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The Road to Rights: Protecting On-Demand Workers in the United States Gig Economy

Viktoria Pitlik

Thesis Advisor: Rainer Braun

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ABSTRACT

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Viktoria Pitlik

Federalism in the United States impedes the realization of human rights. This thesis explains how non-traditional workers are impacted by the inadequacies of the country's labor legislation, demonstrated through the situation of workers in the gig economy. The gig economy is thriving but the workers are not included in federal labor legislation, and therefore their rights are not protected. States have the power to issue their own rulings on matters concerning the gig economy, but these decisions can vary by state. Using the example of Uber drivers, this paper shows how this discrepancy can result in human rights violations. There needs to be uniformity in the United States legal system in order for gig workers to claim their rights.

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I. Introduction

The United States has a booming gig economy, a market system involving short-term and informal relationships between workers and employers. Workers in the gig economy, herein referred to as gig workers, experience unique conditions of work that differ from traditional forms of labor. As a result, the United States has struggled to identify them with the existing labor categories of employees and independent contractors.

Due to the gig economy's relatively recent emergence and rapid expansion, federal law does not cover gig workers. Instead, individual states have ruled independently on the classification of gig workers, which has resulted in disparities between states that label them as employees, and those who deem them independent contractors. This is problematic because independent contractors are not included in federal labor law that guarantees employees certain rights at work. An even greater issue is that these rights overlap with fundamental human rights that everyone is entitled to. Without laws that protect gig workers' labor rights, they are also unable to exercise their human rights.

This paper analyzes how federalism affects the human rights of gig workers, using the situation of Uber drivers as an example. My research explains the reasoning behind the differences in state rulings on employment classification, which ultimately determine which workers have rights. This paper will also uncover whether human rights were considered in these decisions at all, and the implications of this on the overall labor legislation in the United States. Adding the human rights framework to the issue shows how federalism can result in rights violations.

Labor has evolved over time, but there have always been two constants: the inadequacy of existing legislation and the complications of federalism. Whether the gig economy will persist is not a subject in this essay because the importance of rights for gig workers lies in the plain fact that the gig economy exists right now. Gig workers may be unfamiliar to the traditional labor market, but they deserve protection nonetheless.

II. Where Do Rights Come From?

The labor legislation in the United States is failing the workers in the gig economy. Henry M. Hart Jr. says the purpose of law is to settle the problems of the people living interdependently in a community.[1] As such, the formation of law must begin at the grassroots level by taking the citizens' circumstances and needs into account.[2] Among the variety of laws, some serve to tell citizens their rights and freedoms. The federal government has shirked its duty to draft legislation relating to the gig economy, leaving gig workers without protection under federal law. While this is an obstacle for gig workers to exercise their rights, it is not an impasse. The responsibility of writing law is shared by both federal and state governments, a system called federalism. Hart Jr. describes federalism as a "fractionalization of authority" because power is divided between all levels of government.[3] At the same time, federalism is also a fractionalization of responsibility.

Scholars discuss two theories on federalism and how they relate to human rights, specifically those guaranteed by international human rights law.[4] Some citizens believe that the

[1] Henry M. Hart Jr., "The Relations between State and Federal Law," *Columbia Law Review* 54, no. 4
[2] Hart, "The Relations," 490.
[3] Ibid., 490.
[4] Catherine Powell, "Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States," *University of Pennsylvania Law Review* 150, no. 1 (November 2001): 246;

Constitution is the supreme law of the United States and have formed an ideology called constitutionalism. Constitutionalism is defined by Jon Elster and Rune Slagstad as the idea that the Constitution protects individual rights and limits the power of the government.[5] More generally, constitutionalism is a narrow construction of the text as evidence for rights. Catherine Powell describes the first theory on federalism, the constitutional theory, which asserts that the federal government has authority over foreign affairs.[6] Proponents believe international human rights laws must be implemented through federal laws and courts.[7] The contrasting view is the revisionist theory, which favors more fragmentation and power reserved for states.[8] According to Johanna Kalb, international human rights treaties align with affairs typically regulated by states.[9] Revisionists argue that the adoption of international human rights law as a part of federal law would be an infringement on state sovereignty.[10] These theories demonstrate a major problem of federalism—the tension between who has the authority, and responsibility, to protect human rights.

This conflict also plays out in matters concerning labor. Mark Barenberg discusses different models of labor federalism that exist simultaneously in the United States.[11] Two of these models involve federal power: national uniformity and national minimum standards.[12] However, another form is state regulatory primacy, when states regulate labor without

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Johanna Kalb, "Dynamic Federalism in Human Rights Treaty Implementation," *Tulane Law Review* 84, no. 4 (March 2010): 1027.
[5] Jon Elster and Rune Slagstad, *Constitutionalism and Democracy* (Cambridge University Press, 1988), 132.
[6] Powell, "Dialogic Federalism, 255.
[7] Ibid., 246.
[8] Ibid., 247.
[9] Kalb, "Dynamic Federalism," 1027.
[10] Ibid., 1027.
[11] Mark Barenberg, "Law and Labor in the New Global Economy: Through the Lens of United States Federalism," *Columbia Journal of Transnational Law* 33, no. 3 (1995): 451.
[12] Barenberg, "Law and Labor," 451.

interference from the federal government.[13] Barenberg explains that labor federalism has led to vast disparities in labor standards among states.[14] He lists examples to prove this, such as variances in the number of workers provided unemployment and welfare benefits in different states.[15] In addition, Hart Jr. notes that state courts are often the first sites where matters of regulation are officially settled.[16] State courts resolve issues within their domain, but each state can have different rulings, leading to inconsistency in laws and standards across the country.[17] As a result, workers in one state may be granted more rights than workers in another.

The dichotomy between federal and state authority exacerbates the challenge of protecting gig workers universally. In the absence of federal legislation, they are vulnerable to the decisions made at the state level, which can lead to rights violations in certain states. Furthermore, the differences between state rulings create uncertainty around work and businesses that cross state lines. When a group is as substantial as gig workers in that it spans across the country, there needs to be uniformity in legislation in order to resolve the issue of protecting gig workers universally.

Labor Identity and Labor Struggles

A worker's ability to claim rights under law depends on their labor identity. Labor identity can be understood as the identity formed around the distinctive qualities of a laborer and her work. This can include the tasks performed, level of skill or specialization, and the worker's relative position in the hierarchy of authority. As labor evolves over time, the perception of what

[13] Ibid., 452.
[14] Ibid., 453.
[15] Ibid., 453.
[16] Hart, "The Relations," 492.
[17] Ibid., 491.

constitutes 'normal' or 'acceptable' work changes. Atypical workers are often not included in the labor identities that are covered by existing legislation, or it applies to them in ways that prevents them from exercising their rights. In the past, the labor identity of atypical workers even involved their race and gender.

The most significant transformation of labor in the United States concerned indentured servants and slaves. Mary Sarah Bilder and Don Edward Fehrenbacher recount the dispute between federal and state regulation of these workers, yet both forms of government had laws that designated the workers' identity as property.[18] Fehrenbacher writes that states regulated slavery inside their borders with laws called slave codes.[19] Each state's slave codes could be different, and at the same time some states prohibited slavery all together. The disagreement between states culminated in the Civil War, and the Thirteenth Amendment to the Constitution ultimately settled the matter.

James Gray Pope explains that the Thirteenth Amendment abolished slavery and involuntary servitude while simultaneously granting labor rights.[20] Debates over the interpretation of 'involuntary servitude' created conflict between the freedom of contract, which is a worker's right to create and enter enforceable contracts, and freedom of labor, which is a worker's right to terminate their contract at any moment.[21] Pope claims that when the Supreme Court heard cases on this dispute, it tended to favor freedom of labor, which enforced workers'

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[18] Mary Sarah Bilder, "The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce," *Missouri Law Review* 61, no. 4 (Fall 1996): 12, HeinOnline; Don Edward Fehrenbacher, *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective* (Oxford University Press, 1981), 17.
[19] Fehrenbacher, *Slavery*, 17.
[20] James Gray Pope, "Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"" *Yale Law Journal* 119, no. 7 (2010): 1478.
[21] Pope, "Contract, Race, and Freedom of Labor," 1482.

right to quit.[22] He also provides examples of other rights that workers successfully claimed under the Amendment, including the right to receive fair wages, the right to change employers, the right to organize, and the right to strike for improved wages and working conditions.[23] Lea S. VanderVelde's analysis aligns with Pope's ideas as she writes that the unequivocal right to quit work is derived from the Thirteenth Amendment, and she further states it was a broader gain for worker independence.[24] She concludes that the amendment was "a milestone in the elimination of racial oppression, but it was also a milestone in the elimination of labor subjugation."[25] The Thirteenth Amendment linked workers' labor identity to their fundamental rights, completely reshaping labor in the United States.

This is just one example that illustrates the pattern of labor in the country. There have consistently been groups of workers who cannot realize their rights because their labor identity is excluded from or harmed by existing laws. Eventually, these labels and laws were challenged through political and social movements as well as judicial proceedings, leading to new laws and amendments that benefited all workers.

The United States has neglected workers by ignoring the most important aspect of their identity—their humanity. This, compounded with the incompetency of the legal system due to federalism, creates problems for workers to claim their rights. Federalism can lead to differing state legislation and non-uniform regulation. In the case of slavery, this conflict resulted in a violent war. While past labor struggles have been resolved for the most part, federalism still exists and so the problem has not dissipated. There continue to be workers whose labor identity

[22] Ibid., 1482.
[23] Ibid., 1540.
[24] Lea S. VanderVelde, "The Labor Vision of the Thirteenth Amendment," *University of Pennsylvania Law Review* 138, no. 437 (2009): 438.
[25] VanderVelde, "The Labor Vision," 495.

does not align with that of normal workers, therefore they are not protected by labor legislation and cannot exercise their labor rights nor human rights.

III. Out With the Old, In With the New: The Emergence of the Gig Economy

Today, it is the gig economy that is altering the labor landscape and the typical perception of work. Jobs in the gig economy veer from the norms of the long-established labor market. Gerald Friedman states that unlike traditional work involving long-term relationships between employers and workers, the gig economy is a market system involving brief job arrangements.[26] Emilia Istrate and Jonathan Harris add that gig workers are only paid for singular tasks, as opposed to the steady salary from traditional work.[27] The term "gig" stems from these relatively short interactions where workers only complete one job for one customer and then must find another job.

Another factor that distinguishes the gig economy from other forms of labor is the unorthodox employer-worker relationship. Gig workers are hired by companies that act as "intermediaries" to connect workers to customers.[28] The workers enter explicit contracts to provide services for the company, but are not hired long-term because job availability is based on demand. These qualities create a unique labor identity for gig workers, which makes it difficult

[26] Gerald Friedman, "Workers Without Employers: Shadow Corporations And The Rise Of The Gig Economy," *Review Of Keynesian Economics* 2, no. 2 (Summer 2014): 172, https://doi.org/10.2337/roke.2014.02.03.
[27] Emilia Istrate and Jonathan Harris, "The Future of Work: The Rise of the Gig Economy," National Association of Counties, November 2017, https://www.naco.org/featured-resources/future-work-rise-gig-economy#after-related.
[28] Jeremias Prassl, "Work on Demand," in *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford: Oxford University Press, 2018), Chapter 2, https://doi.org/10.1093/oso/9780198797012.001.0001.

to classify them within existing categories of workers in the labor market.

A Close Look at On-Demand Workers

In recent years, a specific area of the gig economy has grown in popularity—the use of Internet-based platforms and applications that instantly connect workers to customers. Within this realm of gig work, coined "on-demand work," Jeremias Prassl describes two types of jobs: crowdwork and work-on-demand via app.[29] The word crowdwork derives from the process of customers uploading job requests on an online platform to a 'crowd' of workers. Crowdwork is done entirely digitally, requiring no face-to-face interaction.[30] This enables crowdworkers to accept jobs from around the world and complete them remotely.[31] In contrast, work-on-demand via app is requested using smartphone applications to find workers who are available at that exact moment. Work-on-demand via app must be completed in person, which restricts these workers to local clients.[32] These forms of on-demand work are distinct, but there are some similarities in the features of their work.

The digital nature of the on-demand gig economy creates unique working conditions for gig workers. Scholars who research crowdwork note some of its advantages.[33] In a survey for the International Labor Organization, Janine Berg found that respondents were most drawn to

[29] Prassl, "Work on Demand," Chapter 2.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Janine Berg, "Income Security in the On-Demand Economy: Finding and Policy Lessons from a Survey of Crowdworkers," *Comparative Labor Law & Policy Journal* 37, no. 3 (March 2016): 7, Social Science Research Network; Mark Graham, Isis Hjorth, and Vili Lehdonvirta, "Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods," *Transfer: European Review of Labour and Research* 23, no. 2 (2017): 47, https://doi.org/10.1177/1024258916687250.

crowdwork because of their ability to work from home.[34] People who are unable to leave their houses, perhaps due to disability, illness, or responsibilities, benefit from being able to work online.[35] Mark Graham et. al. declare another benefit of crowdwork is "economic inclusion," described as the ability to be hired without discrimination due to workers' anonymity on online platforms.[36] Migrants are one example because they may not be able to work in traditional jobs because they don't have the necessary visas or permits.[37] The virtual features of crowdwork allow workers to avoid obstacles that prevent them from finding other work.

Johnathan Hall and Alan Kreuger note that crowdwork and work-on-demand via app share some benefits, such as flexible schedules and a supplemental source of income to complement pay from other jobs.[38] Antonio Aloisi finds that those who work-on-demand via app also have lower entry barriers, such as fewer education or skill requirements.[39] They can also use assets they already own, such as tools and cars, which makes entry into the gig economy more affordable.[40] These benefits make the on-demand gig economy attractive for both types of on-demand gig workers.

Despite the positive aspects, an abundance of literature focuses on the downsides of work in the gig economy.[41] Valerio De Stefano argues that on-demand companies are commodifying

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[34] Berg, "Income Security in the On-Demand Economy," 7.
[35] Ibid., 8.
[36] Graham, et. al., "Digital labour and development," 47.
[37] Ibid., 47.
[38] Jonathan Hall and Alan Kreuger, "An Analysis of the Labor Market for Uber's Driver-Partners in the United States," *Princeton University Industrial Relations Section* Working Paper 587 (January 2015): 11.
[39] Antonio Aloisi, "Commoditized Workers: Case study research on labour law issues arising from a set of "on-demand/gig economy" platforms," *Comparative Labor Law & Policy Journal* 37, no. 3 (August 2015): 670, Social Science Research Network.
[40] Aloisi, "Commoditized Workers," 670.
[41] Valerio de Stefano, "The Rise of the 'Just-in-Time' Workforce: On-demand work, Crowdwork and Labour Protection in the Gig Economy," *Conditions of Work and Employment Series* no. 71 (2016): 4, International Labor Organization; Joellen Riley, "Brand New 'Sharing' or Plain Old 'Sweating'?: A Proposal for Regulating the New 'Gig Economy,'" in *New Directions for Law in Australia: Essays in*

labor into what he calls "humans-as-a-service."[42] He explains that jobs in the gig economy are often coined "gigs," "tasks," or even "favors," which undermine their value and perpetuate the idea that they are not 'real' work.[43] In addition, the transactions from behind a screen hide the fact that customers are interacting with a human being.[44] Crowdworkers specifically are perceived as "invisible workers" because of the lack of in-person contact, which can lead to insensitivity, mistreatment, and even dehumanization.[45] Thus, while the virtual nature of gig work enables workers to work from home or set flexible schedules, it can also lead to misconceptions and disrespect.

Joellen Riley agrees with De Stefano that the companies take advantage of the informal contracts to avoid the title and duties of traditional employers, shifting the risks of the job to the workers.[46] Gig workers face the possibility of low demand for work and resulting low income. High levels of competition also reduce the workers' earnings and force them to take on more jobs, paradoxically reducing the flexibility of gig work that is typically seen as a major benefit.[47] Gig workers also take on more responsibilities as the companies do not provide tools used for the jobs and so gig workers shoulder the price of purchasing and maintaining them, in addition to insurance and taxes.[48] These risks and extra costs can be a burden for gig workers.

Contemporary Law Reform (Australia: ANU Press, 2017), 62; Alex Wood, Mark Graham, Vili Lehdonvirta, and Isis Hjorth, "Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy," *Work, Employment, and Society* 33, no. 1 (August 2018): 64, https://doi.org/10.1177/0950017018785616.

[42] De Stefano, "The Rise of the 'Just-in-Time' Workforce," 4.

[43] Valerio de Stefano, "Introduction: Crowdsourcing, the Gig Economy and the Law," *Comparative Labor Law & Policy Journal* 37, no. 3 (April 2016): 2. As described by De Stefano in this article, 'real' work relates to the traditional perception of work, i.e. long-term arrangements.

[44] De Stefano, "The Rise of the 'Just-in-Time' Workforce," 4.

[45] Ibid., 4.

[46] Riley, "Brand New 'Sharing,'" 62; De Stefano, "The Rise of the 'Just-in-Time' Workforce," 5.

[47] De Stefano, "The Rise of the 'Just-in-Time' Workforce," 5.

[48] Riley, "Brand New 'Sharing,'" 62.

Riley and De Stefano further concur that on-demand workers also have the responsibility of proving their worth.[49] The companies monitor gig workers by looking at reviews from customers, so the workers have to make sure they get good ratings in order to be allowed to work.[50] This puts added pressure on gig workers and forces them to put in extra effort to increase the likelihood of a good rating. Due to their digital tasks, crowdworkers might face expectations to have the same skill and precision as a computer software.[51] This creates potential for even a slight error or delay to impact the worker's rating, so they have to work hard to meet customers' demands.[52] For those who work-on-demand via app, their ratings are largely influenced by their interactions with customers. They have to perform "emotional labor" like showing kindness or holding conversation in order to get good reviews.[53] Sarah Donovan says that the companies depend on the excellence of the gig workers for profit and success, so they terminate contracts with those who do not meet their standard of quality or professionalism.[54] Riley and Alex Wood, et. al. describe that crowdwork platforms use algorithms to filter jobs away from workers with lower ratings, making it hard for them to find work, and companies who manage work-on-demand via app platforms can block workers from accessing the platform if they have low ratings, effectively firing the worker.[55] As a result, customer ratings further decrease job security in the on-demand gig economy.

[49] Ibid., 63; De Stefano, "The Rise of the 'Just-in-Time' Workforce," 5.
[50] Riley, "Brand New 'Sharing,'" 63.
[51] De Stefano, "The Rise of the 'Just-in-Time' Workforce," 5.
[52] Ibid., 5.
[53] Ibid., 5.
[54] Sarah Donovan, "What Does the Gig Economy Mean for Workers?" *Congressional Research Service Report* (February 2016): 7, HeinOnline.
[55] Wood, et. al., "Good Gig, Bad Gig," 64; Riley, "Brand New 'Sharing,'" 63.

Some scholars are especially critical of the role of the companies in the gig economy.[56] Riley contends that the gig economy has been designed to benefit the company only, not the workers.[57] The workers are reliant on the company for jobs but also vulnerable to its power over them. Prassl mentions this is because the companies set prices, establish quotas for the number of jobs that must be accepted, and determine what information the worker and customer receive.[58] Moreover, Friedman calls the gig economy a system of "shadow businesses relying on a transient workforce," with no job ladder or "mutual interest in the well-being of both the company and the workforce."[59] He claims that because of the informal work arrangement, there is no connection between the worker and employer.[60] These details demonstrate how the on-demand companies take advantage of gig workers.

All labor relations have negative aspects, but the positives are just as important. This is the reason why, despite the vast evidence of the disadvantages, the gig economy continues to thrive in the United States. Thus, rather than trying to eliminate the disadvantages, the most crucial thing for gig workers is to be able to exercise their rights. This, of course, ties into labor identity and legislation.

Problems with Classification

The novel labor identity of gig workers is currently dissociated from human rights. Friedman explains that the flexible contracts and short-term job arrangements makes gig work temporary and informal, so gig workers are typically not considered official employees of the

[56] Riley, "Brand New 'Sharing,'" 62; Prassl, "Work on Demand," Chapter 2; Friedman, "Workers Without Employers," 172.
[57] Riley, "Brand New 'Sharing,'" 62.
[58] Prassl, "Work on Demand," Chapter 2.
[59] Friedman, "Workers Without Employers," 172.
[60] Ibid., 172.

company they work for.[61] The gig economy also includes a variety of work, ranging from legal research and data verification to cleaning services and food delivery, which leads to a generalization of gig work. For these reasons, gig workers are often broadly classified as independent contractors.

The independent contractor label is problematic because federal labor laws do not cover independent contractors. This includes the Fair Labor Standards Act that entitles employees to minimum wage and overtime pay, and the National Labor Relations Act that protects various employee rights, such as organizing and collective bargaining.[62] By excluded gig workers from these laws, not only are they vulnerable to the companies' control, it is also more difficult for them to fight for improvements. This deteriorates the quality of the working conditions in the gig economy. Overall, the advantages of the gig economy are outweighed by the workers' independent contractor status.

In addition to being treated as independent contractors, De Stefano writes that the unique features of on-demand work also make it challenging for gig workers to exercise their labor rights.[63] In the International Labor Organization's Fundamental Principles and Rights at Work, the three rights most relevant to gig workers are freedom of association, the right to collective bargaining, and freedom from discrimination.[64] As gig workers find jobs online, there is no physical workplace where they could meet to exercise the freedom of association.[65] Sian Lazar and Andrew Sanchez note the digital platforms also impede the workers' ability to identify each

[61] Ibid., 172.
[62] "Handy Reference Guide to the Fair Labor Standards Act," Wage and Hour Division, United States Department of Labor, last updated September 2016, https://www.dol.gov/whd/regs/compliance/hrg.htm; "National Labor Relations Act," National Labor Relations Board, accessed June 2, 2019, https://www.nlrb.gov/how-we-work/national-labor-relations-act.
[63] De Stefano, "The Rise of the 'Just-in-Time' Workforce," 9.
[64] Ibid., 9.
[65] Ibid., 9.

other and form a common identity, which makes organizing a challenge.[66] The inability to practice freedom of association almost completely negates the right to collective bargaining as workers are unable to come together to discuss concerns or strategies.[67] Furthermore, the complexity of the platforms can make it hard to identify their employer for negotiations.[68] Finally, on-demand platforms can keep workers anonymous, which may prevent discrimination from clients when requesting jobs. At the same time, however, jobs can be restricted by geographical area, language, or skill sets, and discrimination can still be expressed through customer ratings.[69] The digital nature of on-demand gig work is an obstacle for workers to exercise their rights.

On-demand companies assert that gig workers are independent contractors because they benefit the most from this classification. As Friedman points out, companies are able to hire workers and adjust wages based on demand, with no promise of future employment.[70] Workers are employed only to perform a specific task, so the company benefits from their skill and labor without having to train them, provide tools, or pay continuous salaries.[71] De Stefano notes that by treating gig workers as independent contractors, the companies also shed potential liabilities and obligations such as minimum wage, social security, sick days, holidays, and unemployment benefits.[72] This employer-worker relationship, or lack thereof, is advantageous for the company but detrimental to gig workers.

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[66] Sian Lazar and Andrew Sanchez, "Understanding labour politics in an age of precarity," *Dialectical Antropology* 43, no. 1 (February 2019): 9, https://doi.org/10.1007/s10624-019-09544-7.
[67] De Stefano, "The Rise of the 'Just-in-Time' Workforce," 9.
[68] Ibid., 8.
[69] Ibid., 11.
[70] Friedman, "Workers Without Employers," 180.
[71] Ibid., 180.
[72] De Stefano, "The Rise of the 'Just-in-Time' Workforce," 13.

Sarah Donovan argues the gig economy is different from the independent contractor system.[73] Gig workers have more flexibility because they choose when to enter and leave the gig economy altogether, whereas independent contractors create a business around their work and would have greater difficulty switching occupations.[74] However, on-demand companies are already established so gig workers do not have to invest in building and marketing a business, which lowers operating costs.[75] In addition, independent contractors are able to build lasting relationships with customers, which can lead to repeat business. In contrast, gig workers are randomly matched to customers, so customers are unable to request services from specific workers. Lastly, independent contractors have no direct employer that mandates a quota or standard of quality, but workers in the gig economy must follow the rules that the companies dictate. Despite the claims that on-demand companies are solely intermediaries connecting workers to customers, they actually exert control over the workers. The companies take a portion of the workers' earnings for service fees, up to 30% on some platforms.[76] Some companies also prohibit gig workers from finding customers outside the platform, which prevents them from expanding their client base.[77] The companies thus restrict the workers and deny them the freedoms that are beneficial for independent contractors.

The non-traditional labor identity of gig workers has led to the classification as independent contractors. This impacts the rights they are legally entitled to, intensifying their inability to exercise their labor rights caused by the digital nature of the gig economy. As

[73] Donovan, "What Does the Gig Economy Mean," 3.
[74] Ibid., 2.
[75] Ibid., 6.
[76] Prassl, "Work on Demand," Chapter 2.
[77] Donovan, "What Does the Gig Economy Mean," 7.

Donovon explains, the title of independent contractor is an imperfect fit for gig workers. Therefore, labor identity should not be the determinant of their rights.

IV. Fighting for Change: Uber Drivers

The recent and rapid growth of the gig economy has left gig workers without a place in the traditional labor market, without legislation that covers them, and without rights. They are not, however, without agency. The country's history shows that rights are not always granted automatically; they must be fought for. Just like the struggles of laborers in the past, now gig workers are fighting the injustice of the legal system by challenging existing laws. Specifically, gig workers need to be considered official employees of the companies they work for in order to be guaranteed the rights included in federal labor laws.

A multitude of on-demand gig workers have disputed their employment classification and drawn national attention to the issue. One prominent group engaged in this debate is Uber drivers who work-on-demand via app. Uber is a transportation network company that connects drivers and customers through the Uber phone application to facilitate transportation services. It is a popular on-demand platform that operates in almost every American state and numerous countries around the world. Uber drivers constitute one of the largest gig workforces in the United States, so it is crucial to protect their rights.

Uber drivers' contracts say the agreement creates an independent contractor relationship with the company.[78] Uber encourages this classification so that the company can avoid the legal

[78] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.

obligations that employers have.[79] Despite this, Uber drivers in Massachusetts and California filed class action lawsuits claiming they are misclassified as independent contractors and entitled to employee benefits.[80] In 2018, the United States Supreme Court ruled that employers can leverage the arbitration clauses in their contracts to prevent class action lawsuits such as these.[81] This reduced the size of the worker pool that was eligible to file the suit against Uber, and a $20 million settlement was reached in 2019.[82] The Supreme Court's ruling affects all workers with arbitration clauses in their contracts and influenced many to turn to individual arbitration instead.

The complications that arise from federalism are illustrated through the situation of Uber drivers. Table 1 lists the states that have passed laws on the classification of transportation network company (TNC) drivers, like Uber drivers.[83] Among these laws, all but one specify a

[79] Ibid.
[80] "Uber Drivers," Lichten & Liss-Riordan, P.C., last modified March 2019, https://uberlawsuit.com.
[81] Adam Liptak, "Supreme Court Uphold Workplace Arbitration Contracts Barring Class Actions," New York Times, May 21, 2018, https://www.nytimes.com/2018/05/21/business/supreme-court-upholds-workplace-arbitration-contracts.html.
[82] Lichten & Liss-Riordan, P.C., "Uber Drivers."
[83] Sources for the information in Table 1, in order of appearance. It might be interesting to note that these are only *some* examples of state laws that create a presumption that TNC drivers are independent contractors. "Senate Bill 800, An Act to Ensure the Safety, Reliability, and Cost-effectiveness of Transportation Network Company," 2015 Regular Session, State of Arkansas, March 4, 2015, http://www.arkleg.state.ar.us/assembly/2015/2015R/Acts/Act1050.pdf; "AB-5 Worker status: employees and independent contractors," Bill Information, California Legislature, September 11, 2019, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5; "Chapter 19. Transportation Networks," Delaware Code Online, State of Delaware, accessed August 10, 2019, https://delcode.delaware.gov/title2/c019/index.shtml; "627.748 Transportation network companies," 2018 Florida Statutes, Chapter 627 Insurance Rates and Contracts, Florida Senate, accessed August 10, 2019, https://www.flsenate.gov/Laws/Statutes/2018/627.748; "HB 789, Labor and industrial relations; marketplace contractors to be treated as independent contractors under state and local laws," 2017-2018 Regular Session, Georgia General Assembly, last modified March 27, 2018, http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/789; "Chapter 19.1 Transportation Network Companies," 2019 Session, Indiana General Assembly, accessed August 11, 2019, http://iga.in.gov/legislative/laws/2019/ic/titles/008#8-2.1-19.1-4; "Limousine, Taxicab, and Transportation Network Company Act," Michigan Legislature, accessed August 10, 2019, http://www.legislature.mi.gov/(S(kkons4zjupjttd2ls22tif1q))/mileg.aspx?page=GetObject&objectname=mcl-act-345-of-2016; "Chapter 387," Revisor of Statutes, State of Missouri, accessed August 10, 2019, http://revisor.mo.gov/main/OneSection.aspx?section=387.414&bid=34470&hl=; "Chapter 20 - Motor Vehicles," North Carolina General Statutes, accessed August 10, 2019,

presumption that TNC drivers are independent contractors.[84] In comparison, Table 2 shows the states that have issued authoritative decisions on Uber drivers specifically.[85] These decisions are not written law, but court rulings and labor department opinions. Table 2 illustrates the inconsistency that results from federalism, as some states declare Uber drivers are employees while others say they are independent contractors. Furthermore, the decisions in Table 2 not only contradict each other, but those in favor of employee classification also conflict with the explicit TNC laws in Table 1.

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https://www.ncleg.gov/Laws/GeneralStatuteSections/Chapter20; "Chapter 32-40, Transportation Network Companies," Codified Laws, South Dakota Legislature, accessed August 10, 2019, https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=32-40; "Transportation Network Companies Law," Texas Department of Licensing and Registration, accessed August 10, 2019, https://www.tdlr.texas.gov/tnc/tnclaw.htm#2402114; "Article 29. Transportation Network Companies," West Virginia Code, West Virginia Legislature, last modified June 13, 2019, http://www.wvlegislature.gov/wvcode/Code.cfm?chap=17&art=29.

[84] Ibid. See Table 1.

[85] Sources for the information in Table 2, in order of appearance. Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858; Claimant v. Uber Technologies, Inc. California Unemployment Insurance Appeals Board (2015), No. 5371509; Razak v. Uber Technologies, Inc. United States District Court for the Eastern District of Pennsylvania (2018), No.16-573; Brad Avakian, "Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon Regarding: The Employment Status of Uber Drivers," Bureau of Labor and Industries, 2015; "Uber Agrees to Stop Worker Misclassification in Alaska," State of Alaska Department of Labor and Workforce Development, Press Release, No. 15-38, September 3, 2015, https://labor.alaska.gov/news/2015/news15-38.pdf.

Table 1. Classification of TNC Drivers under US State Laws

State	Classification	Year
Arkansas	Independent Contractor	Effective 2015
California	Employee	Passed in State Senate September 2019
Delaware	Independent Contractor	Effective 2016
Florida	Independent Contractor	Effective 2018
Georgia	Independent Contractor	Tabeled by State Senate in 2018
Indiana	Independent Contractor	Effective 2015
Michigan	Independent Contractor	Effective 2017
Missouri	Independent Contractor	Effective 2017
North Carolina	Independent Contractor	Effective 2015
South Dakota	Independent Contractor	Effective 2017
Texas	Independent Contractor	Effective 2017
West Virginia	Independent Contractor	Effective 2016

Table 2. Classification of Uber Drivers in the United States

State	Classification	Decision Type	Year
Alaska	Employee	Workers' Compensation Board Decision	2015
California	Employee	Court Decision	2015
Florida	Independent Contractor	Court Decision	2017
New York	Employee	Court Decision	2017
Oregon	Employee	Advisory Opinion	2015
Pennsylvania	Independent Contractor	Court Decision	2018

There is an evident disparity between state's positions on the employment status of Uber drivers. However, the reason for this is not obvious. There is no notable variance in Uber drivers' work in different states, nor an apparent correlation with independent contractor status and the prevalence of TNCs, union membership, or the influence of Uber or big business. In fact, the state where Uber is headquartered—California—is currently the only state drafting legislation that presumes TNC drivers are employees.[86] It is essential to analyze the reasons behind these contradictions because they determine the states where Uber drivers can exercise their rights, and those where their rights are violated.

The following analysis draws from the evidence in the Florida and New York court cases.[87] These states are particularly interesting to compare because the states' actions after the cases reinforce their court's position: Florida enacted law 627.748 that established the presumption that TNC drivers are independent contractors, and New York's largest city, New York City, adopted the first ever minimum wage law for drivers of ride-hail applications like Uber.[88] Before assessing the greater significance of these contrasting rulings, the arguments in each case must first be understood.

[86] "AB-5 Worker status: employees and independent contractors," Bill Information, California Legislature, September 11, 2019, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.
[87] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[88] "627.748 Transportation network companies," 2018 Florida Statutes, Chapter 627 Insurance Rates and Contracts, The Florida Senate, accessed August 10, 2019, https://www.flsenate.gov/Laws/Statutes/2018/627.748; Sara Ashley O'Brien, "Uber, Lyft prices go up in NYC as new minimum wage law takes effect," CNN, February 1, 2019, https://www.cnn.com/2019/02/01/tech/uber-nyc-rates/index.html.

Florida: Uber Drivers are Not Employees

In the opinion filed on February 1, 2017, the State of Florida's Third District Court of Appeals ruled that Uber drivers are independent contractors in the case *Darrin E. McGillis vs. Department of Economic Opportunity; and Raiser LLC, d/b/a Uber Technologies, Inc. District Court of Florida, Third District* (2017) (hereafter referred to as *McGillis v. Uber* or the Florida case). Darrin E. McGillis is a former Uber driver who filed a claim against Uber for reemployment assistance after his access to the platform was revoked. The Florida Department of Revenue originally found McGillis was an employee, but Uber challenged this in a hearing in front of the Department of Economic Opportunity who then ruled that McGillis served as an independent contractor. In the present case, McGillis appealed the Department of Economic Opportunity's order.[89]

The Third District Court of Appeals (Court) followed Florida common-law rules to inform their decision. First, the Court looked at Uber's Software Sublicense and Online Agreement that drivers must accept before beginning work. The Agreement explicitly states it "create[s] the relationship of principal and independent contractor and not that of employer and employee." It also declares that each transaction is considered a "separate contractual engagement." However, the contract itself is not the sole determinant of employment status because the parties' actual practice may contradict the agreement. According to Florida common-law, the parties' practice trumps the contract in proving the employment relationship.[90]

[89] The following section draws heavily from Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758. In Chicago style citations, one footnote at the end of the paragraph indicates that the entire paragraph is from that source. I have rearranged the order of the details in a different way than presented in the original document, but all of the information is derived from the text.
[90] Ibid.

The Court analyzed the nature of the dealings between Uber and the drivers by referring to the Restatement of the Law (Second) of Agency § 220, which outlines multiple factors that indicate whether the employment relationship is indicative of independent contractors or employees. The first factor listed in the Restatement is "the extent of control which, by the agreement, the master may exercise over details of the work." McGillis and all Uber drivers decide when they want to work, in what location, and which rides to accept or reject. Uber requires information about their driver's license, vehicle, registration, insurance, and drivers may be subject to a background check, but they do not have to display Uber signage in their vehicle, adhere to a dress code, or refrain from working on competitors' platforms. McGillis had dedicated his own time and money to investigate the times and locations that are most profitable for work, but Uber did not require him to do this research and did not reimburse him for it. Uber also did not prohibit McGillis from his simultaneous work with the competitor Lyft. The Court thus decided McGillis exercised control over the details of his work.[91]

Another factor in the Restatement is whether the work is "done under the direction of the employer or by a specialist without supervision." The Court found that Uber does not directly supervise the drivers but instead looks at customer feedback. After a ride, passengers are prompted to rate their driver on a scale of one to five stars. If a driver's score falls below a predetermined level and there is no improvement over a period of time, Uber may deactivate their account. Uber itself does not evaluate the drivers but relies on customers to assess the drivers' quality.[92]

The Court also considered details related to "whether the employer or the workman supplies the instrumentalities, tools, and the place of work" and "the method of payment,

[91] Ibid.
[92] Ibid.

whether by the time or by the job." Uber drivers must secure their own vehicles, pay for its maintenance and gas, and independently choose the location of their work. Drivers only get paid for the jobs they complete. Uber charges the passenger after a ride and drivers receive a portion of the fares in a weekly direct deposit. At the end of the year, Uber sends the drivers a Form 1099, which is an Internal Revenue Service form used for independent contractors. The Court also noted Uber provides the drivers with additional insurance coverage for their vehicle but no benefits such as medical insurance or vacation pay.[93]

Through the analysis of the parties' contract and working relationship, the Court found that McGillis and all Uber drivers are not employees of the company. In particular, the Court concluded that the drivers' autonomy is the most significant part of their work, stating "[this] free agency is incompatible with the control to which a traditional employee is subject." The Court affirmed the Department's order that Uber drivers are not entitled to reemployment assistance and denied McGillis' claim.[94]

New York: Uber Drivers are Entitled to Benefits

There is a stark contrast between *McGillis v. Uber* and *Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board* (2017) (hereafter referred to as the New York case). In the New York case, filed on June 9, 2017, the claimants were referred to by their initials—AK, JH, and JS. The New York Department of Labor determined in 2014 that the claimants and all others in similar situations are employees of Uber and eligible to receive

[93] Ibid.
[94] Ibid.

benefits. Uber challenged the finding in this hearing by arguing the drivers are independent contractors.[95]

Judge Michelle Burrowes first explains the on-boarding process for Uber drivers, who are labeled by the company as "partner-drivers." To establish a drivers' eligibility to work, Uber requires information about their driver's license, vehicle registration and insurance, and New York City Taxi & Limousine Commission (TLC) for-hire driver's license. Uber did not perform a background check on the claimants because a valid TLC license requires them to have passed a background check. At an Uber office, the claimants were shown a video about how the application works and 'best practice guidelines' that would be beneficial for them to follow but not required. This included keeping a clean car and wearing professional attire, even though there is no mandated dress code. As the final step of the on-boarding process the claimants agreed to contracts that designated them as independent contractors, but they were adhesion contracts that could not be negotiated.[96]

Judge Burrowes then analyzed the actual relationship between Uber and the drivers by focusing on "the extent of control." Uber drivers decide on their work schedule and location and are responsible for paying for their vehicle's gas and maintenance. They are also not provided with benefits such as sick leave or health insurance. These qualities of work are equivalent to the independent contractor relationship described in the contract.[97]

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[95] The following section draws heavily from Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858. In Chicago style citations, one footnote at the end of the paragraph indicates that the entire paragraph is from that source. I have rearranged the order of the details in a different way than presented in the original document, but all of the information is derived from the text.
[96] Ibid.
[97] Ibid.

Judge Burrowes described other aspects of control that are more indicative of an employer-employee relationship. Uber has certain requirements all drivers must follow, such as securing their own vehicle and smartphone to access the application. Uber dictates the vehicles the drivers must use, providing a list of acceptable vehicles that is more restrictive than that outlined by the Taxi and Limousine Commission. The vehicles are separated into three categories based on their quality—Uber X, Uber XL, and Uber Black—each with its own starting fare rate.[98]

Uber also controls aspects of work that have a more significant impact on the drivers. When drivers accept a ride request, they are informed only of the passenger's name and pick-up location. It is not until the passenger is in the car that Uber gives the driver the drop-off location. The Judge stated that independent contractors would be given this information in advance before deciding whether to accept the request. In addition, drivers are required to use the application at least once a month to accept ride requests. This quota is not something an independent contractor would have to meet. Moreover, Uber controls all aspects of the payment transactions. After a ride is completed, Uber calculates the fare using an algorithm that considers market factors, like demand, and charges the customer through the application. Drivers have no input on the price and can only challenge it after the payment is completed, upon which Uber decides whether or not to adjust it.[99]

Judge Burrowes also found that Uber actively monitors drivers and tries to modify their behavior. Uber's Code of Conduct states that drivers' access to the platform can be deactivated if they do not meet Uber's standards. Drivers are rated by passengers on a scale of one to five stars and if they have a persistently low score, Uber deactivates the driver's account. Uber also

[98] Ibid.
[99] Ibid.

collects the drivers' data while they work on the application and uses this information to make decisions about their access to the platform. Drivers are expected to accept 90% of ride requests, otherwise Uber temporarily deactivates their account. Drivers' accounts can also be deactivated if they reject or cancel what Uber deems too many rides. Uber will reactivate drivers' accounts if they demonstrate their conduct has improved, explain why they failed to meet Uber's standards, or attend quality improvement courses. These facts led to Judge Burrowes's assessment that Uber acts like an employer by being involved in not only what drivers do, i.e. provide transportation services, but also *how* they do it by requiring them to meet certain standards.[100]

Two New York labor laws were also referenced in the case. Labor Law § 511 (1) says "employment means any service under any contract of employment for hire … and any service by a person for an employer as a professional musician of a person otherwise engaged in the performing arts, and performing services." The second law, Labor Law § 560 (1), states an employer is liable for contributions if they have paid workers "$300 or more in any calendar quarter… including salaries, commissions, and bonuses."[101]

The Judge concluded that while the claimants have some independence, "the overriding evidence establishes that Uber exercised sufficient supervision, direction, and control over key aspects of the services rendered by claimants such that an employer-employee relationship was created." Judge Burrowes sustained the Department of Labor's 2014 decision that the claimants and all others similarly situated are employees of Uber and eligible to receive benefits.[102]

[100] Ibid.
[101] Ibid.
[102] Ibid.

The Cases Juxtaposed

The Florida and New York cases have contradictory decisions, yet they share some commonalities. At the most basic level, the judicial bodies looked at both the contracts and the parties' practice to inform their decision. Neither case provided a lengthy explanation of the parties' written agreement, as both found that Uber's contract inarguably designates the drivers as independent contractors.[103] Both judiciaries then examined the relationship between Uber and the drivers.[104] This established several facts, including that Uber drivers have the freedom to decide when and where to work, are permitted to work on competitors' applications, and are not provided with any benefits such as paid vacation or health insurance.[105] These findings were not contested in either case.

Other elements were also addressed in both cases but argued differently. In regards to supervision, both judiciaries noted that passengers rate their drivers after their trip and Uber will deactivate a driver's account if their ratings fall below a certain level.[106] The Court in *McGillis v. Uber* found the passenger ratings to prove that Uber does not directly supervise the drivers.[107] The Court also stated that due to this, drivers are permitted "just about any manner of customer interaction."[108] Judge Burrowes of New York would have found false, however, because drivers

[103] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[104] Ibid.
[105] Ibid.
[106] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[107] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.
[108] Ibid.

are deactivated for low ratings based on poor interactions with customers.[109] Judge Burrowes explained how deactivation means Uber tracks drivers' data, and the reactivation process shows the company takes steps to modify their behavior.[110] She further described that Uber responds to customer's comments, which proves the company monitors drivers' conduct.[111] The New York case included an example of a passenger complained who that claimant AK had used an inefficient route during their trip so Uber reduced the passenger's fare without notifying or consulting with AK, even though this reduced AK's earnings.[112] Uber might not physically supervise the drivers, but the company demonstrably observes their work and requires them to meet a high standard of quality.

Most importantly, the Florida and New York diverge in their analyses of control.[113] If a hiring entity, such as Uber, has control over the *result*, it is considered an independent contractor relationship; if they control the *means* to achieve the results, it is an employer-employee relationship. In these cases, the Florida Court stressed that the drivers' control indicates they are independent contractors, while the New York case emphasized that Uber's control makes the drivers employees.[114]

The difference is relevant to the rights of workers. With companies that only control result, workers have more freedom and rely less on safeguards to protect their rights. When companies control the means of work, however, the workers are vulnerable to the company's

[109] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[110] Ibid.
[111] Ibid
[112] Ibid.
[113] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[114] Ibid.

actions and decisions. Workers in the latter situation need to be able to exercise their rights so that the companies cannot exploit them.

The Florida Court never explicitly states that Uber's control is focused only on result, but noted the Department of Economic Opportunity's assessment that "Uber acts not as an employer, but as a middleman or broker for transportation services."[115] The Court also cited other court decisions where owner-operator truck drivers, salespersons, and other workers were deemed independent contractors due to aspects of their work that are similar to Uber drivers, such as the ability to set their own work schedule and refuse jobs.[116] Judge Burrowes of New York agreed that these qualities of work are indicative of independent contractor status, but she did a more effective job of proving Uber's control over the means of work.[117] Uber became closely involved in claimants JS and JH's work when they could not secure their own vehicles because of their low credit scores.[118] Uber referred these claimants to a third-party affiliate who allowed them to lease cars, and the drivers signed waivers that authorized Uber to deduct a portion of their fares for the cost of leasing the vehicle and forward it to the lessor on their behalf.[119] When JS neglected his payments, Uber also negotiated an alternative payment schedule with the lessor so that JS could continue to work.[120] The Judge thus found that "Uber did not employ an arms' length approach to the claimants as would typify an independent contractor arrangement."[121] The examples in the New York case are much stronger evidence that Uber acts like an employer by engaging in the details of the drivers' work.

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[115] Ibid.
[116] Ibid.
[117] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.

The Florida and New York cases seem profoundly contradictory at first, but further analysis shows the similarities in the factors that were considered. Both judiciaries assessed driver independence, supervision, payments, and control to inform their decisions. Ultimately, however, Florida's Third District Court of Appeals devalued the parts of the work relationship that affect the drivers most.

The Ignored Factor: Human Rights

The immediate results of the court rulings are clear. Uber drivers in New York are employees and guaranteed the rights and benefits that come with the status. In Florida, Uber drivers are treated as independent contractors and not provided any benefits by the company. The less obvious, yet more significant outcome is that the Florida ruling did more than name the employment classification of Uber drivers—it simultaneously stripped them of their rights.

Foremost, independent contractors are not included in labor laws and therefore Uber drivers are not guaranteed minimum wage, overtime pay, or benefits such as retirement funds and health insurance. The rights to organize, strike, and collective bargaining are also not protected. On April 16, 2019, the National Labor Relations Board published an Advice Memorandum that concluded Uber drivers are independent contractors.[122] This statement is another barrier preventing Uber drivers from claiming federal protection of these rights.

The fact that these rights are not protected does not mean gig workers cannot exercise them. Throughout the past year, Uber drivers across the United States have gone on strike to

[122] Jayme L. Sophir, "Advice Memorandum," Office of the General Counsel, National Labor Relations Board, April 16, 2019, https://www.laborrelationsupdate.com/files/2019/05/NLRB-Uber-memo.pdf.

fight for improved pay and working conditions.[123] The issue with not being included in federal law, however, is that workers are not protected from employer backlash. Therefore, on-demand companies could potentially terminate contracts with workers who strike, filter jobs away from them on the platform, or find other ways to punish them for challenging the company.

Beyond the rights established by law, there is also an impact on the drivers' human rights as outlined in the Universal Declaration of Human Rights.[124] This includes the right to fair remuneration, which simply means payment proportional to the work. Uber drivers are the sole staff that carries out Uber's service, putting in time, effort, and their own money to work on the platform. Uber's control over fares, however, affects their earnings. They do not receive adequate pay for their work, especially in comparison to independent contractors who have no employer that deducts from their fares. In addition, the inability to organize makes it impossible for Uber drivers to exercise their right to form and participate in unions. This further impedes their ability to negotiate with Uber or participate in collective bargaining. By manipulating the conditions of the work arrangement, Uber is not just impeding the drivers' ability to exercise their rights to collective bargaining, unionization, and fair remuneration; it is actually violating these rights. This is subsequently also a violation of the right to favorable conditions of work.

More broadly, the conditions of work also impact the fundamental human right to life and dignity. Work is undoubtedly an important factor in the standard of life, so the unjust situation for Uber drivers harms the quality of their lives. Moreover, the Universal Declaration of Human Rights states that all humans are born equal in dignity and rights. Classifying Uber drivers and

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[123] Kate Cogner, Vicky Xiuzhong Xu, and Zach Wichter, "Uber Drivers' Day of Strikes Circles the Globe Before the Company's I.P.O.," New York Times, May 8, 2019, https://www.nytimes.com/2019/05/08/technology/uber-strike.html?module=inline.
[124] "Universal Declaration of Human Rights," United Nations, December 10, 1948, https://www.un.org/en/universal-declaration-human-rights.

independent contractors undoubtedly creates a disparity between them and other workers whose rights are protected. Finally, it could even be argued that the classification violates the right to be free from discrimination because Uber drivers' labor identity is treated differently that other workers. Ultimately, even though the other rights impacted by Uber's conduct are specific to labor, it is impossible to ignore the universal importance of these human rights.

It should be noted that neither the New York nor Florida case mentioned human rights or even the drivers' rights at work.[125] The judiciaries followed the legal tendency to focus on technicalities instead. In doing so, they overlooked the greater issue concerning the power dynamic between Uber and the drivers.

a. Unequal Control

Both cases investigated the extent of control exercised by Uber and the drivers.[126] Although the analyses were overly technical and did not include human rights, the language used in the New York case suggests Judge Burrowes was concerned with Uber's dominance over the drivers.[127] First, Judge Burrowes notes that the drivers' contracts were "drafted solely by Uber" and "did not allow claimants to negotiate the terms."[128] Uber is able to mandate the conditions of work it deems most favorable for the company and use adhesion contracts that prevent debate and compromise. The Judge also frequently described Uber as acting "unilaterally:" Uber

[125] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[126] Ibid.
[127] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[128] Ibid.

"unilaterally" sets the base price charged to customers, "unilaterally" determines the amount of fees deducted from drivers' fares, and "unilaterally" chooses the acceptable minimum star rating for drivers.[129] These phrases demonstrate how key parts of work are dictated by Uber's sole discretion.

Uber's management of fares is another element of the employment relationship that establishes the company's authority over the workers. The claimants in the New York case testified that they had "no input in determining the fare charged" because it is "determined solely" by Uber's algorithm.[130] Uber deducts 20-30% of the fare for fees, calculating the amount in part based on the type of vehicle used.[131] Uber also decides if customers should be charged with wait fees or for cancelling rides.[132] In addition, when a customer complained about the route claimant AK took, Uber admitted that it deducted the fare from AK's earnings "without notice to AK."[133] After assessing this evidence, Judge Burrowes concluded that Uber's control over fares affects the drivers' earning potential.[134] It is evident the drivers are vulnerable to how Uber handles finances.

The Florida Court mentions that "extent of control" is the most important factor in determining employment relationships, yet dismissed Uber's control over contracts and payment as inconsequential.[135] The Court emphasized the autonomy of the drivers, ignoring the fact that they only preside over trivial details.[136] The drivers undeniably have some control, however the

[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.
[136] Ibid.

ability to choose when and where to work is not as significant as that which Uber controls. By writing the contracts and sending drivers 1099 tax forms, Uber independently determines the drivers' classification. By managing fares and payments, Uber also impacts the drivers' income. The Florida Court seemed to look for the *number* of things controlled instead of their gravity, and thus failed to recognize Uber's blatant abuse of power.

Uber exercises its control in a way that is exploitative because it profits from the drivers' services while offering no benefits in return. Uber manipulates the legal and financial aspects of work to its advantage, putting the drivers in a position where they have little influence. Uber also makes decisions that greatly impact the drivers without consulting them. In contrast, the drivers' autonomy has a comparatively insignificant effect on the company's business. Even when a driver chooses to provide rides on competitors' platforms, there are billions of others who work on Uber's application. The drivers can occasionally make decisions that benefit them individually, such as when McGillis went out of his way to investigate the work opportunities that were most profitable.[137] At the same time, this is also advantageous for Uber who collects a portion of his fares. Uber gains from drivers who provide outstanding services by working during crucial hours and in popular locations because they represent the company in a positive way. Of course, drivers with bad conduct reflect poorly on Uber, but Uber can punish them by deactivating their accounts. Still, Uber never rewards high-quality drivers with minimum wage or other benefits.

The New York and Florida cases dealt too much with the particularities of control even though the most telling element of the employment dynamic is power. No matter the control the drivers exercise, Uber ultimately exploits them. The ruling in the Florida case was based off a

[137] Ibid.

misinterpretation of the most crucial aspects of the work arrangement. As a result, the already powerless drivers are now officially incapable of exercising their rights in the state.

b. The Non-Traditional but Essential Work

Although the Florida Court disregarded the greater meaning of the extent of control, it did mention the contrast between Uber drivers and traditional employees.[138] In the beginning of the Florida Court's analysis, it is noted that modern technology is changing society.[139] There is a description of how the Internet and smartphones allow people to connect in ways unlike ever before, including new business relationships through software like Uber.[140] Due to these changes, the Court had to decide which of two existing legal categories this "multi-faceted product of new technology should be fixed into … when neither is a perfect fit."[141] It is clear that the Court recognizes the complexity of the issue, and even that Uber drivers are not exactly employees or independent contractors.

Uber drivers' work may not be traditional, but they are just as vital to the company as employees. This opinion is clear in the New York case after Judge Burrowes refuted Uber's assertion that it is not a transportation company.[142] Uber admits that it complies with Taxi and Limousine Commission's rules and regulations, which govern the conduct of the for-hire driver industry.[143] Uber has also described itself as a transportation company, such as in the 2014 advertisement that called Uber "Everyone's Private Driver," and a 2016 internal memo that

[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Ibid.

stated "our goal at Uber is transportation as reliable as running water everywhere, and for everyone."[144] Judge Burrowes found that Uber is a transportation company and does not have its own staff that could provide the services the claimants did, so therefore "the claimants role as Drivers was a crucial aspect of Uber's operation."[145]

The Florida Court did not directly acknowledge that Uber drivers are essential for the business. In *McGillis v. Uber*, Uber is not described as a transportation company but "a technology platform that connects drivers with paying customers seeking transportation services."[146] The Florida Court stated that even though the "principal business is to provide transportation," this fact alone does not mean the drivers are employees.[147] Despite this claim, the Florida Court also found that "the central issue is the act of being available to accept requests, [and t]his control is entirely in the driver's hands."[148] This can be interpreted as an admission that drivers control the "central issue" of Uber's services, making them a key part of the company's business.

This is also proven given the Uber platform's consistent operation. The Florida Court declared the drivers' level of autonomy is unlike traditional employees, who would not be allowed this freedom if it meant customers go unserved.[149] The New York case mentioned that drivers are actually expected to accept 90% of ride requests or they are relayed to the next closest driver within fifteen seconds.[150] This would certainly leave few customers without service.

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[144] Ibid.
[145] Ibid.
[146] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.

Furthermore, if the drivers exercise their ability to refuse rides so often that customers go unserved, Uber would not be able to operate. Even if Uber is only a "technology platform" that connects drivers to customers for transportation services, the platform needs drivers to provide these services. In short, Uber would not function without the drivers, so they are a fundamental part of the company.

It is evident that Uber is reliant on the drivers for the business to continue, which implies that Uber should have some responsibility over them. However, Uber treats them as independent contractors as if they have no meaningful tie to the company. Uber exploits them by creating a relation where they get nothing in return for their work, even though Uber could not exist without them. By ignoring the importance of the drivers, the Florida Court again overlooked a crucial element of the work relationship, reinforced the power imbalance, and encouraged a work situation where Uber drivers cannot exercise their rights.

c. Greater Significance of the Rulings

Despite the omission of rights language, the Florida and New York cases have a substantial impact on Uber drivers' human rights. Had the Florida Court applied the human rights framework to the case, it would have seen that Uber's power abuse and exploitation of the workers proves that Uber is violating the drivers' rights. States have the duty to protect their citizens, but Florida's ruling for the independent contractor classification approved of Uber's wrongful conduct. By failing to protect its citizens from violations by third parties, Florida itself is violating the drivers' rights.

This problem is not specific to Uber drivers. In fact, the rights of all gig workers who are misclassified as independent contractors are violated by companies and governments who use the

classification. The Florida case is an excellent example of the problems of federalism in the United States legal system. The federal government has not resolved the issue, which leads to non-uniformity in state laws and decisions. This can lead to rights violations in certain states, such as Florida, because states focus on the identity of 'employee' and 'independent contractor' instead of power dynamics and rights.

Why is a simple word the determinant of rights under the United States legal system? The country has neglected new types of workers and relied on outdated and non-inclusive labor categories to determine what rights they are afforded. Employment classification, and labor identity in general, should be irrelevant because gig workers provide services for a company and deserve benefits because of that. Even more important is the fact that gig workers are human and therefore entitled to universal, inalienable human rights.

V. Employee or Not An Employee? That is the Question of Employment Tests

Courts determine whether workers are employees or independent contractors based on contracts and features of the work relationship. The most important tools for this are employment tests. Employment tests, also called worker classification tests, list criteria used to judge whether an employment relationship exists between two parties. Courts use these tests to identify which features of work should be analyzed and which employment classification the features indicate.

Employment tests may be crucial for gig workers. Federalism has led to conflicting positions on the classification of gig workers among states. The analysis in Section IV of this paper shows states courts have their own interpretation of what the most important factors of an employment relation are. However, employment tests are used in various states, so they could finally provide a conclusive determination on the classification of gig workers that transcends

state lines. By doing this, employment tests will also determine gig workers' rights. This makes them extremely important, and they therefore deserve investigation.

There are numerous employment tests used in the United States. This section will assess the outcomes of the most popular employment tests when applied to Uber drivers, based on the information provided in the Florida and New York cases.

The Restatement of the Law (Second) of Agency

The Restatement of the Law (Second) of Agency, applied in the Florida case, is used by the National Labor Relations Board and courts across the United States to determine whether workers are independent contractors or employees.[151] The National Labor Relations Board (NLRB)'s 2019 advice memorandum states Uber drivers are independent contractors based on the factors in the Restatement.[152] Using the evidence from both the New York and Florida cases, however, the outcome of the test is not as straightforward as the NLRB and Florida opinions would suggest.

Consider the factors addressed in *McGillis v. Uber*: extent of control, supervision, who supplies the tools and workplace, and method of payment.[153] Among these, only the last two were uncontested in the New York case as well.[154] The findings in regard to these two factors indicate an independent contractor relationship. Another element of the Restatement that

[151] "NLRB Returns to Long-Standing Independent-Contractor Standard," National Labor Relations Board, January 25, 2019, https://www.nlrb.gov/news-outreach/news-story/nlrb-returns-long-standing-independent-contractor-standard.
[152] Sophir, "Advice Memorandum."
[153] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.
[154] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.

indicates likewise is "the length of time for which the person is employed."[155] Uber drivers have no specific duration of employment because they can start and stop using the application whenever they choose. This can be likened to the length of employment for independent contractors.

There are other components of the Restatement that denote the drivers are employees, such as "the skill required in the particular occupation."[156] Working for Uber requires minimal skill and no specialization because driving is a common ability, whereas independent contractors may have received an education or training in their field. In addition, independent contractors might use business knowledge to maximize work opportunities, which is not required for Uber drivers to find work. The NLRB also pointed out that this factor supports the employee classification.[157]

Another factor is "whether or not the one employed is engaged in a distinct occupation or business."[158] Uber drivers do not have personal transportation businesses employed by Uber to provide a service for the company. Instead, the drivers are individuals who are hired to carry out Uber's business. The NLRB admitted that Uber drivers are a part of Uber's regular business of transporting passengers.[159] The NLRB then stated that despite this, it is not a particularly strong or dispositive factor of the employment relation.[160] The facts in the New York and Florida case suggest otherwise: Uber drivers are dedicated to Uber's business, and Uber would not exist without the drivers to perform these services.

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[155] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.
[156] Ibid.
[157] Sophir, "Advice Memorandum."
[158] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.
[159] Sophir, "Advice Memorandum."
[160] Ibid.

Similarly, another facet of an employment relation is if "the work is a part of the regular business of the employer."[161] Due to the work they perform, Uber drivers are engaged in the most fundamental part of Uber's business. The Restatement also includes the factor, "whether the principal is or is not in business."[162] Uber is in the business of providing transportation services so the drivers are employees because, as found in the factor listed prior, their work is a part of the company's business.

Other Restatement factors are more contentious. As the New York and Florida cases demonstrate, "extent of control" and "direct supervision" can be debated on both sides.[163] The Restatement also includes the question "whether or not the parties believe they are creating the relation of master and servant."[164] This is challenging to analyze. Uber would surely assert it does not serve as a master, or employer, just as expressed in the contract. However, individual drivers may have their own perception of the relationship and whether they feel they are 'servants' or independent. The assessment regards personal belief and would vary by the individual, so it is not the strongest piece of evidence to support either classification.

Using the evidence in the New York and Florida cases, this investigation of the employment status of Uber drivers found 3 factors that indicate Uber drivers are independent contractors, 4 factors that show they are employees, and 3 factors that are debatable. Overall, applying the Restatement test to Uber drivers yields an inconclusive finding.

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[161] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.
[162] Ibid.
[163] Ibid.; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[164] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758.

Internal Revenue Service Test

The Internal Revenue Service (IRS) is a United States agency that collects taxes for the federal government. The IRS has its own method of testing employment status, which is relevant because Uber drivers are provided 1099 tax forms that are used to report payments from independent contractors.[165] The IRS assesses whether workers are independent contractors or employees based the parties' degree of control and independence in three categories: behavioral control, financial control, and type of relationship.[166]

Behavioral control refers to whether the employer controls what the worker does and how they do it.[167] This includes instruction on when and where to work, the tools to use, and worker evaluation.[168] Uber does not require drivers to work at specific times or locations and does not train them to drive. However, drivers must have cars and cell phones to work on the platform. In addition, although the two cases agreed Uber looks at drivers' ratings for an overall assessment of their quality, they had opposite findings on whether Uber also monitors and manages the specifics of how they perform.[169] Based on these disagreements, the category of behavioral control does not concretely suggest one employment category.

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[165] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[166] "Independent Contractor (Self-Employed) or Employee?" Business and Self-Employed, Internal Revenue Service, last modified July 10, 2019, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.
[167] Internal Revenue Service, "Independent Contractor."
[168] "Understanding Employee vs. Contractor Designation," Fact Sheets, Internal Revenue Service, last modified July 20, 2017, https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation.
[169] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.

Financial control is a consideration of whether "the business aspects of the worker's job [are] controlled by the payer (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)"[170] The per-job method of payment and typically unreimbursed expenses indicate that the drivers are independent contractors.[171] Drivers generally obtain cars and cell phones on their own, but according to the New York case Uber gave claimant AK a cell phone and assisted claimants JS and JH in leasing vehicles.[172] Judge Burrowes also found that Uber controls and adjusts the amount of payment and does occasionally reimburse expenses, which adds further confusion to this category.[173]

Finally, the 'type of relationship' concerns the contract, continued relationship, and whether the work performed is a key part of the business.[174] The contract explicitly states Uber drivers are independent contractors, but the parties' relationship can be debated as evidence for either the employee or independent contractor classification.[175] The IRS includes benefits and the permanency in this category, both of which suggest Uber drivers are independent contractors.[176] Despite this, the fact that the drivers perform a crucial aspect of Uber's business is undeniable.[177] If the employment relation is decided by weighing these factors against each other, Uber's inability to operate without the drivers is objectively more important.

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[170] Internal Revenue Service, "Independent Contractor."
[171] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[172] Ibid.
[173] Ibid.
[174] Internal Revenue Service, "Independent Contractor."
[175] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[176] Internal Revenue Service, "Understanding Employee vs. Contractor."
[177] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.

Given that Uber drivers use independent contractor tax forms, it would be expected that the IRS test would indicate they are independent contractors. Despite this, each category contains individual elements that must be considered, and each other these elements contradict each other in regards to which classification they indicate. The ambiguity of these factors therefore makes the IRS test no more conclusive than the Restatement for officially determining the employment status of Uber drivers.

Economic Realities Test

The Supreme Court uses the economic reality test to determine employment classification, applied in the case *United States v. Silk,* 331 US 704 (1947).[178] This test involves six factors that determine whether the worker is reliant on the hiring entity, making them an employee. One factor is the control exercised by the employer, which, as stated throughout this paper, can be debated.[179] Two other factors indicate Uber drivers are independent contractors: the extent of the relative investments of the worker and employer, and the permanency of the relationship.[180]

The remaining three factors support the classification of employee. One of these is whether the worker's services are an "integral part of the employer's business."[181] Uber's business is to provide transportation service and Uber drivers carry out this service, so they are an integral part of the business. The second factor is the skill and initiative required for the

[178] "Independent Contractors," Fair Labor Standards Act Advisor, United States Department of Labor, accessed July 20, 2019, https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp.
[179] United States Department of Labor, "Independent Contractor Test."
[180] Ibid.
[181] Ibid.

work.[182] Driving does not require specialized skill, and the Uber application connects customers to the closest driver so drivers do not need to act independently to find work.[183] Uber drivers may demonstrate initiative by going to locations where rides are in high demand, but this is not *required* for the job.[184] The last factor that indicates Uber drivers are employees is the degree to which the worker's "opportunity for profit and loss" is determined by the employer."[185] Drivers decide when to use the platform and can opt to accept promotions that would increase their profits. However, Uber connects drivers to customers, creates these promotions, and unilaterally adjusts payments, all of which impact the drivers' earnings.[186] Thus, a significant degree of opportunity for profit or loss is determined by Uber.

In this test, 3 factors suggest Uber drivers are employees, 2 factors indicate they are independent contractors, and only 1 factor could be debated. Compared with the other employment tests, the economic realities test is slightly more decisive.

The ABC test and California: An Opportunity for Gig Workers

A final employment assessment used in states across America is the ABC test. Under the ABC test, the burden is on the hiring entity to prove the workers are not employees based on three conditions.[187] The first component of the ABC test is to prove: A) the worker is "free from

[182] Ibid.
[183] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[184] Ibid.
[185] United States Department of Labor, "Independent Contractor Test."
[186] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[187] Michael S. Kun, "Ninth Circuit Concludes That New California "ABC" Independent Contractor Test Applies Retroactively," National Law Review, May 2, 2019, https://www.natlawreview.com/article/ninth-circuit-concludes-new-california-abc-independent-contractor-test-applies.

the control and direction of the hiring entity with the performance of the work, both under the contract and in fact."[188] Uber's contract designates the drivers as independent contractors, but, as evidenced by the New York case, the actual practice may reveal Uber does control work performance.[189] The second element is: B) the worker performs a service that is "outside the usual course of the hiring entity's business."[190] Uber's business is to provide transportation services, so Uber drivers' work is part of the normal business.[191] The final factor is: C) the worker must be "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."[192] Uber drivers are hired as individual persons, not because they are have their own transportation service that Uber wants to utilize. Therefore, Uber drivers are not engaged in an independent business.

Under the ABC test, a worker is presumed to be an employee until the hiring entity proves otherwise for all of the three elements. Although there can be conflicting views on the matter of control, the fact that the drivers' work is part of the usual course of Uber's business simply cannot be disputed. The ABC test finally provides a conclusive determination that Uber drivers are employees.

This test gained significance in the 2018 California case *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County.*[193] In the case, the Supreme Court of California

[188] Kun, "Ninth Circuit."
[189] Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[190] Kun, "Ninth Circuit."
[191] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[192] Kun, "Ninth Circuit."
[193] Dynamex Operations West, Inc. v. Superior Court of Los Angeles County. California Supreme Court (2018), No. S222732.

ruled that the ABC test is the appropriate test for determining employment classification.[194] The Court made this decision based on the provisions of the California wage order governing the transportation industry, which define "employ" as "to suffer or permit to work."[195] As described in the case, this definition means "the work was performed with the knowledge of the employer… Defendant is only liable to those drivers with whom it entered into an agreement."[196]

By favoring this definition, the California Supreme Court rejected the previously used *Borello* test that determines the employment classification of workers, which lists 10 factors similar to those included in the Restatement test. The California Supreme Court also mentioned that the three common categories of employment tests are common-law tests that consider the workers' control over the details of the work, including the IRS test, the economic realities test, and the ABC test. The Court concluded that the ABC test is simpler and clearer than the other tests because there are only three factors to consider. Furthermore, the ABC test minimizes the disadvantages workers face at work because they are presumed to be employees, and the California Court decided this is the most important purpose of employment tests.[197]

The case *Dynamex v. Superior Court* concerned two delivery drivers who worked for the company Dynamex and claimed they were misclassified as independent contractors. In the past, Dynamex drivers were considered employees. This changed in 2004, when Dynamex introduced a new policy and contract that converted all drivers to independent contractors in order to create savings for the company. Dynamex has since contended that the contract makes the independent contractor classification correct. Certain features of the work are emblematic of independent contractors, and similar to the situation of Uber drivers: the company unilaterally controls prices

[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] This paragraph draws from the *Dynamex v. Superior Court* opinion. Ibid.

charged to the customers and payments made to the drivers; the company requires the drivers to pay all vehicle costs and maintenance; the drivers are required to obtain and pay for cell phones used to keep in contact with the company; the drivers are generally allowed to set their own work schedule; the drivers are allowed to reject assignments; and the drivers are allowed to make deliveries for competing companies when they are not doing so for Dynamex. One significant difference between Dynamex and Uber is that Dynamex drivers are not rated by customers, however Dynamex has the authority to terminate agreements with drivers without cause.[198]

The plaintiffs in the case argued that even after 2004, Dynamex drivers performed the same tasks as those who were considered employees prior to the contract change. Their complaint alleged that as a result, Dynamex engaged in unfair and unlawful business practices in violation of California Business and Professions Code and violated California Labor Code by failing to pay overtime or reimburse expenses.[199] This is comparable to how Uber's manipulation of the work arrangement violates Uber drivers' rights.

Applying the ABC test to Dynamex drivers, the California Supreme first looked at factor B, whether the drivers' work is outside the usual course of business. Dynamex's business is to provide delivery services; therefore the California Court decided the drivers' work is a normal part of the business.[200] Second, the Court considered factor C, whether the drivers have an independently established trade or business.[201] This case only involved the drivers who performed delivery services solely for Dynamex, so the drivers did not have their own

[198] This paragraph draws from the *Dynamex v. Superior Court* opinion. Ibid.
[199] This paragraph draws from the *Dynamex v. Superior Court* opinion. Ibid.
[200] This paragraph draws from the *Dynamex v. Superior Court* opinion. Ibid.
[201] Ibid.

businesses.[202] The Court did not consider factor A, most likely because Dynamex would not have been able to prove the other two factors indicate the drivers are independent contractors.

Although the facts of the Dynamex case are not identical to the situation of Uber drivers, the California Supreme Court's ruling led to a new California law that will impact Uber drivers as well. On September 11, 2019, the California Senate passed Assembly Bill 5, which will make the ABC test the official standard for determining employment classification in the state.[203] Once California's governor signs the bill, it will go into effect on January 1, 2020.[204] This would be significant for gig workers in California because they would be presumed to be employees.

Companies that would be affected by the law, including Uber, have already responded to the news. Uber's chief legal officer, Tony West, commented that he believes Uber would pass the test, although he admits the most difficult factor to prove would be that the drivers' work is not a part of the company's usual business.[205] He explained that Uber's business is to serve as a technology platform, not to provide transportation services.[206] He further stated that even if Uber did not pass the test, the company would still not reclassify the drivers as employees because it firmly believes the workers are independent contractors.[207] The company is considering sponsoring a ballot in November 2020 that, if accepted by California voters, would make them exempt from the law.[208]

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[202] Ibid.
[203] David Lee, "California passes landmark gig economy rights bill," BBC News, September 11, 2019, https://www.bbc.com/news/business-49659775.
[204] Lee, "California passes landmark gig economy rights bill."
[205] Kate Conger, "California's Contractor Law Stirs Confusion beyond the Gig Economy," New York Times, September 11, 2019, https://www.nytimes.com/2019/09/11/business/economy/uber-california-bill.html?searchResultPosition=2&module=inline.
[206] Conger, "California's Contractor Law."
[207] Ibid.
[208] Dara Kerr, "Uber, Lyft business could be upended by California gig-worker bill," CNet, September 11, 2019, https://www.cnet.com/news/uber-lyft-business-could-be-upended-by-california-gig-worker-bill.

Uber has also tried to highlight the disadvantages of the bill. Primarily, Uber claims that the law would require companies to mandate schedules for Uber drivers if they are employees, taking away the flexibility they currently benefit from.[209] Such restrictions on freedom are happening in New York City due to the new minimum wage law for ride-hailing platforms. Lyft now requires drivers to work in shifts so that drivers do not saturate the market and the company does not have to pay minimum wage for as many workers.[210] Uber seems to be trying to frighten workers and convince them not to support the law.

Adam Roston, chief executive officer of an on-demand staffing platform called Bluecrew, counter-argued that the new law does not require strict schedules, saying "it's a false narrative that the flexibility of gig work and worker protections can't coexist."[211] His point is true—nothing in the law says companies must impose restrictions on their workers. Instead, the law would rightfully force companies to recognize and reward workers whose services aid the company's business, but have yet to receive benefits for this.

Despite West's assertions, Uber could fail the ABC test given the prior investigation of the ABC test applied to Uber drivers. Both the New York and Florida cases found that Uber's business is to provide transportation services.[212] Even if Uber references the National Labor Relations Board's opinion that drivers are independent contractors to support of their argument, the NLRB also found that their work is a regular part of Uber's business.[213] Furthermore, Uber would still have to prove factor C, that the drivers have independent businesses. Uber would

[209] Conger, "California's Contractor Law."
[210] Ibid.
[211] Kerr, "Uber, Lyft business could be upended by California gig-worker bill."
[212] Darrin E. McGillis v. Department of Economic Opportunity and Uber Technologies, Inc. District Court of Florida, Third District (2017), No. 3D15-2758; Claimants v. Uber Technologies, Inc. New York Unemployment Insurance Appeals Board (2017), No. 016-23858.
[213] Sophir, "Advice Memorandum."

have to prove this for each individual driver, and while this might result in some drivers being considered independent contractors, it might not result in that classification for the majority of Uber drivers.

The changes in California have positive implications for workers in the gig economy. In a BBC News article on the bill, it is mentioned that California is often the first state to introduce legislation that is soon adopted by other states as well.[214] This could trigger other states to pass similar laws that presume gig workers to be employees, guaranteeing them rights and benefits under both state and federal law. Despite this possibility for monumental change for the gig economy, the California bill is still not a law as of yet. While waiting for this potential catalyst for uniformity, gig workers' rights are still not protected universally in the United States.

The investigation of the Restatement, IRS, economic realities, and ABC employment tests is by no means exhaustive or official. Courts are certainly more qualified to use these tests and issue a decision, but this analysis serves to raise awareness of the inadequacies of labor legislation in the United States. Two of the most common avenues for determining employment status are failing: there is a variance between state court decisions, and many employment tests yield results that could be debated and do not clearly indicate one classification. There is an absence of a precise, universal method of determining employment classification even though the matter is of pressing importance. This has a profoundly negative effect on gig workers, whose rights are violated when they are classified as independent contractors.

[214] Lee, "California passes landmark gig economy rights bill."

VI. Conclusion

The disunity in the United States legal system is a barrier to human rights realization. This paper illustrates how the absence of federal legislation enables states to rule on the gig economy independently, leading to variation in labor standards across the United States. The difference in state rulings is due to an overriding focus on the technicalities of labor identity and classification, ignoring the broader power dynamics between workers and employers and the impact of this on human rights. Using Uber drivers as an example, this paper shows how this fractured system leads to rights violations.

The current labor legislation in the country is inadequate. Governments have the duty to protect their citizens and as society changes, laws need to adapt to address new forms of work and labor identities. The complexity of federalism is embodied in the conflict between constitutionalist and revisionist theories on the division of authority. This paper does not intend to suggest that a dominant federal government is the solution to the problems with labor identity and employment classification for workers in the gig economy. Instead, there must be uniformity across all bodies of the United States legal system in order to ensure that all workers are universally guaranteed their labor rights and human rights.

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