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'Freedom's Just Another Word for Nothin' Left to Lose': The Ongoing Struggle to Properly Regulate the Gig Economy in California

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"FREEDOM'S JUST ANOTHER WORD FOR NOTHIN' LEFT TO LOSE":[1] THE ONGOING STRUGGLE TO PROPERLY REGULATE THE GIG ECONOMY IN CALIFORNIA

"LIBERDADE É APENAS OUTRA PALAVRA PARA DIZER 'NÃO HÁ MAIS NADA A PERDER' ": A BATALHA INACABADA PARA A REGULAÇÃO LABORAL DA "GIG ECONOMY" NO ESTADO DA CALIFÓRNIA

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1 ME AND BOBBY McGee. Intérprete: Janis Joplin. Compositores: Fred Foster e Kris Kristofferson. In: PEARL. Intérprete: Janis Joplin. Los Angeles: Columbia Records, 1971. LP, faixa 7.

2 I would like to thank Daniel Pulino, for inviting us to write this article, Maria Beatriz Almeida Brandt, my student, and the Editors of Revista da AGU for publishing the article with their Journal.

SUMMARY: Introduction. 1. The Growth of the Gig Economy in California: Economic and Normative Considerations. 2. Regulating the Gig Economy in California under Competing Definitions of "Employee". 2-A. A. The Common Law Multi-factor Control Test. 2-B. The California Supreme Court Adopts the "ABC Test" for Wage Order Claims. 2-C. The California Legislature Selectively Extends the ABC Test: AB 5 and AB2257. 2-D. The Empire Strikes Back: Proposition 22 and App-Based Drivers. 3. Thoughts on Ending the Regulatory Chaos Surrounding the Gig Economy. 4. Conclusion.

SUMÁRIO: Introdução. 1. O Crescimento da "Gig Economy"[3] (Setor de Serviços por Aplicativo) na Califórnia: Considerações Econômicas e Jurídicas. 2. Regulando o Trabalho na "Gig Economy" na Califórnia a partir das Definições Concorrentes de "Empregado" no Direito Norte-Americano. 2-A. O Teste Multi-Fatorial do Sistema da "Common Law" para Aferir a Subordinação Trabalhista. 2-B.

3 NdT: Optamos por manter a expressão original "gig economy" não só por sua difusão nos ambientes especializados, mesmo em publicações nacionais, como por sua maior precisão para discussão em nível técnico e acadêmico. Seu significado, no Brasil, vem sendo comumente identificado com o termo "uberização" do trabalho, por simplificação e adoção por prevalência daquela que é talvez a mais característica (embora não a única) das plataformas digitais a que diz respeito o fenômeno. O tema é inserido mais amplamente, no Direito do Trabalho, dentro do estudo da precarização e informalidade laborais e está diretamente ligado às relações de trabalho que decorrem dos serviços oferecidos por aplicativos. Segundo Nogueira e Carvalho (2021, p. 59-61), a "gig economy" ou uberização "[r]eúne o conjunto das atividades cuja 'alocação' do trabalhador se dá por intermédio de um aplicativo, seja para telefone celular, seja para computadores – ou, para resgatarmos um elemento utilizado quando descrevemos a terceirização, pela presença de uma empresa operadora de aplicativo que opera como interposto. Esta é, efetivamente, uma modalidade recente de contratação, surgida principalmente a partir da difusão dos aplicativos para smartphones. Trata-se daquilo que Oitaven, Carelli e Casagrande (2018) chamam de 'economia do bico'. Essa expressão talvez não seja a mais apropriada para descrever esta situação, pois, se por um lado a palavra bico carrega consigo a ideia de precariedade das relações existentes, por outro pode sugerir que se trata de uma ocupação eventual ou secundária, quando muitas vezes, senão na maioria delas, é de fato a ocupação principal do trabalhador". Segundo os mesmos autores e na mesma passagem, são três as modalidades de relações de trabalho que se enquadram nessa categoria: (i) serviços específicos "on-demand" (p. ex., uber, 99); (ii) entregas "on-demand" (Ifood, Rappi, p. ex.) e; (ii) plataformas de mera intermediação de serviços entre um cliente final e, diretamente com este, um prestador profissional, as quais cumprem papel semelhante ao dos antigos classificados de jornais (p. ex., a plataforma Getninjas).

ABSTRACT: In this article, a law professor and economist from the United States assess the recent efforts in California to address the gig economy and the designation of workers as either "employees" or "independent contractors." They offer their suggestions for productive ways forward in this effort.

RESUMO: Neste artigo escrito em coautoria, dois professores de uma faculdade de Direito norte-americana, um deles jurista e o outro economista que é professor de Políticas Públicas, avaliam os recentes esforços adotados pelo estado da Califórnia[5] visando regular a "gig economy" (o setor de serviços por aplicativos ou plataformas digitais) no que diz respeito especificamente ao tema da qualificação de seus trabalhadores como "empregados" ou "trabalhadores autônomos". Ao final do artigo, os autores oferecem sugestões para possíveis caminhos produtivos a seguir neste esforço.

4 NdT: Ao texto original, escrito em Inglês, foram acrescidos o sumário e as palavras-chave em Inglês (para atendimento das exigências de publicação, mesma razão aliás que levou à necessidade de adaptar todas as citações e referências, uma a uma) e foi ele livremente traduzido apenas no título, sumário, resumo e palavras-chave, além do acréscimo de algumas poucas notas explicativas (NdT), por Daniel Pulino – que é Procurador Federal, Professor da Faculdade de Direito da PUC/SP, mestre e doutor pela PUC/SP, e participante, entre meados de 2019 e 2020, do programa de "Visiting Scholar" da Faculdade de Direito da Universidade da Califórnia, campus Davis, pela Escola da AGU, período em que o Professor Francis J. Mootz lecionou em referida Universidade. A ele em particular (e agora a Jeffrey Michael) registre-se um grande agradecimento, pelo atendimento ao convite com a produção de tão atual e inédito artigo. E pela oportunidade, aproveitamos para também agradecer, sincera e profundamente, à Escola da AGU, assim como, mais amplamente, à AGU, à PGF e à Procuradoria Federal junto à Previc, pela inestimável oportunidade de estudo, sem a qual aquele encontro e o presente artigo não teriam ocorrido.

5 NdT: Em contraposição à velocidade com a qual passamos a assistir, no mundo todo, à expansão dos serviços por aplicativo ou plataformas digitais na última década (e com acelerada intensidade, particularmente, a partir das transformações impostas pela pandemia da Covid-19), a regulação legal das relações laborais inerentes a esse novo e cada vez mais presente setor da economia tem sido marcada pela lentidão na busca e sobretudo na descoberta de soluções capazes de responder adequadamente aos reais problemas surgidos quanto à precarização e falta de suficiente proteção aos trabalhadores, diante da redução de custos e liberdade de vinculação laborativa que são características do próprio modo de funcionamento do modelo de negócio.

KEYWORDS: Freedom to work. Worker protection. Gig Economy. Employee. Independent Contractor. Dynamex Case. California Assembly Bill 5 ("AB5"). Proposition 22.

PALAVRAS-CHAVE: Liberdade de Trabalho. Legislação Trabalhista. Setor de Serviços por Aplicativo. Empregados. Trabalhadores Autônomos. Caso "Dynamex" (da Suprema Corte do Estado da California). Projeto de Lei Estadual AB 5. Proposição 22.

Vivemos possivelmente ainda uma fase que, se não é de completa desregulação dessas relações de trabalho (comparável talvez à primeira etapa da Revolução Industrial no século XVIII), é ao menos, seguramente, de enorme dificuldade para enquadrar o novo fenômeno nas categorias jurídicas tradicionalmente postas no âmbito legal e jurisprudencial do Direito do Trabalho para enfrentar os desafios surgidos. E justamente visando responder a tais desafios, a recentíssima experiência vivida no estado norte-americano da Califórnia (não por acaso, local de origem e sede de alguma das gigantes companhias do setor, como é o caso de Uber, Lyft, Doordash, para ficar em poucos exemplos), com suas reviravoltas que bem se acham descritas neste trabalho, talvez seja uma das mais ricas e significativas em todo o mundo e, justamente por isso, pode acabar servindo de modelo de análise e ensaio para muitos outros países, como aqui mesmo no Brasil. Vem daí então, não obstante as acentuadas e inegáveis diferenças legais entre os sistemas jurídicos brasileiro e norte-americano, a atualidade e o interesse do presente artigo, que nos é apresentado por dois qualificados estudiosos nativos que acompanharam e ainda acompanham de perto a experiência californiana e que podem, assim, nos oferecer sua abalizada visão do momento em que hoje se situam as principais discussões desse assunto, que é, literalmente, da ordem do dia em praticamente todo os países do mundo.

Dentro do federalismo norte-americano, a constituição estadual da Califórnia (como a de vários outros estados) prevê instrumentos de democracia direta (como também há entre nós, na Constituição Federal, o plebiscito, o referendo e a iniciativa popular de leis) chamados de "ballot propositions", que podem ser de vários tipos e finalidades, como emendar leis ou a constituição estaduais, criar novas leis, rejeitar leis existentes etc. A "Proposition 22" resultou formalmente de iniciativa popular mediante coleta de assinaturas, após campanha fortemente financiada justamente pelas maiores companhias do setor de serviços por aplicativo (foram mais de 205 milhões de dólares vertidos por Uber, Lyft, Doordash, Instacart e Postmates, contra aproximados 20 milhões de dólares apenas reunidos pelos sindicatos que fizeram campanha pela rejeição da proposição), resultando na sua aprovação na última eleição geral de 3 de novembro de 2020 (as "propositions" estaduais na California podem ser votadas juntamente com a eleição geral, e foi este o caso), a mesma que elegeu o atual presidente Joe Biden. A medida acabou sendo aprovada pelos eleitores por cerca de 59% dos votos. Com a vitória, as companhias passaram a poder classificar seus motoristas como trabalhadores autônomos ("independente contractors"), não como empregados ("employees"), o que as isentou da observância das condições legais de proteção a estes, desde que fossem concedidas algumas condições mínimas de trabalho, inferiores, naturalmente, às dos empregados.

INTRODUCTION

Labor economies around the world are being disrupted by a disaggregated mode of production that is organized through numerous short-term contracts rather than stable employment relationships.[6] 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., 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 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, and the only real question is how best to foster and regulate this new reality.[7]

In this short article, we will describe how California has addressed the gig economy. Over the past few years, California has acted far more aggressively than most States in the United States, through a combination of court decisions, legislation and a Proposition enacted directly by the people. The California experience has been complex and somewhat convoluted, but the guiding principle 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 is organized in three parts. First, we describe the advent of the gig economy in California and note its rapid expansion. Second, we describe the growth of regulatory structures that govern the gig economy, explaining the transition from the common law definition of employee, to a revision of the definition by the California Supreme Court, to expansive legislation by the California Legislature, and finally to the enactment of Proposition 22 directly by the people in last November's election. Third, we offer our suggestions for how this chaotic regulatory

6 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. (2019).

7 Two professors (CHERRY; RUTSCHMAN, 2020, p. 11-16) 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.

story might better serve the needs of workers and their customers. We write together as a Professor of Law and as a Professor of Public Policy with a focus on economics, because this issue calls for an interdisciplinary approach to understand and react to the rapidly changing legal, economic, political and social contexts.

1. THE GROWTH OF THE GIG ECONOMY IN CALIFORNIA: ECONOMIC AND NORMATIVE CONSIDERATIONS.

The number of self-employed workers in California grew steadily over a recent five-year period, apparently driven largely by the explosion of those participating in the platform economy. The census data on "nonemployer" individual proprietors shows growth from 2.607 million workers in 2012 to 3.066 million workers in 2018 (an increase of 18% in six years). Transportation accounted for the majority of that growth, moving from 121,527 workers in 2012 to 393,340 workers in 2018 (an increase of 224% in six years). While this growth is remarkable, it is certainly an underestimate due to nonreporting on taxes and because nonemployer statistics do not include those with reported business earnings under $1,000.[8] The transformation has accelerated over the past several years.

This data concerns all independent contractors, not just those engaged in the platform models of the gig economy. Given current data collection by tax authorities, it is difficult to focus directly on the growth of gig workers (such as a driver for Uber) as opposed to more traditional subcontractors who are self-employed (such as a plumber who markets himself to potential customers).[9] Nevertheless, a recent study by an economist from UCLA (FELER, 2020, p. 3) provides stunning

8 Compare:
https://data.census.gov/cedsci/table?q=nonemployer&g=0400000US06&tid=NONEMP2018.NS1800NONEMP&hidePreview=false.
with:
https://data.census.gov/cedsci/table?q=nonemployer&g=0400000US06&tid=NONEMP2012.NS1200NONEMP&hidePreview=false.
The data is difficult to analyze accurately, as acknowledged by Katz and Krueger (2019, p. 3). The authors walk back their 2015 estimate of the enormous growth of "alternative work arrangements" and describe the "difficulty capturing changes in the incidence of casual or intermittent work in the United States" due to a variety of factors.

9 In 2017 the U.C. Berkeley Center for Labor and Research and Education published a white paper that describes the difficulties in quantifying the growth of the gig economy as distinguished from traditional independent contractors. See Annette Bernhardt and Sarah Thompson (2017). The authors suggest that the appropriate inquiry is whether the work performed is the worker's primary job or for supplemental income, and whether the job is a "quality job".

confirmation of the rapid expansion of the number of workers participating in the platform economy through rideshare apps such as Uber or Lyft. The study concludes that the apps "expanded the market for 'taxi and limousine services' in California by 171,000 drivers and $3.3 billion" in revenues from 2010 to 2018 (FELER, 2020, p. 3). This growth was in addition to the forecasted steady growth of these services that would have occurred in the absence of the gig economy. Because the majority of drivers use the platforms as a source of supplemental income and to bridge financial challenges, it is critical that these workers have low barriers to entry and flexibility in scheduling (FELER, 2020, p. 5). The study suggests that "by helping workers smooth economic shocks and earn additional income, the gig economy reduces the government's role in caring for these workers." (FELER, 2020, p. 5).

Of course, this observation elides important normative considerations. The foremost question is whether drivers should have to submit to the limitations of the gig economy to survive economic challenges that could be addressed by a more robust social safety net. Another way of reading the data is that drivers require and celebrate flexibility in schedules because they are forced to cobble together several jobs in order to earn a living wage. Or that the newly unemployed often turn to ride-share services because unemployment benefits, up until the COVID-19 pandemic, have been too small to cover basic needs. Consider the author's conclusion about the growth of this sector of the economy:

> Even before the current recession, when California's economy was running at 3.9 percent unemployment, its lowest level in decades, the number of people signing up to work for Uber and Lyft as independent contractors kept increasing. This is a revealing fact. It means that even when there are lots of other jobs available, people still want to drive for Uber and Lyft. [Treating these workers as employees] would ration these opportunities to those who are able to work full-time and would reduce options for people seeking part-time work and supplemental income. (FELER, 2020, p. 7-8).

It is not at all clear that the attraction of rideshare apps to workers seeking supplemental income proves that the gig economy is beneficial to workers in general.[10] Even if converting all drivers to employees would sharply reduce the number of part-time, supplemental jobs, it would likely

10 We put to the side for now the question of the benefits to consumers and the impact on the economy as a whole. The growth in the number of drivers is a direct result of the strong consumer response to the convenience and affordability of these new services.

lead to substantial improvements for full-time workers most dependent on this income. It is reasonable to ask if the focus of regulation of labor policy should be to improve the inadequacies of the employment opportunities that motivate employed workers to supplement their income in the "flexible" gig economy in the first place.

On the other hand, there clearly are a significant number of workers who genuinely took advantage of the flexibility offered by the gig economy. Examples come to mind easily, and are confirmed anecdotally by our conversations with drivers over the years: retirees who want to earn a little extra income at their convenience while enjoying some social interactions; graduate students earning some extra cash in between their classes and teaching obligations; and primary caregivers who are able to drive for a few hours while their children are in school to help supplement their income. These persons are not turning to the gig economy out of desperation, but are more freely choosing a convenient and flexible source of additional income. Assuming that the majority of workers fall back on the gig economy to buffer periodic financial distress might explain why many workers "typically use platforms in short bursts and for limited amounts of time: more than half (52%) of labor platform participants exit within 12 months (40% within the first 6 months) – (BERNHARDT; THOMPSON, 2017, p. 16). But it might equally be the case that the drivers abandon the option because the platform provides insufficient pay and benefits to make it worth the effort. Consequently, there are many "truths" to consider when seeking to regulate a sector of the economy that is not yet fully understood.

The COVID-19 pandemic and the resulting U.S. policy response has added new dimensions. The pandemic caused both consumer demand and driver supply for rideshare apps to plunge due to safety concerns, while demand for gig-workers by food and grocery delivery apps surged. In addition, the U.S. government has temporarily added a large supplement to unemployment benefits and extended unemployment benefits to independent contractors, including rideshare drivers, that were previously exempt. In Spring 2021, consumer demand for travel has started to recover as COVID-19 vaccinations increase, and the rideshare companies have suddenly found themselves with an extreme shortage of drivers that has left them frequently unable to satisfy their customers' requests for rides (FORMAN, 2021).

The shortage of drivers has temporarily led to higher fares and higher earnings for drivers. Uber and Lyft were reporting hourly driver

earnings were 25% to 75% higher than pre-pandemic earnings in April 2021 (BELLON, 2021).

Historically, newly unemployed workers have been the largest source of new rideshare drivers, but for much of the pandemic, these unemployed workers have received a federal supplemental payment in addition to regular unemployment benefits from their state. Between March and September 2021, the federal supplement to unemployment benefits is an additional $300 per week. These enhanced safety-net benefits make it harder for rideshare companies to attract new drivers from the ranks of the unemployed. The $300 weekly unemployment supplement is scheduled to expire in September 2021, and could provide a natural experiment to determine the relationship between a weak social safety net and rideshare driver supply.

2. 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 limited to "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. Only an employee can avail herself of the protections of employment law and secure the benefits of employment law.

The platform economy is built on the categorization of the workers as independent contractors who are connected through the app with people seeking their services. The business model is premised on avoiding the costs and complexity of having continuing employees. In Part A we explain that complex questions for platform workers arise under the traditional common law definition of "employee." In Part B we describe 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 we describe how the California legislature expanded the new *Dynamex* definition to apply to questions beyond the regulation of hours and wages. Finally in Part D

we describe the adoption of Proposition 22 by the people in a direct vote, overriding the legislative definition of rideshare workers as putative employees.

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 question of the degree of "control" exercised by the hiring entity was central to the determination, but noted the 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 (UNITED STATES, 1992).

As with all multi-factor tests, the court must engage in a detailed inquiry to determine how the test applies to particular cases. We now turn to a typical case applying the multi-factor control test.

In *Perez v. SuperMaid LLC* (UNITED STATES, 2014), the court determined that maids hired by a cleaning business were employees because the business exercised extensive control over their work. The maids were provided with vehicles, uniforms, cleaning supplies and tools. They were trained how to clean houses, and their performance was monitored. Their work was scheduled by the home office, and the maids did not manage their own workflow; indeed, they were monitored by GPS and told 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. Maids were not allowed to hire others to do their work or to assist them. Maids were not paid for time spent traveling to pick up the 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. One 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 statue. 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 v. Lauritzen* (UNITED STATES, 1987), a case considering the status of migrant farmworkers who harvested pickles (cucumbers) from the defendant's field. 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. (UNITED STATES, 1987, p. 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" (UNITED STATES, 1987, p. 1538).

Against this legal backdrop, businesses that developed platforms as part of the gig economy have structured the relationship with the worker and customer in an attempt to ensure that the workers are not their employees. Consider the meal delivery platform, Grubhub, which matches customers seeking delivery of food with drivers willing to make that delivery. Grubhub seeks 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. As a result, Grubhub does not need to comply with employment law protections of its drivers. In a recent case, a California court explained in detail why Grubhub did not control the manner and means of the work:

> 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.
>
> ...
>
> 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 (UNITED STATES, 2018a).

This selective excerpt of the extensive factual analysis in the case provides a sense of how workers in the 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 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.

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 associate 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 argued that the test for employee status should be revised. Others argued 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 (HARRIS; KRUEGER, 2015). Against this backdrop, in 2018 the California Supreme Court 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* (UNITED STATES, 2018b), 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:

> 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 (UNITED STATES, 2018b, p. 912-913).

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 or the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed (UNITED STATES, 2018b, p. 955-56).

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 (UBER Blog,

2020). However, Uber revoked that control option for California drivers in April 2021 citing high numbers of customer cancellations due to higher driver-set prices (SAID, 2021). Of course, this change also came after California voters approved Proposition 22 in November 2020 which as discussed in more detail in Part 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 the drivers would be considered 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. In *Vazquez v. Jan-Pro Franchising Int'l, Inc.* (UNITED STATES, 2022), 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 course 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 ordinary course of the hiring entity's business (UNITED STATES, 2022, p. 15).

The court explained that element "b" has been applied by courts 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 (UNITED STATES, 2022, p. 16). 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 (UNITED STATES, 2022, p. 17). The defendants argument that it was solely a franchisor has not been will-received by other courts, and the court concluded that the franchise arrangement was simply a mode of distributing a service to customers, and not a distinct business (UNITED STATES, 2022, p. 17).

The California Court of Appeal embraced this same approach with regard to litigation seeking a preliminary injunction against rideshare

businesses that orders them to cease mis-characterizing their drivers as independent contractors under the ABC test. The State has the burden of showing, 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 the 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 (UNITED STATES, 2020a).

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 they 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 where 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.

C. The California Legislature Selectively Extends the ABC Test: AB 5 and AB2257.

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 continued to be judged under the multi-factor control test. There were approximately 100 exempted occupations, which included 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...(UNITED STATES, 2019)*

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 AB5 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 the workers currently enjoyed. On the other hand, workers argued that some occupations should have been exempted 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 economic strain, and those workers would be worse off than they would be working as independent contractors writing for a number of outlets. Even with AB5 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 AB5 for their members.

AB5 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 AB5 (EASTER, 2020).

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 AB5 that was enacted less than a year later.

The California legislature enacted AB2257 on September 4, 2020 to subsequentially amend AB5. The new law took effect immediately. Perhaps most prominently, AB2257 addressed the problems facing music performers and freelance journalists that had been widely reported after the passage of AB5. Moreover, B2257 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 that person

> 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 [UNITED STATES, 2020c, Sec. 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 statue 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 Propositions

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 AB5, as amended. As we describe 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 AB5, 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 to 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 AB5 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.[11]

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. This campaign was well-funded by the platform companies, who spent more than $205 million dollars into the effort to enact Proposition 22. In contrast, the labor groups fighting the initiative raised only $19 million in support. The total spending on Proposition 22

11 Proposition 22, Chapter 10.5, Sec.7449 (f).

was by far the most money ever spent on an initiative in California.[12] 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.[13] And the result was definitive: Proposition 22 was adopted by a vote of 58.6% to 41.4%.[14]

The 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, but those who work in other sectors of the gig economy remain subject to AB5 and are almost certainly to be regarded as employees. The CEO of Thumbtack, a platform company that matches homeowners with personal service workers such as handypersons or tutors, concluded that "the 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 says" (MARSHALL, 2020). Second, the terms of Proposition 22 seek to prevent amendment by the legislature, which would further inhibit any attempt to provide a comprehensive solution to worker categorization.[15] The fragmentation of the law applicable to gig workers means that a reasonable and principled solution will be ever more difficult to find.

3. THOUGHTS ON ENDING THE REGULATORY CHAOS SURROUNDING THE GIG ECONOMY.

12 The campaign finance details can be found at https://ballotpedia.org/California_Proposition_22,_AppBased_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020). Acesso em 12 jul. 2022.

13 2020 CALIFORNIA Proposition 22. In: WIKIPEDIA: the free encyclopedia. Disponível em: https://en.wikipedia.org/wiki/2020_California_Proposition_22. Acesso em 12 jul. 2022.
Voting results can be found at https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf (UNITED STATES, 2020d), p. 66.

14 Voting results can be found at https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf (UNITED STATES, 2020d), p. 66.

15 The Proposition was immediately attacked in court for intruding on the legislature's plenary power to provide workers' compensation insurance for all workers and intruding on the Supreme Court's power to interpret the provisions of the law. See Castellanos v. California, "Emergency Petition for Writ of Mandate and Request for Expedited Review," (January 12, 2021). The Emergency Petition was denied by the Supreme Court on February 3, 2021, and so the plaintiff filed the litigation in the Superior Court and the case will proceed there. The Supreme Court case docket is at: https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2338840&doc_no=S266551&request_token=NiIwLSEmTkw8W1AtSCI9SEtIUFg0UDxTJSM%2BUz9TICAgCg%3D%3D. Acesso em 12 jul. 2022.

The principal lesson to be learned from California's attempt to regulate the gig economy is that legal reforms are often piecemeal, subject to powerful interests, and incoherent from a broad policy and economic perspective. We suggest some broad guidelines for a more thoughtful and integrated approach. Some of these speak to aspects of the general U.S. policy issues that are amplified by increasing "gig" employment, and others are changes that are more directly target app-based "gig" employment.

First, the U.S. economy is characterized by a relatively weak social safety net compared to other wealthy nations. For example, unemployment benefits are much less generous and most health insurance is privately provided, most commonly by employers due to tax incentives. At the same time that general social insurance remains low, regulations on employers have strengthened in some states like California. This creates a strong incentive for workers to seek employment status. By decoupling major worker protections from employment status, as was attempted with the Affordable Care Act and health insurance, workers may be best served in a non-employment role. A second area for potential improvement is to expand and modernize the set of legal arrangements for organizing work beyond the current classifications of employee or independent contractor. For example, Harris and Krueger (2015) proposed an "independent worker" category as an intermediate status that blends aspects of employee status with aspects of independent contractor status. Under their proposal,

> Independent workers would receive some protections and benefits of employees, such as the right to organize and the requirement that intermediaries contribute half of Social Security and Medicare payroll taxes, but not others, such as time-and-a-half for overtime hours. Most importantly, we think that reforms along the lines that we propose would help to protect and extend the hard-earned social compact that has protected workers and improved living standards over the past century, reduce uncertainty, and enhance the efficient operation of the labor market.

We believe that it is critically important that any such new classifications are created by the government with the broad public interest in mind, rather than created by select, powerful industries to serve their own purposes as app-based transportation companies did with Proposition 22.

Another option to consider is for governments to become more actively involved in creating and supporting the app-based labor market

rather than allowing the market to be created by firms with monopsony power and a significant bargaining advantage over workers. We suggest that internet or app-based matching of workers with those seeing services could be considered vital public infrastructure, and that these marketplaces for gig services are natural monopolies like utilities. Governments could regulate the app-based companies like private utilities are by a public utilities commission, or governments could simply create and operate their own app-based marketplace with an eye to the greater public good. Wingham Rowan (BRIGGS; ROWAN, 2021) has been instrumental in developing and promoting this type of approach.[16]

4. 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 find that their freedom to choose quickly becomes 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. We 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 nothing left to lose.

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16 See also ROMEO (2021)

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