 (N.D. Cal. 2018), *vacated and remanded*, 13 F.4th 908 (9th Cir. 2021) (vacating on other grounds). The multi-factor control test applied by the court was changed to the ABC test and so the analysis changed.

sought recognition as an “employee” in order to secure certain employment benefits, including minimum wage, overtime and employee expense reimbursement laws. He would argue that any freedom that he had was purchased at the cost of substandard wages. Moreover, platforms may include class waiver and arbitration provisions in their standard form agreements that make it highly unlikely that an individual case would be worth enough to sustain litigation on the question of employee status.<sup>10</sup>

The *Grubhub* case pointed toward the legal battles on the horizon to determine if gig workers enjoy the flexibility and opportunity for profit and loss associated with independent contractor status, or whether gig workers enjoy the protections of employment laws that assist them to address the superior bargaining power of the platform. Some argue that the test for employee status should be revised. Others argue that a new status was required to address the unique features of the gig economy. For example, two leading commentators argue for a new category of “independent worker” to address the needs of gig workers.<sup>11</sup> Against this backdrop, in 2018, the California Supreme Court unanimously changed the definition of “employee” under the state version of the Fair Labor Standards Act governing minimum wage, overtime wages and other benefits. We now turn to that development.

#### *B. The California Supreme Court Adopts the “ABC Test” for Wage Order Claims*

In *Dynamex Operations West, Inc. v. Superior Court*,<sup>12</sup> the California Supreme Court determined that the broadly worded language governing wage claims called for a more liberal test of “employee” than the multi-factor control test, even when the multi-factor test was attuned to the “economic realities” of the relationship. The case involved “independent drivers” hired by Dynamex to deliver parcels for Dynamex’s customers. The Court begins by succinctly describing the various interests at stake:

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10. Indeed, Grubhub successfully moved for an order denying class certification in the *Lawson* case. *Tan v. Grubhub, Inc.*, Case No. 15-cv-05128.JSC, 2016 WL 4721439 (N.D. Cal. July 19, 2016). Although *Lawson* and *Tan* both opted out of the arbitration and class waiver provisions, they were apparently the only two drivers to do so. Consequently, they clearly failed to meet the foundational “typicality and adequacy of representation” requirements of Rule 23. FED. R. CIV. P. 23(a)(3)–(4). Of course, one could seek certification of the class of drivers who did not successfully opt out, but their class claims would then be barred by the contractual waiver in their agreement with Grubhub.

11. See generally Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The ‘Independent Worker’*, HAMILTON PROJECT (Dec. 2015), [https://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf) (on file with the *University of the Pacific Law Review*).

12. 4 Cal. 5th 903, 912–13 (2018).



Under both California and federal law, the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally. On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing a worker's compensation insurance, and most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families.<sup>13</sup>

The Court determined that it could balance these interests with regard to wage and hour claims only by adopting a new definition of "employee" under the "ABC Test." The ABC test originated in some states under their unemployment compensation statutes but had also been used more generally to define employees. The California Supreme Court determined that the ABC test was appropriate for all wage and hour claims but did not apply to test beyond that context.

The ABC test begins by presuming that a worker is an employee. The hiring entity can overcome this presumption and establish that the worker is an independent contractor only by proving three things, hence the "ABC" name. The Court phrased the three-prong test as:

The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily

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13. *Id.* at 912–13.

engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.<sup>14</sup>

Element “b” has been the most challenging factor for ride-share businesses.

In an effort to satisfy element “a” and reduce control, Uber announced that California drivers could set their own fares in July 2020.<sup>15</sup> However, Uber revoked that control option for California drivers in April 2021 citing high numbers of customer cancellations due to higher driver-set prices.<sup>16</sup> Of course, this change also came after California voters approved Proposition 22 in November 2020 which, as discussed in more detail in Section D, relieves rideshare companies from satisfying the ABC test.

Element “b” requires the business to show that the worker is performing work that is outside the usual course of the hiring entity’s business. Consider a platform company such as Uber. What is Uber’s “usual course of business?” If the business is to provide rides to customers, then of course courts applying the ABC test would consider the drivers employees because they are supplying the core services provided in the course of Uber’s business. This conclusion is difficult to overcome, as the cases following *Dynamex* have made clear. On the other hand, Uber argues vigorously that its business is to provide a platform that may be used by drivers and passengers to connect with each other. In *Vazquez v. Jan-Pro Franchising Int’l. Inc.*,<sup>17</sup> the Ninth Circuit acknowledged that *Dynamex* was to be applied retroactively to a case involving the sale of cleaning services “franchises” to persons who performed the work. The court acknowledged that element “b” is the element that is most susceptible to a summary judgment, given that there will often be no dispute as to material facts when the question is simply to determine the scope of the ordinary course of the hiring entity’s business.<sup>18</sup>

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14. *Id.* at 955–56.

15. *Driver Announcements: California Drivers: Set Your Own Fares When You Drive with Uber*, UBER BLOG (June 25, 2020), <https://www.uber.com/blog/california/set-your-fares/> (on file with the *University of the Pacific Law Review*).

16. Carolyn Said, *Uber Axes Price-Naming Feature as Ride-Hail Companies Recruit New Drivers*, S.F. CHRONICLE (Apr. 8, 2021) <https://www.sfchronicle.com/business/article/Uber-axes-price-naming-feature-as-rideshare-16087206.php> (on file with the *University of the Pacific Law Review*); *California Proposition 22, Driver-Based Apps and Labor Policies Initiative*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_22,\\_App-Based\\_Drivers\\_as\\_Contractors\\_and\\_Labor\\_Policies\\_Initiative\\_](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_) (last visited July 3, 2022) (on file with the *University of the Pacific Law Review*).

17. 986 F.3d 1106, 1111 (9th Cir. 2021).

18. *Id.* at 1125.

The *Vazquez* court explained that courts have applied element “b” according to several criteria. Courts “have considered whether the work of the [workers] is necessary to or merely incidental to that of the hiring entity, whether the work of the [worker] is continuously performed for the hiring entity, and what business the hiring entity proclaims to be in.”<sup>19</sup> Although the court remanded to the trial court to assess the facts under the ABC test, it noted that the defendant faced difficulty in proving this element. The defendant’s sole business was to recover payments from its “franchisees” who provided the cleaning services consistently, unlike a plumbing contractor who might be called occasionally to provide services incidental to the defendant’s primary business.<sup>20</sup> The defendant’s argument that it was solely a franchisor has not been well-received by other courts, and the court concluded that the franchise arrangement was simply a mode of distributing a service to customers, rather than a distinct business.<sup>21</sup>

The California Court of Appeal embraced this same approach with regard to litigation seeking a preliminary injunction against rideshare businesses to cease mis-characterizing their drivers as independent contractors under the ABC test. The State has the burden of establishing, among other elements, that it has a likelihood of success on the merits of the injunction in order to receive a preliminary injunction during the pendency of the litigation. The trial court found that the rideshare platforms provided travel services as the core of their business, and so the State was likely to prevail on the merits. The Court of Appeal agreed that the “facts amply support the conclusion that, whether or not drivers purchase a [platform] service from defendants, they perform services for them in the usual course of defendants business,” and upheld the trial court determination.<sup>22</sup>

In the wake of the *Dynamex* decision, the die appeared to be cast for hiring entities in the platform economy under the ABC test. Even if the business could relinquish control significantly to meet element “a,” and even if their workers conducted an independent business by simultaneously working for multiple entities (such as Uber, Lyft, and Grubhub) that would plausibly meet the “c” element, the hiring entities had no reliable argument for meeting element “b.” Platform entities such as Uber argued that they are in the platform business rather than providing services to riders, but the courts regarded this claim with skepticism and did not endorse it. The imposition of the ABC test had seemingly ended the dispute: rideshare companies were employers of their drivers for the purpose of wage and hour claims. But after the extensive press coverage of the *Dynamex* decision and its aftermath, the legislature was primed to jump into the fray. The result of this intervention complicated matters significantly.

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19. *Id.* at 1125.

20. *Id.* at 1125.

21. *Id.* at 1126.

22. *People v. Uber Techs., Inc.*, 56 Cal. App. 266, 272 (2020); *cf. Sportsman v. A Place for Rover, Inc.*, 537 F. Supp. 3d 1081, 1095–96 (N.D. Cal. 2021) (finding that Rover was a genuine platform where service providers use their profiles to promote their services and offer their rates; Rover leaves the providers to their own devices to make a successful business.)

*C. The California Legislature Selectively Extends the ABC Test: AB 5 and AB 2257*

California Assembly Bill 5 (“AB5”) was signed into law September 18, 2019, and became effective on January 1, 2020. The law codifies the adoption of the ABC test in *Dynamex* and extends the scope of the test beyond wage and hour claims to include eligibility for unemployment compensation and general employee protections under the California Labor Code. Thus, the ABC test now defines employee status for the entire range of employee protections, except for particular occupations that were exempted by statute and therefore continue to be judged under the multi-factor control test. AB 5 exempted approximately 100 occupations, including licensed insurance agents, registered securities broker-dealers, direct sales salespersons, licensed barbers and cosmetologists, and other enumerated professionals. These exceptions are sometimes quite detailed. For example, a licensed cosmetologist is exempt, but only if the worker:

(I) Sets their own rates, processes their own payments, and is paid directly by clients.

(II) Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.

(III) Has their own book of business and schedules their own appointments.

(IV) Maintains their own business license for the services offered to clients.

(V) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space. . . .<sup>23</sup>

A cosmetologist who meets this strict test and is therefore exempted from the application of the ABC test would almost certainly be classified as an independent contractor under the multi-factor control test.

There was a storm of protest after AB 5 was enacted. On one hand, platform companies such as Uber and Lyft argued that the expansion of the limited *Dynamex* holding to the whole range of employee rights would cause severe stress on their business model and eliminate the flexibility and control their workers currently enjoyed. On the other hand, workers argued that the legislature should have exempted some occupations from the ABC test altogether, given the nature of the work performed. As just one example, publishers would not be able to treat freelance writers, editors, and photographers as employees without facing a severe

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23. AB 5, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (amending CAL. LAB. CODE § 2750.3(c)(2)(B)(xi)(I–IV) (repealed 2020)).

economic strain, and those workers would be worse off than they would be working as independent contractors working for a number of outlets. Even with AB 5 creating an exemption for writers who published fewer than 35 content pieces a year for a single outlet, the American Society of Journalists and Authors joined with the National Press Photographers Association to seek legal relief from AB 5 for their members.<sup>24</sup>

AB 5 engendered confusion and consternation across a number of occupations beyond the freelance writers. Even the quintessential “gig worker,” a musician delivering a single-engagement live performance, was potentially swept up by the broad reach of AB 5.<sup>25</sup> The law was hurriedly written at the close of the legislative session, and the myriad exemptions were not carefully considered and worked out in a consistent manner. The legislature subsequently passed some quick “fixes”, and ultimately undertook a comprehensive revision of AB 5 that was enacted less than a year later.

The California Legislature enacted AB 2257 on September 4, 2020, to substantially amend AB 5. The new law took effect immediately. Most prominently, AB 2257 addressed the problems facing music performers and freelance journalists that had been widely reported after the passage of AB 5. Moreover, AB 2257 added new exemptions for a variety of occupations, such as licensed landscape architects, real estate appraisers, and home inspectors. However, these new provisions detailing exemptions were often quite detailed. For example, the law exempts freelance writers from the ABC test, but only if the writer:

works under a written contract that specifies that rate of pay, intellectual property rights, and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity’s business location . . . and the individual is not restricted from working for more than one hiring entity.<sup>26</sup>

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24. The court denied the plaintiffs’ request for a preliminary injunction. *Am. Soc’y of Journalists and Authors, Inc. v. Becerra*, No. CV-19-10645-PSG, 2020 WL 1444909 (C.D. Cal. March 20, 2020). The case was appealed, but because the Plaintiffs were given leave to amend the appeal was dismissed. *Am. Soc’y of Journalists & Authors, Inc. v. Becerra*, No. 20-55408, 2020 WL 6075667 (9th Cir. Aug. 20, 2020). On the impact of AB 5 for these occupations, *see generally* Kerry Flynn, *Publishers Prepare for New Law that Puts Limits on Freelance Journalists*, CNN (Dec. 19, 2019), <https://www.cnn.com/2019/12/19/media/california-ab5-freelancers-media/index.html> (on file with the *University of the Pacific Law Review*).

25. *See* Makeda Easter, *The AB5 Backlash: Singers, Actors, Dancers, Theaters Sound Off on Freelance Law*, L.A. TIMES (Feb. 12, 2020), <https://www.latimes.com/entertainment-arts/story/2020-02-12/how-ab5-is-impacting-california-readers-in-the-performing-arts> (on file with the *University of the Pacific Law Review*).

26. AB 2257, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (enacting CAL. LAB. CODE § 2278(b)(2)(J)).

Although the intent is clear—don't permit publishers to offload employees into a "contractor" role—the test will likely be difficult to apply in the myriad workplace settings of the rapidly changing business models for contemporary media. This level of precision in the statute will incite the hiring entities for each occupation in the state to lobby for more fairly balanced rules.

One might expect that this would be the end of the story. The *Dynamex* decision introduced the ABC test of employee status for wage and hour claims, disrupting the emerging platform economy. The legislature quickly stepped in and expanded the scope of the ABC test to most employment law protections, but also exempted a number of business models and occupations that appeared to be working well. Those exempted hiring entities were still subject to the multi-factor control test. The balance of labor and capital had been accomplished.

However, California has a very strong tradition of direct democracy, whereby the citizens may directly enact laws in the form of initiatives that are placed on the ballot if enough voters sign their names requesting that it be subject to vote. In 2020, the voters enacted Proposition 22, which had the effect of exempting rideshare drivers from the scope of AB 5, as amended. As described in the next section, the Proposition significantly re-calibrated the regulation of the gig economy.

#### *D. The Empire Strikes Back: Proposition 22 and App-Based Drivers*

Drawing from the democratic mythology of citizen initiatives, some might claim that the classification of rideshare workers as employees so offended the populace that they spontaneously arose and sought to change the law. The political reality, of course, is quite different. After the *Dynamex* decision was endorsed and expanded by the legislature in AB 5, it was clear that rideshare platforms would find no relief by seeking a legislative exemption. Consequently, Uber, Lyft, and DoorDash led other rideshare apps to qualify Proposition 22 for the ballot and secure its approval by the voters.

The formal name of Proposition 22 was the "Protect App-Based Drivers and Services Act." The proponents were smart enough to add additional benefits for ride-share drivers to sweeten the pot, and so the Proposition was much more than merely negating the effect of AB 5 on gig workers. As the Proposition summarized:

This chapter is necessary to protect their freedom to work independently, while also providing those workers new benefits and protections not available under current law. These benefits and protections include a healthcare subsidy. . . .; a new minimum earnings guarantee tied to one hundred twenty percent (120%) of minimum wage without maximum; compensation for vehicle

expenses; occupational accident insurance to cover on-the-job injuries; and protection against discrimination and sexual harassment.<sup>27</sup>

The public relations campaign was straightforward: allow drivers to have continued flexibility to work as contractors but provide them with some of the most important “employee” benefits that protect them from exploitation. Platform companies funded this campaign in extravagant fashion, spending more than \$205 million in the effort to enact Proposition 22. In contrast, the labor groups fighting the initiative spent only \$19 million in support of their position. The total spending on Proposition 22 was by far the most money ever spent on an initiative in California.<sup>28</sup> The turnout for this election was uncommonly high, given that Donald Trump was running for a second term as President of the United States. More than 80% of the registered voters in California voted on Proposition 22, lending democratic legitimacy to the result.<sup>29</sup> And the result was definitive: Proposition 22 was adopted by a vote of 58.6% to 41.4%.<sup>30</sup>

As codified, Proposition 22 §1 establishes the following test for platform drivers to be considered independent contractors:

Notwithstanding any other provision of law . . . an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver’s relationship with a network company if the following conditions are met:

(a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company’s online-enabled application or platform.

(b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintain access to the network company’s online-enabled application or platform.

(c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.

(d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.<sup>31</sup>

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27. Cal. Proposition 22 (2020).

28. BALLOTPEDIA, *supra* note 16.

29. 2020 California Proposition 22, WIKIPEDIA, [https://en.wikipedia.org/wiki/2020\\_California\\_Proposition\\_22](https://en.wikipedia.org/wiki/2020_California_Proposition_22) (last updated Sept. 1, 2022) (on file with the *University of the Pacific Law Review*).

30. ALEX PADILLA, SEC’Y OF STATE, STATEMENT OF VOTE (2020).

31. Protecting Independence, CAL. BUS & PROF. CODE § 7451 (West 2022).

As should be apparent, this test relaxes the multi-factor control test to a few basic considerations. Other elements of the control test, such as control over rates charged to platform customers, no longer play a role in worker classification.

The broader implications of Proposition 22 are significant. First, it divides workers into two pools: those who work for transportation and delivery platforms are deemed independent contractors under the test above, but those who work in other sectors of the gig economy remain subject to AB 5 and are almost certainly to be regarded as employees under the ABC test. The CEO of Thumbtack, a platform company that matches homeowners with personal service workers such as handypersons or tutors, concluded that “[t]he success of Uber, Lyft, and others in essentially writing their own labor law looks bad . . . and makes it harder for everyone to engage in good-faith conversations about how to reconfigure regulations so they’re fairer to everyone, workers included. ‘Proposition 22 takes us further from a fundamental solution and a holistic approach, and sets a terrible precedent,’ he [said].”<sup>32</sup> Indeed, the parties used legislation and the initiative process to create a complex and unprincipled regulatory scheme.<sup>33</sup> It should be no surprise that battle is now being fought on constitutional grounds, with Proposition 22 and AB 5 both under attack.

#### *E. The Last Dance? Constitutional Challenges*

Currently, the parties have launched dueling constitutional challenges. On one hand, the platform companies have challenged AB 5 (as amended) for using an irrational scheme of exemptions to subject certain businesses to disparate treatment based on irrational animus and political favoritism. On the other hand, opponents of Proposition 22 have sued to declare it unconstitutional for infringing on the legislature’s plenary constitutional power regarding Workers’ Compensation.<sup>34</sup> If one or both of these challenges prevail, the legal landscape will be substantially disrupted yet again. If both challenges fail, this may be the last dance before the regulatory regime settles into an uneasy combination of AB 5 and Proposition 22.<sup>35</sup>

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32. Aarian Marshall, *Who’s Still Covered by California’s Gig Worker Law?*, WIRED (Nov. 18, 2020), <https://www.wired.com/story/whos-still-covered-californias-gig-worker-law/> (on file with the *University of the Pacific Law Review*).

33. Nevertheless, Uber, Lyft, Instacart and DoorDash are pushing ballot two initiatives in Massachusetts that are similar to Proposition 22. See Emma Platoff, *Gig Worker Petitions Move One Step Closer to 2022 Ballot*, BOSTON GLOBE (Dec. 27, 2021), <https://www.bostonglobe.com/2021/12/27/metro/gig-worker-petitions-move-one-step-closer-2022-ballot/> (on file with the *University of the Pacific Law Review*) (noting that the 80,000 signatures obtained clears the way for a vote on the petitions).

34. This is not an exhaustive list of the litigation arising out the issue of gig worker classification. For example, the California Trucking Association argued that the California Labor Commissioner was preempted by federal law from purporting to classify owner-operators as employee under application of the multi-factor control test. See generally *California Trucking Ass’n v. Su*, 903 F.3d 953 (9th Cir. 2018) (holding that there was no federal preemption of AB 5). After enactment of AB 5, the Association renewed its preemption argument. See *California Trucking Association v. Bonta*, 995 F.3d 644 (9th Cir. 2021) (holding that there was no federal preemption). In this short essay, I focus on the constitutional challenges to AB 5 and Proposition 22.

35. A number of cases, including *Lawson v. Grubhub*, were caught between the shifting legal standards



1. The Constitutional Challenges to AB 5

A number of workers have challenged AB 5, alleging that it infringes on their First Amendment rights, but these cases have generally been dismissed promptly and without much fanfare.<sup>36</sup> Of greater interest, several platform companies, including Uber and Postmates (which was later acquired by Uber and now operates at UberEats), joined with several drivers to challenge the constitutionality of AB 5 because it draws irrational distinctions. The District Court denied the plaintiffs' motion for a preliminary injunction on February 10, 2020. Subsequently, the District Court granted the defendants' motion to dismiss, with prejudice, on July 16, 2021, and entered judgment for the defendants.<sup>37</sup> These two rulings were consolidated on appeal to the Ninth Circuit Court of Appeals. The Plaintiff-Appellants filed their opening brief on November 17, 2021, and the defendants have yet to file their responding brief.

The platform companies and drivers argue that AB 5 irrationally targeted network companies providing driving services, and then compounded that mistreatment by arbitrarily rolling back the effect of AB 5 for millions of workers by enacting AB 2257 without having any reasonable basis for distinguishing between the various categories of workers. This equal protection challenge was summarized in their opening brief as follows:

AB2257 magnified the irrational line-drawing in AB5, nullifying the ABC test for millions *more* workers by creating new classes of exemptions and broadening the categories of exemptions contained in AB5. For example, AB2257's "referral agency exemption arbitrarily excluded Uber and Postmates while exempting other errands-based apps like TaskRabbit . . . and Wag!" The complaint details how these exempted service providers' work is factually identical in all relevant respects to the work performed by app-based drivers, including that the "service providers who use TaskRabbit and Wag! have the same patterns

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over the past two years. 302 F. Supp. 3d 1071. At trial, the District Court determined that the drivers were not employees under the control test, but the trial judge also determined that "food delivery was part of Grubhub's regular business in Los Angeles." *Id.* at 1090. Because *Dynamex* was deemed to have retroactive effect, the Ninth Circuit remanded for a full factual determination under the ABC test as articulated in *Dynamex. Lawson v. Grubhub, Inc.*, 13 F.4th 908, 916–17 (9th Cir. 2021). Although Proposition 22 subsequently altered the application of the ABC test under AB 5, the court found that it did not abate the effects of Lawson's pre-existing rights under the ABC test. *Id.* at 915–16. As a result, the litigation is continuing under the ABC test and not under Proposition 22.

36. See, e.g., *Am. Soc'y of Journalists & Authors v. Becerra*, No. CV-19-10645-PSG, 2020 WL 1444909 (C.D. Cal., March 20, 2020) (rejecting the first Amendment claims by freelance writers and journalists); see also *Crossley v. California*, 479 F. Supp. 3d 901 (S.D. Cal. 2020) (rejecting the First Amendment claims of data processing entities that hired workers to qualify measures for the ballot); *Mobilize the Message, LLC v. Bonta*, No. 2:21-CV-05115-VAP-JPRx, 2021 WL 3556959 (C.D. Cal., Aug. 9, 2021) (Order denying Motion for Preliminary Injunction brought by companies who hire door knockers for political campaigns).

37. *Olson v. Bonta*, No. 19-cv-10956-DMG-RAO, 2021 WL 3474015 (C.D. Cal., July 16, 2021).

of use as the ‘drivers’ and ‘couriers’ who use Uber and Postmates.” In fact, Wag!’s business model is so similar, it is often referred to as “Uber for dogs.” [citations to complaint omitted]<sup>38</sup>

Needless to say, this argument is a long shot. Of course, if Proposition 22 is upheld, Uber will no longer be subject to disparate treatment, although ironically other platform companies not included within the scope of Proposition 22 have made similar claims of disparate treatment against Uber.<sup>39</sup>

## *2. The Constitutional Challenges to Proposition 22*

Proposition 22 sought to prevent easy amendment by the legislature, further inhibiting any attempt to provide a comprehensive solution to worker categorization. The Proposition was immediately challenged for intruding on the legislature’s plenary power under the constitution to establish and maintain a workers’ compensation system of insurance, and also for subverting the Supreme Court’s power to interpret the provisions of the law.<sup>40</sup> The Emergency Petition was denied by the Supreme Court on February 3, 2021, and so the plaintiff filed the litigation in the Superior Court where the case is now proceeding.

The proponents of Proposition 22 sought to immunize its protection of transportation and delivery platform apps from subsequent legislative action that would disturb the classification of their workers as independent contractors. To this end, section 7145 expressly declares that the designation is not reversible so long as certain workplace criteria are met.<sup>41</sup> Unions and worker’s rights groups argue that the law interferes with the legislature’s plenary power under the constitution to establish and administer a workers’ compensation system. On August 20, 2021, the trial judge ordered that the entirety of Proposition 22 was unconstitutional in light of this infirmity, given a non-severability provision in the law.<sup>42</sup>

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38. Plaintiffs-Appellants’ Opening Brief, Appeal from Dismissal of Plaintiffs’ Second Amended Complaint, *Olson v. California*, Nos. 20-55267 and 21-55757 (9th Cir., filed November 17, 2021).

39. The plaintiffs also argued that AB 5 unconstitutionally impaired their right to enter into contracts, and had the effect of a Bill of Attainder by imposing “punishment” without due process.

40. See Emergency Petition for Writ of Mandate and Request for Expedited Review, *Castellanos v. California* No. RG21088725, 2021 WL 3730951 (Cal. Super. Jan. 12, 2021).

41. In a section entitled, “Protecting Independence,” the law enacted by Proposition 22 ensures that its definition of app-based drivers prevails, “Notwithstanding *any other provision of law, including, but not limited to*, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations.” CAL. BUS. & PROF. CODE § 7451 (West 2022) (emphasis added).

42. Order Granting Petition of Mandate, *Castellano v. State of California*, No. RG21088725, 2021 WL 3730951 (Cal. Super. Aug. 20, 2021).

The arguments are elegant, even if a bit peculiar. First, the California constitution establishes plenary authority of the legislature to create and enforce a complete system of workers' compensation.<sup>43</sup> The workers' compensation system applies to "employees," and so altering the classification of employees alters the scope of the system.<sup>44</sup> Because an initiative may be amended only by legislative action that is then sustained by the voters, the legislature does not exercise the plenary power granted to it by the constitution. By reclassifying app drivers as "independent contractors" and exempting them from the legislature's adoption of the ABC test in AB 5, Proposition 22 effectively undermined the legislature's authority to determine the scope of the workers' compensation program. As the court concluded, "Proposition 22's Section 7451 is therefore an unconstitutional continuing limitation on the Legislature's power to exercise its plenary power to determine what workers must be covered or not covered by the worker's compensation system."<sup>45</sup>

Additionally, the court found that the law unconstitutionally sought to constrain legislation regarding collective bargaining that could not be construed as an amendment of the law. Limitation of collective bargaining rights does not fall within the stated purpose of Proposition 22 to protect the flexibility enjoyed by drivers who are independent contractors. The court reasons:

No other part of Proposition 22 deals with collective bargaining rights other than Section 7465, subdivision (c)(4), and it does so only obliquely and indirectly, as a side effect of a contested construction of certain antitrust laws as barring independent contractors from bargaining collectively. This is related to Proposition 22's subject [matter] but it is utterly unrelated to its stated common purpose. A prohibition on legislation authorizing collective bargaining by app-based drivers does not promote the right to work as an independent contractor, nor does it protect work flexibility, nor does it provide minimum workplace safety and pay standards for those workers. It appears only to protect the economic interests of the network companies in having a divided, ununionized workforce, which is not a stated goal of the legislation.<sup>46</sup>

The case is currently on appeal to the California Court of Appeal, pursuant to Notices of Appeal filed in September 2021. The wrangling is far from over.

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43. CAL. CONST. art. XIV, § 4.

44. See CAL. LAB. CODE § 3600(a) (West 2022) ("Liability for the compensation provided by this division, . . . shall . . . exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . .").

45. *Castellanos v. State*, No. RG21088725, 2021 WL 3730951, at \*4 (Cal. Super. Aug. 20, 2021), *appeal docketed*, No. A163655 (Cal. App. Dec. 13, 2021).

46. *Id.*

### III. CONCLUSION

Those who control the gig economy and the new labor platforms insist that this is a new era of freedom for workers to sell their labor to multiple different purchasers, rather than being constrained through an exclusive employment relationship. Indeed, many workers celebrate their freedom of choice. Of course, this choice is often between working a number of gigs or finding a fully satisfactory job in the traditional employment economy. When that traditional economy stalls and unemployment rises, at least some gig workers discover that their freedom to choose has quickly become a necessary strategy to survive. They then find themselves working outside the protections of employment law, including minimum wage and basic benefits, in a struggle to make ends meet. I have described the California experience of seeking to regulate this “freedom” in a manner that preserves the dignity of workers without erasing the benefits of freedom altogether. Regulatory balancing is an important goal. We cannot simply assume that the “free” market will properly align the interests of workers, hiring entities, and society. As Janis Joplin hauntingly reminds us, all too often “freedom is just another word for nothin’ left to lose.”<sup>47</sup>

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47. JANIS JOPLIN, *Me and Bobby McGee*, on PEARL (Columbia Recs. 1971) (written by Fred Foster and Kris Kristofferson).

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