# "WE WANT ALL WORKERS TO HAVE THE RIGHT TO BARGAIN COLLECTIVELY": HOW THE ABCs CAN EQUALIZE THE GIG ECONOMY

**Abstract:** The term employee, though colloquially understood as a simple concept, is difficult to define. The advancement of technology enabling the development of new forms of work only further complicates defining this term. In particular, the recent inception and expansion of the gig economy increases the complexity of understanding what it means to be an employee. The combination of decentralization, the precariousness of the work, and the disproportionate shift of risk from the capital to the working class in the gig economy challenges the effectiveness of the current statutory framework built around the traditional concept of an employee. The National Labor Relations Act (NLRA), which is part of this statutory framework, has been unable to formulate a workable definition of an employee for the modern economy. This Note first provides an overview of the gig economy, the development of the independent contractor test under the NLRA, the application and implications of the currently applied test, and its proposed replacement, the ABC test. It then outlines the particular importance of NLRA coverage for gig workers and details problems with the use of the common-law right to control test. Finally, this Note argues that Congress should revise the NLRA by adopting the ABC test to determine who qualifies as a covered employee. This solution would better align the NLRA's coverage with its stated purpose and give gig workers a voice to address grievances while allowing businesses to retain their unique labor structures.

## INTRODUCTION

A once in a generation pandemic ravaged the nation, and as technology fundamentally changed the nature of work, an increasingly powerful and consolidated patriciate emerged.[1] An already weak lower class lost an even greater

[1] *See 1918 Pandemic (H1N1 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html [https://perma.cc/MWE5-NNFM] (Mar. 20, 2019) (explaining that the H1N1 virus precipitated the deadliest pandemic in recent history with an infection rate nearing one third of the world's population and a death toll of about 675,000 people in the United States); *The Soaring Twenties*, FORBES (July 29, 2009), https://www.forbes.com/2009/07/28/great-depression-roosevelt-hoover-opinions-columnists-thomas-f-cooley [https://perma.cc/6GT8-Q7UW] (arguing that dramatic technological change, including the ubiquitous use of the combustion engine, the evolution of electrical powered machinery, and the dissemination of electricity across households and manufacturing plants, fundamentally transformed the economy of the United States during the 1920s); Becky Little, *Why the Roaring Twenties Left Many Americans Poorer*, HISTORY, https://www.history.com/news/roaring-twenties-labor-great-depression [https://perma.cc/K7AG-QT3Y]

share of new wealth to a more dominant upper class, resulting in a wealth gap never before seen in American society.[2] Empowered by their recent ascendance, the nation's elite used their influence to crush a budding organized labor movement.[3] Less than a decade later, the nation faced its worst ever economic downturn, which forced the country to rebuild the very foundations of its economy.[4]

This is the story of the United States in the 1920s, but it is not unlike the story being written about the 2020s today.[5] The American labor force of the 1920s experienced a transformation, fueled by the technological advances of the Industrial Revolution, in which untrained, easily replaceable workers became economically viable substitutes for skilled labor.[6] As the working-class became more fungible, the power of the owners of capital grew, enabling unchecked concentration of wealth that contributed to economic disrepair.[7] The

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(Mar. 26, 2021) (detailing how the top 1% of American families received 23.9% of all pre-tax income while about 60% of families earned less than the minimum livable income as classified by the Bureau of Labor Statistics with an anti-labor climate contributing to this inequality).

[2] *See* Chad Stone, Danilo Trisi, Arloc Sherman & Jennifer Beltran, *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality [https://perma.cc/674V-6UNK] (Jan. 13, 2020) (explaining that the share of total pre-tax income to the top 1% and 0.5% grew rapidly during the 1920s and peaked in 1928).

[3] *See Chapter 2: The 1920s and the Start of the Depression 1921–1933*, U.S. DEPT. OF LAB., https://www.dol.gov/general/aboutdol/history/dolchp02 [https://perma.cc/FF4J-TY3T] (describing how the decline of labor unions during the 1920s coincided with the promotion of company unions and the practice of providing increased benefits to avoid unionization).

[4] Gary Richardson, *The Great Depression*, FED. RSRV. BANK OF ST. LOUIS (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-depression [https://perma.cc/2TLH-GNE9] (explaining that the Depression precipitated a fundamental reformation of the financial system, including the creation of new federal agencies, a restructuring of duties among existing federal agencies, and changes to both monetary and fiscal policy).

[5] *See* Peter Coy, *The 1920s Roared After a Pandemic, and the 2020s Will Try*, BLOOMBERG (Jan. 26, 2021), https://www.bloomberg.com/news/features/2021-01-26/roaring-twenties-2020s-will-try-to-roar-like-1920s-after-covid [https://perma.cc/QNB7-7XAR] (finding that the social and economic upheaval following the 1920s is a particularly apt period to examine for predictions about the current decade given social and economic similarities).

[6] *See* Gregory Wood, *"The Paralysis of the Labor Movement": Men, Masculinity, and Unions in 1920s Detroit*, 30 MICH. HIST. REV. 59, 62–63 (2004) (explaining that the restructuring of design schemes across industries that occurred during the early 20th century caused the segmentation of work once done by skilled laborers into work done by machinery unskilled laborers). During the early part of the 20th century, the economy dramatically shifted from the use of skilled to unskilled labor. *Id.* at 63. For example, in just three years the Ford Motor Company went from having a payroll of 75% skilled workmen in 1910 to a payroll comprised of 70% unskilled workmen in 1913. *Id.* Alongside mechanization came increased productivity. *Id.* at 62. For instance, the skilled workmen of 1904 produced 21,692 automobiles annually, but less than two decades later in 1921, with the assistance of automation and standardization, less skilled workers produced over 1.6 million automobiles. *Id.* at 62–63.

[7] *See* DAVID J. GOLDBERG, DISCONTENTED AMERICA: THE UNITED STATES IN THE 1920S, at 88 (1999) (arguing that the Great Depression exposed the fragility of a system in which the extremely wealthy took increasingly greater shares of the productivity gains while the average worker saw little

COVID-19 pandemic highlighted how the most vulnerable workers in modern American society are still undervalued and how technology contributes to this problem.[8] Even though technology provides work opportunities to many low skilled workers, it also furthers their economic vulnerability.[9] The creation of the modern gig economy offers a modern example of technologically driven economic development that diminishes the bargaining power of low-skill workers.[10]

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of the newfound prosperity); Wood, *supra* note 6, at 62 (explaining that workers under the new production schemes wielded considerably less influence over their work and became more expendable).

[8] *See* Miriam A. Cherry & Ana Santos Rutschman, *Gig Workers as Essential Workers: How to Correct the Gig Economy Beyond the COVID-19 Pandemic*, 35 ABA. J. LAB. & EMP. L. 11, 15–16 (2020) (highlighting the need for labor protections for gig workers in light of their status as essential workers during the COVID-19 pandemic); Editorial Board, Opinion, *'You're on Your Own,' Essential Workers Are Being Told*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/2020/04/20/opinion/osha-coronavirus.html [https://perma.cc/6HPS-TKGR] (arguing that millions of American workers deemed essential to the U.S. economy, such as grocery store or transit workers, received inadequate protections from the COVID-19 virus); *see, e.g.*, Lareign Ward, *I'm an Instacart Shopper. I Buy Groceries So Others Can Socially Isolate.*, VOX (Mar. 20, 2020), https://www.vox.com/first-person/2020/3/20/21185791/instacart-shopper-groceries-social-distancing [https://perma.cc/QN6Z-B3E9] (detailing the personal side of an Instacart delivery worker, an individual who picks up and drops off groceries for customers who make orders through the app, and highlighting the inherent danger of such work during the COVID-19 pandemic).

[9] Daron Acemoglu & Pascual Restrepo, *Unpacking Skill Bias: Automation and New Tasks*, 110 AM. ECON. ASS'N PAPERS & PROC. 356, 359–60 (2020) (finding a stronger demand for skilled workers since 1987 due to technological development and the subsequent increased rate of displacement of low-skilled jobs without equivalent replacement since that inflection year); Nicola Croce & Moh Musa, *The New Assembly Lines: Why AI Needs Low-Skilled Workers Too*, WORLD ECON. F. (Aug. 12, 2019), https://www.weforum.org/agenda/2019/08/ai-low-skilled-workers/ [https://perma.cc/9EWU-B9XY] (contending that technological innovation that replaces low-skilled workers on a global scale often creates new forms of work, but also highlighting that these new forms of work are often very low paying). The COVID-19 pandemic accelerated the problem of artificial intelligence (AI) replacing human workers. *See* Joe McKendrick, *AI Adoption Skyrocketed Over the Last 18 Months*, HARV. BUS. REV. (Sept. 27, 2021), https://hbr.org/2021/09/ai-adoption-skyrocketed-over-the-last-18-months [https://perma.cc/RZ34-D3TB] (explaining that 86% of companies are using AI as a mainstream technology and that 55% of companies report that COVID accelerated their AI strategy).

[10] *See* E. Tammy Kim, Opinion, *The Gig Economy Is Coming for Your Job*, N.Y. TIMES (Jan. 10, 2020), https://www.nytimes.com/2020/01/10/opinion/sunday/gig-economy-unemployment-automation.html [https://perma.cc/UYH3-X7VT] (discussing the problem of deskilling enabled by the gig economy); Ben Zipperer et al., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, ECON. POL'Y INST. (June 1, 2022), https://www.epi.org/publication/gig-worker-survey/ [https://perma.cc/U94U-2F9Z] (emphasizing that gig workers operate under a business model that leaves them very little control over their working conditions and, of particular importance, no legal rights to collective bargaining). *See generally* Mike Volkin, *Why the Gig Economy Will Drive the Future of Employment*, FORBES (Mar. 27, 2020), https://www.forbes.com/sites/forbescoachescouncil/2020/03/27/why-the-gig-economy-will-drive-the-future-of-employment/?sh=5589af444f52 [https://perma.cc/YM7D-W9D5] (arguing that the gig economy will dominate the future of employment because technological advances reshaped the traditional job economy, enabling businesses to cut costs and affording workers more flexibility). The gig economy has also been termed the "sharing economy" or the "[o]n-[d]emand [e]conomy." *See* Mike Jaconi, *The 'On-Demand Economy' Is Revolutionizing Consumer Behavior—Here's How*, BUS. INSIDER (July 13, 2014), https://www.businessinsider.com/the-on-demand-economy-2014-7 [https://perma.cc/YAH5-HW2G] (defining the "[o]n-

The gig economy refers to a labor market comprised of independent contracting on a casual, temporary, and contingent basis that is commonly facilitated through electronically mediated means.[11] Although nontraditional, short-term work existed prior to the digital era, modern technology connects individuals seeking and those providing part-time labor in a different way.[12] The gig economy's decentralization, the precariousness of the work it offers, and the disproportionate shift of risk from the owners of capital to the working class present in it challenge the effectiveness of Great Depression era labor laws designed to protect the working class.[13]

In reaction to the economic calamity of the 1920s, the U.S. government established a social safety net and regulated nearly every aspect of economic

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[d]emand [e]conomy" as companies engaged in the use of technology to provide services and goods); JAMIE WOODCOCK & MARK GRAHAM, THE GIG ECONOMY: A CRITICAL INTRODUCTION 11 (2020) (explaining that "sharing economy" is an "optimistic" term used interchangeably with gig economy (quoting ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 2 (2016))). This Note uses the phrase gig economy rather than these other terms.

[11] WOODCOCK & GRAHAM, *supra* note 10, at 9. Presently, the gig economy is estimated to account for about 1% of fulltime employment, but notably 16% of survey respondents indicated they once worked a gig job and moreover its relevance goes beyond these numbers because of its growth potential. *See Electronically Mediated Employment*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/cps/electronically-mediated-employment.htm [https://perma.cc/R4WV-XHMF] (Sept. 28, 2018) (explaining that the 2017 Contingent Worker Supplement of the Current Population Survey asked new questions to measure "electronically mediated employment," which is defined as brief, piecemeal work arranged and compensated through a digital platform); Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/ [https://perma.cc/686G-5DFE] (highlighting that in 2021 the Pew Research Center surveyed adults across the United States and found that 16% of Americans work or worked in the gig economy). *See generally* Marcin Zgola, *Will the Gig Economy Become the New Working-Class Norm?*, FORBES (Aug. 12, 2021), https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm/?sh=6e7851a3aee6 [https://perma.cc/7PWB-W3S2] (questioning the role that the gig economy will play in the larger U.S. economy and noting that it grew at a rate of 35% in 2020—significantly faster than other U.S. economic sectors).

[12] *See* Anderson et al., *supra* note 11 (arguing that new technologies enable the existence of the gig economy and lead to the creation of many new companies, such as Uber, Task Rabbit, and Door Dash).

[13] William J. Tronsor, *Unions for Workers in the Gig Economy: Time for a New Labor Movement*, 69 LAB. L.J. 181, 182–83 (2018) (detailing the history of labor law in America and contending that labor law must evolve to match the modern American economy); Alexandrea J. Ravenelle, Ken Cai Kowalski & Erica Janko, *The Side Hustle Safety Net: Precarious Workers and Gig Work During COVID-19*, 64 SOCIO. PERSPS. 898, 900 (2021) (defining gig work as the epitome of precarious work); Bryce Covert, *Like Uber, but for Gig Worker Organizing*, AM. PROSPECT (Mar. 30, 2020), https://prospect.org/labor/like-uber-but-for-gig-worker-organizing/ [https://perma.cc/LP8M-ZSEQ] (asserting that gig work is inherently decentralized); Lutfun Nahar Lata, Jasmine Burdon & Tim Reddel, *New Tech, Old Exploitation: Gig Economy, Algorithmic Control and Migrant Labour*, SOCIO. COMPASS, Aug. 2022, at 1, 7–8 (explaining the shift of risk from capital owners to laborers in the gig economy).

life.[14] Included among these economic regulations were new national labor protections for unionization and collective action.[15] Perhaps the most impactful piece of legislation signed into law during this period was the National Labor Relations Act (NLRA).[16] The NLRA defines the parameters of the employee-employer relationship by dictating both the rights and limitations of workers, labor organizations, and companies.[17] Over time, the NLRA developed through a combination of statutory change, administrative action by the National Labor Relations Board (NLRB), and judicial interpretation.[18] These changes, alt-

[14] *See* Jerry D. Marx, *American Social Policy in the Great Depression and World War II*, VA. COMMONWEALTH UNIV. (2011), https://socialwelfare.library.vcu.edu/eras/great-depression/american-social-policy-in-the-great-depression-and-wwii/ [https://perma.cc/JF8P-B5VC] (highlighting the change in perspective about the propriety of government intervention following the Great Depression). The election of Franklin D. Roosevelt ushered in a new era of government social welfare programming, including Social Security, the Civil Works Administration, the Federal Emergency Relief Administration, the Civilian Conservation Corps, banking regulations, and an income tax to support these programs. *Id.*

[15] *See Labor Unions During the Great Depression and New Deal*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/labor-unions-during-great-depression-and-new-deal/ [https://perma.cc/76VD-V7N9] (describing the evolution of labor law leading up to, during, and after the Great Depression, including the passage and enactment of major legislation protecting the rights of unions and the process of collective bargaining).

[16] *See* Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, REGULATION, Spring 2014, at 20, 26 (highlighting the various successes of the National Labor Relations Act (NLRA), including most significantly the creation of a legal framework for unionization protections); *National Labor Relations Act*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/6YSZ-6Z6V] (articulating that the U.S. government supports collective bargaining and the protection of freedom of association for workers); *see also* KENNETH G. DAU-SCHMIDT, MATTHEW W. FINKIN, RUBEN J. GARCIA & JASON R. BENT, LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 12–13 (6th ed. 2021) (describing the motivations behind the wave of New Deal legislation, with particular reference to the passage of the NLRA and the shift in Supreme Court review that enabled its enactment); Graham Boone, *Labor Law Highlights, 1915–2015*, BUREAU OF LAB. STAT. (Oct. 2015), https://www.bls.gov/opub/mlr/2015/article/labor-law-highlights-1915-2015.htm [https://perma.cc/2YN5-SW72] (explaining that laborers joined unions without federal protections prior to the 1930s, but that this changed after the passage of federal labor laws). In 1933, Congress passed the National Industrial Recovery Act, which articulated the rights of unions. Boone, *supra*. With the passage of the NLRA in 1935, Congress expanded those rights to include the right to collective bargaining. *Id.*

[17] *See* 29 U.S.C. §§ 152, 157, 158 (detailing provisions of the law, including definitions for the applicability of the Act and the various sections which bestow rights and place limitations on employers, employees, and labor organizations).

[18] *See* NAT'L LAB. RELS. BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 10 (2015) (providing a brief history of the NLRA, including the establishment of the National Labor Relations Board (NLRB), some of the major statutory revisions, including the Taft Hartley Act, Landrum Griffin Act, and 1974 Healthcare Amendments, and highlights of the countless NLRB and court decisions that interpret the Act's language). The passage of the NLRA in 1935 created the NLRB, consisting of three members appointed by the President and confirmed by the Senate, charged with the responsibility of enforcing the rights enshrined in the law. *1935 Passage of the Wagner Act*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [https://perma.cc/JQQ2-T3LE].

hough varied in their application, all attempted to uphold the statute's foundational purpose of encouraging peaceful labor relations.[19]

One development of particular importance came with the passage of the Labor Management Relations Act (LMRA), which amended the definition of "employee" to exclude independent contractors.[20] This exclusion denies any worker labeled as an independent contractor from accessing the vast majority of rights afforded by the NLRA.[21] Statutory employees, on the other hand, are guaranteed, among other protections, the right to form and organize a union, collectively bargain, and act collectively for mutual aid or protection.[22] The amendment originally intended to differentiate between economically independent and economically dependent workers according to general principles of the law of agency, which today exists in a ten-factor right to control test.[23] Notwithstanding that intention, the current right to control test, which developed under tort law, is inadequate for making a distinction between an employee and an independent contractor for purposes of labor law protections.[24] This inadequacy becomes clear when applied to the modern gig economy.[25]

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[19] *See, e.g.*, Herman Benson, *Union Democracy and the Landrum-Griffin Act*, 11 N.Y.U. REV. L. & SOC. CHANGE 153, 154 (1982) (explaining that Congress passed the Landrum Griffin Act with the intention of modeling union elections after democratic national political elections); Dale Mineshema-Lowe, *Taft-Hartley Act of 1947 (1947)*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1050/taft-hartley-act-of-1947 [https://perma.cc/D49W-BU4U] (detailing the Taft Hartley Amendments passed as a reaction to the perceived increase in power of labor unions and increased government control over labor disputes, including the power to investigate labor union actions and to grant injunctions against strikes); Robert F. Wagner, *The Philosophy of the Wagner Act of 1935*, 32 ST. JOHN'S L. REV. 1, 1–2 (1957) (explaining that Congress passed the NLRA, often referred to as the Wagner Act, with the goal of fostering cooperation between labor and management through a better balance of bargaining power between the two); *see also* James Long, Note, *#Fired: The National Labor Relations Act and Employee Outbursts in the Age of Social Media*, 56 B.C. L. REV. 1217, 1228–29 (2015) (highlighting the new meaning of concerted activity protections afforded by Section 7 of the NLRA in light of the creation and expansion of social media).

[20] Labor Management Relations Act of 1947, Pub. L. No. 101, § 101, 61 Stat. 136, 137–38 (codified at 29 U.S.C. § 152).

[21] *See* 29 U.S.C. § 152(3) (excluding "any individual having the status of an independent contractor" from the definition of employee).

[22] *See id.* § 157 (guaranteeing statutory employees' rights, including the rights to organize, form or join a union, and engage in collective action for "mutual aid or protection").

[23] 93 CONG. REC. 6441–42 (1947) ("The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency."); RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

[24] *See* Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 400 (2019) (explaining that the original purpose behind the separation of independent contractors from employees was to hold the financially stable independent contractors liable for their actions, but to hold the employer liable for the actions of an employee to ensure compensation for the injured party).

[25] *See* Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 349–51 (2016) (finding that the multifactorial test developed under the principles of agency represents a fertile ground for manipulation).

Current application of the right to control test, coupled with subsequent administrative and judicial interpretations of it, leaves a significant number of gig workers outside the protections of the NLRA.[26]

Excluded from the NLRA's protections, gig workers—already structurally disadvantaged because of the decentralized nature of their work—face greater obstacles to unionization.[27] Furthermore, the modern expansive view of who constitutes an independent contractor outside the protections of the NLRA con-

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[26] *See id.* (arguing that the ambiguity and lack of modernization of worker classification tests contributes to the widespread problem of misclassification); *see also* Chris Opfer, *Most Gig Workers Won't Be Seen as Employees, Trump Lawyer Says*, BLOOMBERG L. (June 13, 2019), https://news.bloomberglaw.com/daily-labor-report/trumps-top-labor-lawyers-narrow-gig-worker-protections [https://perma.cc/QJQ4-D4AZ] (detailing recent actions taken by the NLRB that expand the independent contractor exception to include gig workers); Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *Unprecedented: The Trump NLRB's Attack on Workers' Rights*, ECON. POL'Y INST. (Oct. 16, 2019), https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/ [https://perma.cc/DTK3-ZGD2] (describing the reversal of NLRB's precedent in *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (Jan. 25, 2019), wherein the board announced a new test centering on entrepreneurial opportunity above other factors that, when applied, found that drivers previously considered employees were instead independent contractors). Recent NLRB decisions overturning precedent narrowed the definitions of terms used to delineate the coverage of the NLRA's protections and expanded the rights of managers. McNicholas et al., *supra*. This narrowing occurred while rights to limit concerted activity, set restrictive workplace rules, and engage in union-activity-related terminations expanded. *Id.* Nonetheless, the rapid evolution of the economy via the implementation of AI and other technological advances continues to exasperate the problems related to the erosion of labor protection and concentrates those problems among low-skill workers. WORLD ECONOMIC FORUM, THE FUTURE OF JOBS REPORT 2020, at 30 (2020) (finding that the rate of job destruction is set to accelerate among low-skilled work and that the pandemic will accelerate this automation of work).

[27] *See* Li Jin, Scott Duke Kominers & Lila Shroff, *A Labor Movement for the Platform Economy*, HARV. BUS. REV. (Sept. 24, 2021), https://hbr.org/2021/09/a-labor-movement-for-the-platform-economy?registration=success [https://perma.cc/DT2M-9T3U] (arguing that collective action is more difficult for gig-platform workers than for traditional workers because gig-platform workers lack NLRA protection and work in decentralized environments); *see, e.g.*, Sam Drysdale, *App-Based Drivers Revive Push for Union Rights*, WBUR (Dec. 22, 2022), https://www.wbur.org/news/2022/12/22/uber-lyft-doordash-union-orrganizing-efforts-rally [https://perma.cc/TR34-39AH] (highlighting the experiences of Massachusetts-based rideshare drivers who protested for legislation to help them unionize); *see also* SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 15–16 (2015) (demonstrating that coverage under the NLRA would allow gig workers to avail themselves of the federal antitrust labor exemption that poses a significant challenge to legal worker organizing). Low unionization contributes to a variety of societal ills, including wealth inequality at levels not seen since the Great Depression. *See Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL'Y INST. (Apr. 23, 2021), https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/ [https://perma.cc/W3FW-TP7J] (finding a strong correlation between union membership and economic inequality, and showing that inequality grew while unionization dropped across the United States over the last seven decades); Andrew Keshner, *America's 1% Hasn't Had This Much Wealth Since Just Before the Great Depression*, MARKETWATCH (Feb. 24, 2019), https://www.marketwatch.com/story/its-been-almost-a-100-years-since-the-americas-1-had-so-much-wealth-2019-02-11 [https://perma.cc/CN7T-3AEJ] (highlighting that wealth in the United States is nearly as concentrated and unequal as it was at its peak in the 1920s).

flicts with the original purposes of the Act.[28] This exclusionary interpretation of the NLRA highlights the need to rethink the test of who is an employee.[29] The best way to achieve a stable, new definition of employee is through statutory change.[30]

To prevent unsustainable societal imbalances, Congress should amend the NLRA to replace the right to control test with the ABC test for determining employment status.[31] The ABC test, in comparison to the right to control test, focuses on more relevant factors and presumes a worker is an employee, placing the burden of proof to show otherwise on the employer.[32]

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[28] *See* 79 CONG. REC. 9686 (1935) (providing a record of the House floor debate regarding passage of the NLRA). Congressman William P. Connery, a co-sponsor of the NLRA, clarified during debate that "labor" did not refer to the workers of a particular union, but rather to "all the working people of the country." *Id.* Connery went on to say that "we want all workers to have the right to bargain collectively." *Id.*

[29] *See* Carl Shaffer, Note, *Square Pegs Do Not Fit in Round Holes: The Case for a Third Worker Classification for the Sharing Economy and Transportation Network Company Drivers*, 119 W. VA. L. REV. 1031, 1059 (2017) (arguing that Congress must adopt a new definition of employee to adequately capture the workers who provide labor in the new gig economy).

[30] *See infra* notes 207–233 and accompanying text (arguing for a statutory change to the definition of employee).

[31] *See* Heidi Shierholz, Margaret Poydock, John Schmitt & Celine McNicholas, *Latest Data Release on Unionization Is a Wake-up Call to Lawmakers*, ECON. POL'Y INST. (Jan. 20, 2022), https://www.epi.org/publication/latest-data-release-on-unionization-is-a-wake-up-call-to-lawmakers/ [https://perma.cc/NE65-CGU4] (arguing for the passage of the PRO Act, which would amend the NLRA to adopt the ABC test and support worker unionization); Kenneth Dau-Schmidt & Michael D. Ray, *The Definition of "Employee" in American Labor and Employment Law* (finding that the actions by the courts and the NLRB to exclude an expanding list of workers from NLRA protections is contradictory to the expressed goals of the NLRA), *in* JAPANESE INST. FOR LAB. & POL'Y TRAINING, THE MECHANISM FOR ESTABLISHING AND CHANGING TERMS AND CONDITIONS OF EMPLOYMENT/THE SCOPE OF LABOR LAW AND THE NOTION OF EMPLOYEES 117, 123 (2004); *see also* Little, *supra* note 1 (detailing how increased inequality, exacerbated by an anti-labor climate, led to less stable consumption and an overall weaker economy, which ultimately contributed to the Great Depression). The labor power imbalances from the 1920s, which were brought on in part due to an evolution in the understanding of labor, should act as a cautionary tale. *See* Stone et al., *supra* note 2, at 2 (explaining that the share of income for top earners in the United States is reaching levels of concentration not seen since the 1920s).

[32] *See* Karen R. Harned, Georgine M. Kryda & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 102 (2010) (describing the ABC test as both simpler to apply and harder for employers to misclassify workers under because it presumes employee status); Pinsof, *supra* note 25, at 369–70 (arguing that, in comparison to the right to control test, the ABC test is better because it presumes workers are employees and minimizes the number of manipulable factors); Eric Markovits, Note, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee-Independent Contractor Status*, 2020 CARDOZO L. REV. DE-NOVO 224, 247, https://cardozolawreview.com/easy-as-abc-why-the-abc-test-should-be-adopted-as-the-sole-test-of-employee-independent-contractor-status/ [https://perma.cc/YCH5-GHAY] (extolling the dual benefits of the ABC test, namely that it presumes workers to be employees and minimizes the number of factors for analysis). Although significant literature exists on the reformation of the independent contractor distinction under American labor law, this Note uniquely argues for the application of the ABC test under the NLRA as a solution to the competing challenges to reform in the modern gig economy. *See, e.g.*, Pinsof, *supra* note 25, at 367–69 (arguing for the adoption of the

This Note explores the history of the independent contractor distinction under the NLRA and argues that abandoning the right to control test is vital for a twenty-first-century economy marked by economic flexibility typified by the gig economy.[33] Part I of this Note discusses the gig economy, the history of the test to determine independent contractors under the NLRA, the application and implications of the currently applied right to control test, and the proposed ABC test.[34] Part II analyzes the importance of coverage under the NLRA for gig workers and the shortcomings of the currently applied right to control test for determining coverage under the NLRA.[35] Finally, Part III argues that the right to control test should be replaced with the ABC test to align coverage with the NLRA's original purposes and to better protect economically dependent gig workers.[36]

## I. DEFINING EMPLOYMENT IN THE NEW GIG ECONOMY

The gig economy generally refers to a market of laborers and employers contracting for irregular, nonpermanent, and conditional work.[37] The concept of short-term contingent work is not new, but a unique combination of features present in work relationships in the gig economy is a recent phenomenon.[38] This presents challenges to the framework of American labor law originally built on the concept of an employee engaged in stable long-term work.[39] Sec-

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ABC test as the single test for all federal labor statutes to solve the plight of the gig-economy worker); Cunningham-Parmeter, *supra* note 24, at 408 (arguing for the adoption of the ABC test); Brian A. Brown II, Note, *Your Uber Driver Is Here, but Their Benefits Are Not: The ABC Test, Assembly Bill 5, and Regulating Gig Economy Employers*, 15 BROOK. J. CORP. FIN. & COM. L. 183, 207 (2020) (suggesting federal adoption of the ABC test in place of all other employment status determination tests currently applied in order to resolve the classification issues facing gig workers); HARRIS & KRUEGER, *supra* note 27, at 15–21 (proposing a litany of legislative reforms to establish a third category of worker); Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* 37 COMPAR. LAB. L. & POL'Y J. 471, 471 (2016) (advocating for various policy changes rather than the introduction of a new worker category); Cherry & Rutschman, *supra* note 8, at 14–15 (arguing that the COVID-19 pandemic provided more than enough justification to elevate gig workers to employee status under the law).

[33] *See infra* notes 1–233 and accompanying text.

[34] *See infra* notes 37–150 and accompanying text.

[35] *See infra* notes 151–206 and accompanying text.

[36] *See infra* notes 207–233 and accompanying text.

[37] WOODCOCK & GRAHAM, *supra* note 10, at 3.

[38] *See* Susan J. Ashford, Brianna Barker Caza & Erin M. Reid, *From Surviving to Thriving in the Gig Economy: A Research Agenda for Individuals in the New World of Work*, 38 RSCH. ORGANIZATIONAL BEHAV. 23, 27 (2018) (noting relevant structural differences between the gig and traditional economy, including job instability, significant worker autonomy, a lack of career development opportunities, contingencies of work, and relational decentralization); Jin et al., *supra* note 27 (highlighting the various features of the gig economy that distinguish it from traditional labor relationships, such as lack of leverage, low barriers to entry, strong labor supply, and decentralization).

[39] *See* Seth Oranburg & Liya Palagashvili, *Transaction Cost Economics, Labor Law, and the Gig Economy*, 50 J. LEGAL STUD. S219, S234–35 (2021) (arguing that the decentralizing and efficiency

tion A of this Part explores the history and development of the modern gig economy.[40] Section B of this Part provides an overview of how the NLRA historically classified employees and changes to that classification over time.[41] Section C of this Part then explains the application and implications for gig workers of the current right to control test as well as the ABC test.[42]

### *A. The Gig Economy*

Jazz musicians first used the term "gig" at the turn of the century to describe an arrangement to play at a local establishment for a single night.[43] Such gigs, even if arranged for an extended period of time, provided little to no guarantee of long-term work or protections, and usually only offered subsistence wages with the possibility of pay reduction in proportion to the quality of work performed.[44] The original understanding of gigs appears quite similar to the modern conception of the gig economy, in which workers engage in tasks on an unpredictable, short-term basis, and access to continued work depends on the quality of past performance.[45] Subsection 1 of this Section defines gig work.[46] Subsection 2 outlines the advantages and disadvantages of this new form of work.[47]

#### 1. Defining Gig Work

The modern gig economy relies upon matching digital platforms that facilitate exchanges of labor for payment and not exchanges of assets.[48] These

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effects of modern technology will lead to the domination of formerly unconventional work relationships, necessitating revision of the American labor law framework); *see also* MBO PARTNERS, THE STATE OF INDEPENDENCE IN AMERICA 19 (2019) (projecting continued growth for the gig economy).

[40] *See infra* notes 43–68 and accompanying text.

[41] *See infra* notes 69–111 and accompanying text.

[42] *See infra* notes 112–150 and accompanying text.

[43] Travis Clark, *The Gig Is Up: An Analysis of the Gig-Economy and an Outdated Worker Classification System in Need of Reform*, 19 SEATTLE J. SOC. JUST. 769, 773 (2021).

[44] WOODCOCK & GRAHAM, *supra* note 10, at 2–3. Gig work typically paid so little that gig workers could barely cover expenses and gig jobs placed workers outside of labor protections. *Id.*

[45] *Id.* at 3.

[46] *See infra* notes 48–56 and accompanying text.

[47] *See infra* notes 57–68 and accompanying text.

[48] *See* Jim Stanford, *The Resurgence of Gig Work: Historical and Theoretical Perspectives*, 28 ECON. & LAB. RELS. REV. 382, 384 (2017) (explaining that digital platform businesses all perform a matching function that bifurcates into platforms that facilitate the exchange of labor and those that facilitate the exchange of assets, with both categories sharing several similar characteristics). Examples of gig platforms that fit this definition include Uber, Lyft, Taskrabbit, and the Amazon Mechanical Turks. *See How Does Uber Work?*, UBER, https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e [https://perma.cc/25RP-LWWB] (self-describing Uber as a "platform" that links consumers with driving and delivery services via an online application); *How Lyft Works: 6 Things to Know Before Your First Ride*, LYFT (June 9, 2016), https://www.lyft.com/blog/posts/how-does-lyft-work [https://perma.cc/2Y44-BLPG] (explaining that Lyft is a rideshare company

digital platforms often break down further into two separate, but similar, work relationships known as crowdsourcing and on-demand work.[49] Crowdsourcing work focuses on connecting individuals across the globe to organizations and businesses seeking to complete a wide variety of tasks, most commonly through digital means.[50] On-demand work, on the other hand, is often assigned via smartphone applications and more closely mirrors traditional work tasks performed locally and in person.[51]

Under both crowdsourcing and on-demand work, gig workers engage with labor in a fundamentally different way than the traditional employee and employer.[52] Workers in the gig economy work irregular hours, determined primarily by fluctuations in demand for the type of labor provided and the worker's autonomous choice to engage in the work.[53] Commonly, the laborer

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that enables users to request a driver through a smartphone application); *Revolutionizing Everyday Work*, TASKRABBIT, https://www.taskrabbit.com/about [https://perma.cc/MQ5X-XXLD] (highlighting that Taskrabbit connects customers with skilled workers who perform various jobs and errands); *Amazon Mechanical Turk*, AMAZON, https://www.mturk.com [https://perma.cc/3Y6L-BRKT] (defining the Amazon Mechanical Turk as a crowdsourcing marketplace that provides individuals and businesses with access to a virtual distributed workforce). A commonplace example of a gig platform that would not fit this definition would be Airbnb. *See About Airbnb: What It Is and How It Works*, AIRBNB, https://www.airbnb.com/help/article/2503 [https://perma.cc/M4XF-ALUM] (explaining that customers rent spaces from hosts through the platform).

[49] De Stefano, *supra* note 32, at 471. *See generally* Cherry & Rutschman, *supra* note 8, at 14–15 (highlighting different challenges that on-demand workers and crowd-source workers face given the public conception of gig work as a side hustle).

[50] *See* De Stefano, *supra* note 32, at 473–74 (explaining crowdsourcing as the use of online platforms to hire workers to complete tasks of varying degrees of difficulty and complexity). Crowdsourcing tasks range from routine and repetitive tasks carved out from a larger job, such as photo tagging or survey completion, that are known as "microtasks," to larger projects, such as web development or marketing work. *Id.*

[51] *Id.* at 474 (explaining that on-demand work more closely resembles traditional labor, includes tasks such as transportation, running errands, cleaning, and clerical work, and is more standardized due to the terms set by the application through which labor is bought and sold). While these distinctions are useful in terms of describing the differing forms of work completed, most gig-economy work fails to fit neatly into these two categories. *Id.* at 472 (explaining that all gig work involves job opportunities with flexible schedules, one of the many factors that suggest a new work relationship). Furthermore, regardless of its classification, all gig work differs sufficiently from traditional labor for analysis as a whole. *See id.* at 475–76 (arguing that regardless of the differences between on-demand and crowdsourcing work they share enough characteristics for analysis together). Gig work generally is made possible by the internet, consists of job opportunities on an instantaneous basis, draws from large pools of supply and demand, and engages part-time workers and workers who draw their primary income from these platforms. *Id.*

[52] *Id.*; *see* Gwendolyn Paige Watson, Lauren D. Kistler, Baylor A. Graham & Robert R. Sinclair, *Looking at the Gig Picture: Defining Gig Work and Explaining Profile Differences in Gig Workers' Job Demands and Resources*, 46 GRP. & ORG. MGMT. 327, 334–35 (2021) (defining the three predominant characteristics of gig work as project-based remuneration, non-permanent work, and flexibility in the performance of work).

[53] Andrew Stewart & Jim Stanford, *Regulating Work in the Gig Economy: What Are the Options?*, 28 ECON. & LAB. RELS. REV. 420, 421 (2017); *see also* Watson et al., *supra* note 52, at 338

themself provides some or all of the capital necessary to perform the work, often without expectation of compensation for any expenses incurred.[54] Gig workers often work physically separate from other workers, their superiors, and, sometimes even, their customers.[55] Finally, compensation is often earned per job and organized around a digital platform that sets the expectations and rates for the job performed.[56]

### 2. A Good Gig, but for Whom?

Flexibility is the hallmark of gig work.[57] Companies utilizing gig work benefit from the latitude provided by an on-demand workforce in comparison to the structure of traditional employment relationships.[58] Under the gig work model, corporations pay for labor on a piecemeal basis, efficiently allocating payment to each job.[59] This significantly decreases the costs of recruitment, training, supervision, and enforcement associated with the traditional purchase of labor.[60] This allows companies to offer lower prices due to lower costs of labor, more readily meet the demand of consumers, and capture more value

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(comparing gig work to nontraditional, albeit commonplace, work arrangements, including contingent work and self-employment).

[54] Stewart & Stanford, *supra* note 53, at 421; *see also* WOODCOCK & GRAHAM, *supra* note 10, at 2–3 (explaining the various drawbacks of gig work).

[55] *See* Ashford et al., *supra* note 38, at 27 (describing the physical distance between gig workers and their work products, fellow workers, and employers).

[56] Stewart & Stanford, *supra* note 53, at 421.

[57] *See* Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKLEY J. EMP. & LAB. L. 143, 152 (2011) (arguing that companies tap into a flexible workforce at a low cost by employing gig workers who are available on-demand); Laura Katsnelson & Felix Oberholzer-Gee, *Being the Boss: Gig Workers' Value of Flexible Work* 3 (Harv. Bus. Sch., Working Paper No. 21-124, 2021) (finding that flexibility is central to the appeal of gig work and estimating that losing the option to control their work schedules is equivalent to over 5% in pay cuts).

[58] Norm Johnson, *Should You Hire Gig Workers?*, FORBES (Aug. 18, 2022), https://www.forbes.com/sites/forbeshumanresourcescouncil/2022/08/18/should-you-hire-gig-workers/?sh=3da418a35315 [https://perma.cc/8CGV-UJFA] (extolling the benefits of gig work for an employer, such as the ability to flexibly hire qualified workers); Lydia DePillis, *If the Job Market Is So Good, Why Is Gig Work Thriving?*, N.Y. TIMES, https://www.nytimes.com/2022/08/15/business/economy/gig-work.html [https://perma.cc/QCD8-R8TY] (Aug. 17, 2022) (contrasting the expected decrease in demand for gig work in a strong labor market with the reality of a robust gig work economy and noting that gig work serves to support labor supply in such a labor market). *See generally* Oranburg & Palagashvili, *supra* note 39, at S221–22 (applying Ronald Coase's theoretical framework of transactional costs to the alternative labor arrangements of the gig economy and finding that gig work is efficient because it significantly reduces the cost of hiring and training workers); *Coase Theorem*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining Coase Theorem as "[a] proposition in economics describing the relationship between legal rules and economic efficiency").

[59] WOODCOCK & GRAHAM, *supra* note 10, at 2.

[60] Oranburg & Palagashvili, *supra* note 39, at S227 (explaining that the gig economy utilizes technology to create a peer-to-peer network that instantaneously adjusts prices to reflect supply and demand, thereby making the renting of labor a significantly more attractive option).

than they could by using the traditional labor model.[61] Consumers, therefore, benefit from lower prices and faster completion of work.[62] Workers also benefit from this new model of work by exercising greater control over their schedules and, in some cases, securing higher pay per job.[63]

Nevertheless, some argue that the increase in individualization and independence of the gig economy leads to a power imbalance among the buyers and sellers of labor.[64] In order to hire workers in the gig economy, employers eschew the traditional employer-employee relationship and relinquish considerable control over their employees in both supervision and scheduling.[65] Even so, control exercised by employers in these areas remains meaningful and includes the power to set wages, grant or revoke access to the labor platform, and the retention of considerable—albeit indirect—supervision.[66] Workers in the gig economy further sacrifice traditional employment benefits, such as healthcare, minimum-wage guarantees, workers' compensation, and—most importantly for the purposes of this Note—federal protections under the NLRA.[67] To understand why the NLRA classifies gig workers so that they are left without its protections, it is necessary to understand the history and development of the employee-independent contractor binary.[68]

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[61] *See* Felstiner, *supra* note 57, at 151 (arguing that employers, by engaging in the gig economy, gain from the dual advantages of "scalability and on-demand labor"); Alex Kirven, *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 260 (2018) (explaining that firms hire gig workers as independent contractors, thereby removing the requirement to pay overtime, minimum wage, taxes, and healthcare benefits as well as the threat of unionization all while more efficiently connecting buyers and sellers of labor). For example, comparing Uber to the traditional taxicab model, companies can hire workers without incurring the transaction cost of a medallion. Kirven, *supra*, at 260. Furthermore, Uber utilizes part-time workers who spend less time waiting for rides, offering consistently cheaper rides than traditional cab companies. *Id.*

[62] *See* Kirven, *supra* note 61, at 260 (detailing the benefits of the gig economy to consumers).

[63] *See id.* at 261 (explaining that greater worker autonomy is inherent in this conception of the gig economy).

[64] *See* Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMPAR. LAB. L. & POL'Y J. 619, 626 (2016) (explaining that the lack of central organization, concentration of market share among a few firms, and lack of legal protections all contribute to the power imbalance between the firms and workers in the gig economy).

[65] *See* Kirven, *supra* note 61, at 264 (arguing that the use of technology fundamentally reshapes the traditional conception of control and supervision for employers in the gig economy).

[66] *See id.* at 285 (finding that the gig economy employers empower customers to gather information and use them as proxy supervisors to maintain control over the individuals they hire); Prassl & Risak, *supra* note 64, at 620–21 (explaining that though employers in the gig economy see themselves primarily as platforms, the reality is that they retain a significant portion of control over the laborers they employ); *see also* Oranburg & Palagashvili, *supra* note 39, at S222 (explaining that employers benefit heavily from a massive reduction in costs when hiring gig employees because their term of employment is reduced to their time engaged in completing the task).

[67] Clark, *supra* note 43, at 777–78.

[68] *See infra* notes 69–111 and accompanying text (explaining the history of the characterization of workers as either employees or independent contractors under the NLRA).

### *B. The History of Defining an Employee Versus an Independent Contractor Under the National Labor Relations Act*

Events leading up to the passage of the NLRA in 1935 contributed to an understanding by the average American of the importance of self-organization and collective bargaining, but the patchwork of state labor laws in effect prior to 1935 did not reflect that consensus.[69] Legislators passed the NLRA to formalize and nationalize the regulations that govern the employer-employee relationship with the goal of equalizing the power imbalance between them.[70] Congress contentiously debated the specifics of national labor law proposals, and those particulars remain in controversy today.[71] Specifically, the debate over the proper way to classify workers under the statutory definition of an employee endures.[72] Driving this debate is the question of whether a worker's position is sufficiently independent to preclude their inclusion within the legislative definition of employee.[73]

Subsection 1 of this Section provides a background on the definition of an employee under the NLRA from its initial conception to the application of the principles of agency.[74] Subsection 2 of this Section outlines changes in the application of the right to control test that led to identifying independent contractors as outside the NLRA's definition of employee.[75] Subsection 3 of this Section delineates the development and impact of the most recent shift that placed "entrepreneurial opportunity" at the center of the test.[76]

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[69] *See* Charles Fahy, *The National Labor Relations Act*, 15 IND. L.J. 103, 105–06 (1939) (explaining that voluntary recognition of unions and the labor movement was well established in the United States prior to achieving widely applicable national statutory protections).

[70] *See* 29 U.S.C. § 151 (asserting that the NLRA seeks to equalize bargaining power between employees and employers); Allen D. Holloway, *The National Labor Relations Act*, 3 J. MARSHALL L.Q. 1, 2 (1937) (describing unfair labor practices, which the NLRA in part ameliorated, as a central issue in the United States at the time of the Act's passage).

[71] *See* Florence M. Johnson, *The National Labor Relations Board Recent Changes and Decisions*, AM. BAR ASS'N (Mar. 24, 2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/national_labor_relations_board/ [https://perma.cc/A6B4-79NK] (explaining various recent changes in the interpretation of the NLRA, including decisions that affect the definition of employee, the duty to bargain in good faith, collective bargaining, elections, and more).

[72] *See* Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 69 (2013) (explaining the ramifications of the absence of a clear definition of an employee, and arguing that it causes courts to question their jurisdiction and complicates operations for employers).

[73] *See id.* at 68 (explaining that the distinction between employee and independent contractor is fundamental to the American workplace).

[74] *See infra* notes 77–90 and accompanying text.

[75] *See infra* notes 91–98 and accompanying text.

[76] *See infra* notes 99–111 and accompanying text.

### 1. The Principles of Agency: Rejected Then Accepted

When passed in 1935, Section 2(3) of the NLRA broadly defined the term employee.[77] The original definition only excluded agricultural workers, domestic workers, individuals employed by their parents or spouses, and those workers whose work ceased as a result of a labor dispute but shortly thereafter obtained substantially equivalent work.[78] The drafters of the NLRA intended broad applicability, and accordingly the original exclusions from the definition of employee under the Act were made on narrow grounds.[79] Nevertheless, the modern language of the Act excludes classes of workers originally covered under it by classifying them as independent contractors.[80]

The erosion of this expansive definition began shortly after the passage of the NLRA in an attempt by businesses to blur the lines between employees and independent contractors.[81] In 1943, in *NLRB v. Hearst Publications, Inc.*, the U.S. Supreme Court heard a challenge to the expansive definition of employee under the NLRA when four Los Angeles newspaper publishers refused to collectively bargain with a newspaper delivery workers union.[82] The newspapers argued that the common-law right to control test developed in tort law should be used to determine the existence of an employer-employee relationship under the NLRA, but the Court rejected this contention, finding that the test did not reflect the terms nor the purposes of the NLRA.[83] Instead, the Court upheld

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[77] *See* National Labor Relations Act, Pub. L. No. 198, § 2, 49 Stat. 449, 450 (1935) (codified at 29 U.S.C. § 152) (excluding only domestic and agricultural workers and workers who lost a job due to a current labor dispute or an unfair labor practice, but who then secured meaningful employment).

[78] *Id.*

[79] *See* Veena B. Dubal, *Employment Law: The Employee vs. Independent Contractor Dichotomy*, 2 JUDGES' BOOK 51, 54 (2018) (finding that the drafters of the NLRA intended broad applicability for the Act's protections). Legislators excluded agricultural workers because most farms were small and striking during harvests could bring economic calamity to a farm. Philip L. Martin, *A Comparison of California's ALRA and the Federal NLRA*, CAL. AGRIC., July-Aug. 1983, at 6, 6. Legislators excluded domestic workers from the NLRA believing that the close relationship of workers in the domicile left those workers outside the reach of labor-related legislation. LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 250.

[80] 29 U.S.C. § 152; DAU-SCHMIDT ET AL., *supra* note 16, at 25 (suggesting that at the time of the NLRA's passage the inclusion of all employees in the Act's protections was so obvious that the drafters failed to address the issue of coverage).

[81] *See* Dubal, *supra* note 79, at 55 (arguing that businesses sought to draw on the ambiguity of the right to control test that courts used to distinguish between employees and independent contractors in tort law).

[82] 322 U.S. 111, 120–21 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); *Collective Bargaining*, BLACK'S LAW DICTIONARY, *supra* note 58 (defining collective bargaining as "[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits").

[83] *See Hearst Publ'ns, Inc.*, 322 U.S. at 115–16, 122 (arguing that the test developed at common law to distinguish between employees and independent contractors in order to determine responsibility for wrongdoing in tort actions is not a test fit for use universally in all areas of the law). As written

the NLRB's earlier determination that the workers were in fact employees, instructing reviewing bodies to analyze the underlying economic realities rather than technical legal classifications.[84]

In response to the Court's decision in *Hearst*, Congress amended the NLRA four years later with the passage of the Labor Management Relations Act (LMRA), adding independent contractors to the list of workers excluded from the definition of employee under the NLRA.[85] In the years following the amendment, the NLRB and lower courts applied the definitional change in determining whether a worker was an employee and ultimately viewed the new law as a rebuke of the *Hearst* decision.[86]

In 1968, in the seminal case *NLRB v. United Insurance Company of America*, the Supreme Court held that Congress, by passing the LMRA, expected courts and the NLRB to apply general agency principles in determining whether a worker was an employee or an independent contractor.[87] The Supreme

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in 1933, § 220 of the *Restatement (First) of Agency* established a ten-factor test for determining whether an individual was an employee for the purposes of vicarious liability under tort law, but this definition of an employee was not widely applied in other areas of the law. RESTATEMENT (FIRST) OF AGENCY § 220 (AM. L. INST. 1933); *see Hearst Publ'ns, Inc.*, 322 U.S. at 120–21 (explaining that the simplicity of the multifactorial common-law control test is deceptive because applying it to different areas of the law yields differing results).

[84] *See Hearst Publ'ns, Inc.*, 322 U.S. at 129 (instructing that the determination of the status of an employee must be made with reference to the purposes of the Act and the specifics of each economic relationship without concern for the other tests developed outside the area of labor law). The Court emphasized that the NLRA expressly authorizes the NLRB to make interpretations of the statutory language. *Id.* at 130–31.

[85] Labor Management Relations Act of 1947, Pub. L. No. 101, § 101, 61 Stat. 136, 137–38 (codified at 29 U.S.C. § 152); *see* DAU-SCHMIDT ET AL., *supra* note 16, at 25 (emphasizing that Congress deliberately chose to legislate against the Supreme Court's decision in *NLRB v. Hearst Publications, Inc.* to apply an economic dependency test to determine the coverage of the NLRA); Johnda Bentley, Richard F. Griffin Jr. & Lori Armstrong Halber, Evolving Labor Issues in the Gig Economy, 13th Annual ABA Section of Labor and Employment Law Conference (Nov. 6–9, 2019), https://www.americanbar.org/content/dam/aba/events/labor_law/2019/annual-conference/papers/evolving-labor-issues-in-gig-economy.pdf [https://perma.cc/9KGH-9WWU] (explaining that Congress specifically reacted to the Supreme Court's interpretation of the law and created the independent contractor exclusion).

[86] *See* Dubal, *supra* note 79, at 54–55 (explaining that businesses took advantage of the ambiguous new bifurcation in the law to expand the coverage of the independent contractor exception). *Compare* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (holding that the passage of the Labor Management Relations Act (LMRA), which excluded independent contractors from the definition of an employee under the NLRA, represented an instruction from Congress to apply general agency principles), *with Hearst Publ'ns, Inc.*, 322 U.S. at 129–30 (rejecting the application of common-law agency principles to determine whether a worker is an employee under the NLRA).

[87] *See* 390 U.S. at 256 (holding that by amending the NLRA Congress instructed the NLRB and the courts to apply the general principles of agency). *See generally* St. Joseph News-Press, 345 N.L.R.B. 474, 478 (2005) (explaining that the NLRB must not only follow the Supreme Court directive to apply the common law of agency from *United Insurance*, but also that it has no authority to change this directive), *overruled by* FedEx Home Delivery (*FedEx II*), 361 N.L.R.B. 610 (2014), *vacated*, FedEx Home Delivery v. NLRB, 849 F.3d 1123 (D.C. Cir. 2017). There, applying the principles of agency, the NLRB found that insurance company agents trained and supervised by the com-

Court referenced ten non-exhaustive factors, drawn from the *Restatement (Second) of Agency* and commonly referred to as the right to control test, that the NLRB and lower courts should use in making an employee-independent contractor determination: (1) the extent of control the principal may exercise over the work, (2) the distinctiveness of the work or business, (3) the presence or absence of a supervisor, (4) the skill necessary for the work, (5) the inclusion of the instrumentalities and the location of the work, (6) the length of employment, (7) the method of payment, (8) the regularity of the work, (9) the subjective understanding of the parties, and (10) whether the employer is a business.[88] Nevertheless, the exact weight that the reviewing body should give to each agency factor remained unsettled.[89] In the absence of controlling precedent, the NLRB and the District of Columbia Court of Appeals continue to develop the application of the right to control test in the context of worker status under the NLRA.[90]

### 2. Extent of Control: Means and Manner to Entrepreneurial Opportunity

In 1978, in *Local 777, Democratic Union Organizing Committee, Seafarers International Union v. NLRB*, the D.C. Circuit reversed the NLRB's determination that taxicab companies could not recognize a driver union because the drivers were independent contractors outside the protections of the NLRA.[91] The court, applying the ten-factor right to control test, held that de-

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pany and primarily responsible for collecting payment on pre-existing policies qualified as employees under the NLRA, and the Court upheld this determination. *Id.* at 259–60. The Supreme Court cited the congressional record from the passage of the LMRA where U.S. Representatives explained that the determination of employment status is a question requiring the application of the principles of agency. *Id.* at 256.

[88] RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958); *see* Pinsof, *supra* note 25, at 347–48 (explaining that courts adopted the ten-factor common-law right to control test developed prior to the NLRA for use in labor disputes and that it remains largely unaltered from its original conception).

[89] *See* Loc. 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. v. NLRB, 603 F.2d 862, 869 (D.C. Cir. 1978) (discussing the inconsistency of the NLRB's decisions with respect to employee versus independent contractor determinations). *Compare* John Himmer Transfer, Inc., 221 N.L.R.B. 284, 285 (1975) (finding owner-operator drivers are employees), *with* Loc. 814, Int'l Brotherhood of Teamsters, 223 N.L.R.B. 752, 752 (1976) (finding that owner-operator drivers are independent contractors).

[90] *See, e.g.*, FedEx Home Delivery v. NLRB (*FedEx I*), 563 F.3d 492, 504 (D.C. Cir. 2009) (reversing the NLRB's decision to classify drivers as employees on the grounds that the drivers had the potential for entrepreneurial opportunity); FedEx Home Delivery (*FedEx II*), 361 N.L.R.B. 610, 619 (2014) (finding that entrepreneurial activity should only play a role in the determination of employment status in so far as it is realized and that the mere potential for entrepreneurial activity alone is insufficient to be a part of the calculus).

[91] *See Loc. 777, Democratic Union Org. Comm., Seafarers, Int'l Union of N. Am.*, 361 N.L.R.B. at 872–73 (affirming the NLRB's application of agency principles and emphasizing the extent of supervisory control over the work as the central determinative factor). In *Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. NLRB*, taxicab compa-

termining whether a worker was an employee or independent contractor could not be made with reference to any one singular factor.[92] Rather, the D.C. Circuit determined that an employment relationship only existed if the purchaser of the performance retained the right to control the "means and manner" of completing the work.[93] Under this test, if a worker retained control over the final product or service, they were an independent contractor.[94] The NLRB employed the means and manner test for over two decades, but changed course and shifted the focus of the right to control test to a newly derived factor: entrepreneurial opportunity.[95]

In 2002, in *Corporate Express Delivery Systems v. NLRB*, the D.C. Circuit affirmed the NLRB's decision that delivery truck owner-operators were employees after replacing the means and manner test with the new entrepreneurial opportunity test.[96] Under the entrepreneurial opportunity test, a worker would be considered an independent contractor if that worker maintained "significant entrepreneurial opportunity for gain or loss."[97] Although this decision established entrepreneurial opportunity as the focal point for determining employment status, the exact contours of what entrepreneurial opportunity entailed remained undetermined.[98]

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nies sought the review of an NLRB order requiring recognition of the driver's union, arguing that in light of the circumstances of the work relationship, such as the leasing of the cabs, the driver's liability for any damage to the vehicles, the lack of control over the drivers, and the flat fees collected by the company, application of the right to control test suggested that drivers were independent contractors. *Id.* at 875–77.

[92] *Id.* at 872–73.

[93] *Id.*

[94] *Id.* at 873.

[95] *See* Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 779–80 (D.C. Cir. 2002) (upholding the NLRB's decision to utilize entrepreneurial opportunity as the determinative factor between a worker's status as an employee or independent contractor).

[96] *Id.* at 779–81. In *Corporate Express Delivery Systems v. NLRB*, the court, focusing primarily on the owner-operators' inability to employ others to do work or use their own vehicles, found that respondents did not have entrepreneurial opportunity and, therefore, were employees. *Id.* at 780–781.

[97] *See id.* at 780 (quoting Corp. Express Delivery Sys., 332 N.L.R.B. 1522, 1527 (2000)) (reasoning that risk taken on by a worker rather than the control retained over the "means and manner of the work" would yield better outcomes, and centering the right to control analysis on entrepreneurial opportunity). The court illustrated that analyzing economic risk was more relevant than the prevalence of supervision for determining employment status through the comparison of a full-time cook, who is an employee even though his supervisors exercise no discretion over the actual preparation of food, and a lawn-care laborer, who is an independent contractor notwithstanding the potential for supervision by his clients. *Id.*

[98] *See id.* at 780–81 (explaining the shift in emphasis from employer control to employee entrepreneurial opportunity without explaining the exact effect of such a shift on the application of the other agency principles).

### 3. Defining Entrepreneurial Opportunity: Reality or Potential

Seven years later, the D.C. Circuit attempted to clarify what satisfied the entrepreneurial opportunity factor in determining employment status.[99] In 2009, in *FedEx Home Delivery v. NLRB* (*FedEx I*), the D.C. Circuit held that, even in the absence of actual realized entrepreneurial opportunity, the existence of potential entrepreneurial opportunity sufficed to classify FedEx drivers as independent contractors rather than employees.[100] The court reasoned that drivers who did not operate under the discretion of FedEx and who could use their vehicles for other economic or personal pursuits had the potential for entrepreneurial opportunity and therefore were independent contractors, whether or not they actually used their vehicles for that purpose.[101]

The NLRB initially declined to follow the instructions of the Court of Appeals to treat potential entrepreneurial opportunity as a relevant element of the inquiry.[102] In 2014 in *FedEx Home Delivery* (*FedEx II*), under substantially the same facts as *FedEx I*, the NLRB found that the FedEx drivers were employees.[103] The NLRB reasoned that entrepreneurial opportunity was just one of many factors weighed in determining whether a worker is an employee or an independent contractor under their new independent business factor test.[104] Under this new test, the NLRB emphasized that weight should only be given to actual realized entrepreneurial activity, not to theoretical opportunity, and found that the FedEx drivers were employees.[105] Yet, just four years later, the majority of the NLRB reversed itself in *SuperShuttle DFW, Inc.*[106]

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[99] *See* FedEx Home Delivery v. NLRB (*FedEx I*), 563 F.3d 492, 504 (D.C. Cir. 2009) (reversing the NLRB's decision to classify drivers as employees because of the existence of entrepreneurial opportunity).

[100] *Id.* In 2007, in *FedEx Home Delivery*, the NLRB determined that certain part-time, full-time, and swing contractors for a home delivery service were employees with the right to federal protection and ordered the company to recognize the employee's chosen union. 351 N.L.R.B. No. 16, at 2 (Sept. 28, 2007), *vacated*, FedEx Home Delivery v. NLRB (*FedEx I*), 563 F.3d 493 (D.C. Cir. 2009). This determination is what the D.C. Circuit eventually overruled in *FedEx Home Delivery v. NLRB (FedEx I)* in 2009. 563 F.3d at 504.

[101] *See FedEx I*, 563 F.3d at 498–99 (explaining that the FedEx drivers' contracts explicitly stated the drivers were not employees because drivers had discretion in completing tasks, FedEx did not control schedules, breaks, routes, or details of job execution, the drivers provided all the capital and equipment necessary to perform the work, and drivers were unrestricted in pursuing other personal or economic pursuits with the trucks they used for work).

[102] *See* FedEx Home Delivery (*FedEx II*), 361 N.L.R.B. 610, 619 (2014) (declining to follow the D.C. Court of Appeal's instruction to elevate the status of entrepreneurial activity above other factors and finding that entrepreneurial opportunity is only relevant in so far as it is actually exercised).

[103] *Id.*

[104] *See id.* at 611, 621 (finding that the evaluation of independent-contractor status considers all principles of agency with none more relevant than another).

[105] *Id.* at 619. Under the new independent business factor test, the NLRB looked not only to entrepreneurial opportunity, but also to (1) a worker's realistic ability to engage in supplementary work elsewhere, (2) whether the worker had a possessory interest in the fruits of his work, and (3) a work-

In 2019, in *SuperShuttle DFW, Inc.*, the NLRB held that franchisees operating their own shared-ride vans were independent contractors.[107] The NLRB reasoned that the alteration of the independent contractor test in *FedEx II* wrongfully diminished the significance of entrepreneurial opportunity to the inquiry and restored it as the preeminent factor in determining employment status.[108] The NLRB explained that entrepreneurial opportunity and control are counterparts, meaning more of one necessitates less of the other.[109] Furthermore, the NLRB rejected the previous majority's reformulation, asserting that it was an impermissible attempt to renew the *Hearst* standard that Congress explicitly rejected.[110] Therefore, to determine whether a worker is an employee covered under the NLRA or an independent contractor, the NLRB and courts will evaluate the existence of actual or potential entrepreneurial opportunity, rather than control by the employer, as the primary factor.[111]

### *C. Application and Implications of the Right to Control Test and the ABC Test*

Employing the *SuperShuttle* test for employee status, which emphasizes entrepreneurial opportunity, the typical gig economy worker is more likely than not an independent contractor.[112] Applying the current formulation of the right to control test likely means that workers who exercise some level of control over their work will be left outside of significant NLRA protections.[113]

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er's control over significant managerial decisions, such as scheduling, hiring, assignment of work, and outlay of capital. *Id.* at 621.

[106] *See* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at 1, 23 (Jan. 25, 2019) (reversing the NLRB's majority decision in *FedEx II* and finding there was an impermissible diminution of the entrepreneurial opportunity factor).

[107] *Id.* at 1. In *SuperShuttle DFW, Inc.*, the NLRB found that the franchise agreement providing drivers with significant control over their day-to-day performance, the collection of payment directly from customers, the lack of employer-supplied instrumentalities, and the lack of supervision as leading to the conclusion that the franchisees were independent contractors. *Id.* at 14.

[108] *Id.* at 1.

[109] *Id.* at 9.

[110] *Id.* at 8–9.

[111] *See id.* at 2 (explaining that entrepreneurial opportunity is not a separate test nor an aspect of a separate test, but rather a prism through which to evaluate the common-law factors).

[112] *See id.* (applying the principles of agency in light of their effect on the worker's entrepreneurial opportunity); *see also* FordHarrison, *Supershuttle Transports Independent Contractor Status into the Spotlight*, JDSUPRA (Jan. 31, 2019), https://www.jdsupra.com/legalnews/supershuttle-transports-independent-59845/ [https://perma.cc/U7XD-B9HJ] (explaining that the NLRB's decision represented a fundamental shift in the focus of the employee status determination in favor of employers, who seek continued classification of their workers as independent contractors).

[113] *See Your Rights*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights [https://perma.cc/R339-ASMR] (discussing the rights enjoyed by workers classified as employees under the NLRA, such as the right to form, join, or assist a union; the right to engage in concerted activity for mutual aid or protection, including by discussing wages or working conditions, requesting representation, and striking; and the right to refuse to engage in any of these activities); *see,*

Subsection 1 of this Section details the application of the current *SuperShuttle* test to gig economy workers broadly.[114] Subsection 2 of this Section delineates the implications that this formulation has on the rights of gig workers.[115] Subsection 3 of this Section then details a competing test to the right to control test, the ABC test, and reviews the implications that its application would have on the status of gig economy workers.[116]

1. The Exclusion of Gig Workers

Although no one common law principle is dispositive of employment status, and no gig economy job is the same, many of the atypical gig economy job characteristics weigh in favor of independent contractor status under the current framework.[117] For example, the typical gig economy worker exercises significant control over their schedule, instrumentalities of work, and location of work with minimal direct employer supervision.[118] A recent memorandum issued by the NLRB's Office of the General Counsel applied this exact line of reasoning to a group that represents the larger gig economy, Uber drivers.[119]

In 2019, the NLRB applied the *SuperShuttle* test and found that Uber drivers qualified as independent contractors, not employees.[120] The NLRB admitted that several factors weighed in favor of classifying Uber drivers as employees, including that the drivers need no special skills, do not work in a distinct occupation, and are integral parts of Uber's regular business.[121] Nevertheless, the NLRB reasoned that the drivers' control over their personal car, schedule, and the location of their work, along with their freedom to perform services for competitors, established sufficient entrepreneurial opportunity to classify them as independent contractors.[122]

Although it is possible that the NLRB's Uber memorandum is confined to Uber drivers, this is unlikely as it represents a departure from a previous

*e.g.*, Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., Advice Memorandum on Uber Technologies, Inc. (Apr. 16, 2019), at 14 (finding that Uber drivers are independent contractors).

[114] *See infra* notes 117–126 and accompanying text.

[115] *See infra* notes 127–141 and accompanying text.

[116] *See infra* notes 142–150 and accompanying text.

[117] *See, e.g.*, Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 113, at 15 (reasoning that Uber drivers' freedom to work for competitors, control over the capital necessary for and the location of their work, and ability to self-schedule meant they were not employees under the NLRA).

[118] *See* Stewart & Stanford, *supra* note 53, at 421 (explaining that gig-economy work is not homogenous, but that many features typify gig-economy work, including inconsistent work schedules, the expectation that capital equipment is self-provided, payment on a per-job basis, and centralized and impersonal work allocation).

[119] *See* Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 113, at 14 (finding that Uber drivers are not employees, but rather independent contractors exempt from NLRA protections).

[120] *Id.* at 1.

[121] *Id.* at 14.

[122] *Id.*

NLRB decision made under substantially similar facts.[123] In a 2016 memorandum, the NLRB, applying the previous *FedEx II* independent business factor test, held that Postmates delivery drivers were employees.[124] The NLRB reasoned that many of the agency principles favored employee status because the Postmates drivers: (1) performed a core function for the employer, (2) had the option of a long-term work relationship, (3) received compensation based on the employers' formula, (4) were provided the essential tools by the employer, and (5) were supervised digitally by the employer.[125] The NLRB's departure from the Postmates memorandum in the Uber decision indicates that gig economy workers will likely not be classified as employees for purposes of the NLRA under the *SuperShuttle* formulation.[126]

### 2. The History and Effects of Independent Contractor Status

The independent contractor designation originally developed as an exception to the application of vicarious liability.[127] Under respondeat superior, a

[123] *See id.* at 15 (finding specifically that UberX and UberBLACK drivers are independent contractors and not employees under the NLRA); Hassan A. Kanu & Robert Iafolla, *Uber Drivers Are Contractors, Labor Board's Top Lawyer Says (1)*, BLOOMBERG L., https://news.bloomberglaw.com/daily-labor-report/uber-drivers-are-contractors-not-employees-nlrb-top-lawyer [https://perma.cc/9WQF-83ML] (May 14, 2019) (detailing the NLRB's recent and deliberate departure from precedent that classified gig workers as legal employees to a new framework that classified Uber drivers as independent contractors).

[124] *See* Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., Advice Memorandum on Postmates, Inc. (Sept. 19, 2016), at 11 (arguing that Postmates drivers are employees because they conduct the core business of the firm and identify with the firm rather than individually). Postmates is an app-based delivery service that employs gig-economy workers to provide food and goods to consumers. Brett Helling, *What Is Postmates and How Does It Work? Get Food Delivered the Easy Way*, RIDESTER, https://www.ridester.com/definitive-guide-to-postmates/ [https://perma.cc/3Z3Q-6YSF] (Feb. 22, 2022).

[125] Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 124, at 11.

[126] *See* Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 113, at 14 (reasoning that Uber drivers' freedom to work for competitors, control over the capital necessary for and location of their work, and ability to self-schedule rendered them not employees under the NLRA); SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at 1, 24 (Jan. 25, 2019) (finding that the recent NLRB precedent impermissibly modified the common-law agency test and returning to previous precedent, which centered on entrepreneurial opportunity). In addition, under substantially similar facts, the NLRB found that Handy Technologies, Inc.'s cleaners were also statutory employees. *See* Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., Advice Memorandum on Handy Technologies, Inc. (June 16, 2017), at 19 (finding that Handy Technologies' workers were more like employees because they provide cleaning services, the company's core function, identify with the company rather than individually, work on a long-term basis, receive compensation based on the employer's pay scale, are supervised by company employees, and their employer controls discipline and termination). Handy Technologies is an online platform that connects consumers seeking assistance with household tasks, such as cleaning or repair services, with individuals able to perform those services. *How Does Handy Work?*, HANDY, https://help.handy.com/hc/en-us/articles/215567637-How-does-Handy-work- [https://perma.cc/6JZR-QCJU].

[127] *See* DAU-SCHMIDT ET AL., *supra* note 16, at 25 (tracking the roots of the independent contractor distinction to the sixteenth-century concept of respondeat superior, which developed into a theory of enterprise liability by the nineteenth century); O.W. Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 347

form of vicarious liability, employers bear the cost of an employee's actions.[128] Employers bear this cost because, in an economy full of large and complex commercial transactions, employers most closely associated with the services or goods that caused harm are in the best position to prevent that harm and compensate parties for injuries related to business activity.[129]

The exception to employer liability for the actions of independent contractors under vicarious liability developed because independent contractors are themselves more akin to a separate business than a dependent employee.[130] Thus, employers of independent contractors are exempt from vicarious liability because they do not directly supervise the actions of independent contractors and because independent contractors are in a financial position to compensate third parties that sustain injuries as a result of their actions.[131] In the context of NLRA labor protections, the justification for excluding independent contractors flows from this same reasoning; independent contractors neither work under the direction of nor depend on their employer in the same way that a typical employee does.[132]

The categorization of gig workers as independent contractors outside the protections of the NLRA significantly impacts the rights of gig economy workers.[133] The NLRA broadly seeks to equalize the power imbalance between employers and employees by protecting an employee's right to collective action.[134] Under the NLRA, an employee has the right to form, join, or assist a

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(1891) (explaining that an individual who commands an act is liable for the natural consequences of said act, including a principal that employs independent contractors).

[128] *See* Daniel J.H. Greenwood, *Understanding Respondeat Superior*, HOFSTRA (Dec. 2004), https://sites.hofstra.edu/daniel-greenwood/understanding-respondeat-superior/ [https://perma.cc/GXJ6-R7GT] (detailing the rule of respondeat superior).

[129] *See* Cunningham-Parmeter, *supra* note 24, at 403 (explaining that the theory of respondeat superior developed because of a shift toward more sophisticated structures). This justification relies on the earliest labor relationship, that of a master and a servant, which held masters liable for the actions of their servants because they were the only parties capable of compensating injured third parties. T. BATY, VICARIOUS LIABILITY: A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES 8 (1916) (explaining that the relationship between employee and employer resembles that between servant and master for the purposes of vicarious liability).

[130] *See* Cunningham-Parmeter, *supra* note 24, at 406 (explaining that independent contractors represented a new class of workers because they possessed skills that made them attractive to multiple clients).

[131] *See id.* at 400 (detailing the reasoning behind the independent contractor distinction).

[132] *See id.* at 406 (describing how the courts, in the same way they identify independent contractors as capable of renumerating victims financially in the context of tort liability, identify independent contractors as economically self-reliant enough to not need labor protections).

[133] *See generally* 29 U.S.C. § 152(3) (excluding independent contractors from the definition of employee and, therefore, the protections of the NLRA); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015) (explaining that the traditional test of employment evolved under a fundamentally different economic model than the gig economy).

[134] 29 U.S.C. § 151.

union.[135] Through a union, an employee can elect representatives to bargain collectively over significant topics, including wages, benefits, hours, and other working conditions.[136] Outside of union-related activity, the NLRA affords employees several other rights.[137] Statutory employees have the right to discuss terms of employment freely, seek assistance from a labor organization, and act in concert with other coworkers to seek better working conditions.[138] The NLRA also protects actions taken in pursuit of better working conditions, such as strikes and pickets.[139] Furthermore, the NLRA protects employees from retaliation by an employer or labor organization for their choice to engage in or refrain from engaging in any of these activities.[140] Because gig workers have been designated as independent contractors, they have no federal protections under the NLRA if they choose to engage in any of these activities.[141]

3. The ABC Test

In response to the constant fluctuation in employee classification under the NLRA, some Senators and Representatives introduced legislation in Congress to provide stability and improve worker organizing rights.[142] The Protecting the Right to Organize (PRO) Act, introduced in 2021, would amend Section 2(3) of the NLRA to redefine who qualifies as an employee.[143] The Act replaces the right to control test with what is commonly referred to as the ABC

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[135] *Id.* § 157.

[136] *Id.* §§ 157, 159; *see* Celine McNicholas et al., *Why Unions Are Good for Workers—Especially in a Crisis Like COVID-19*, ECON. POL'Y INST. (Aug. 25, 2020), https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/ [https://perma.cc/QGK9-7B8F] (explaining that unions help workers secure better pay, health and safety procedures, benefits like sick pay, and greater job security).

[137] *See* 29 U.S.C. § 157 (protecting statutory employees' rights to engage with unions, collectively bargain through chosen representatives, partake in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and refrain from such activities).

[138] *Id.* §§ 157–158. The NLRA protects employees working directly with coworkers to improve working conditions by raising work-related complaints to employers or government agencies. *Id.* § 157.

[139] *Id.* § 158. The U.S. Code defines the term strike to "include[] any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees," and that definition is applicable under the relevant NLRA provisions. *Id.* § 142.

[140] *Id.* § 157.

[141] *See id.* § 152(3) (excluding independent contractors).

[142] *See* Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts [https://perma.cc/N4X8-QBX3] (explaining that the House of Representatives passed a bill entitled the Protecting the Right to Organize Act, which would significantly change employment status determination under the NLRA if enacted).

[143] H.R. 842, 117th Cong. § 101 (2021).

test, which is currently in effect in some states.[144] Under the ABC test a worker is presumed to be an employee unless an employer can prove all three of the following factors: (1) that the worker is free from control and direction to deliver the service under contract and in practice, (2) that the service delivered does not fall within the ordinary business of the employer, and (3) that the worker is independently engaged in a trade, business profession, or occupation similar to that of the service delivered.[145]

Although the ABC test currently does not apply at the federal level, its application under state law provides instruction as to its potential impact on the rights of gig workers.[146] Under California's ABC law, which was later repealed, a state Court of Appeals required Uber to classify its drivers as employees based on Uber's failure to prove that the drivers provided services outside the usual course of business.[147] Similarly, under the Massachusetts ABC law, a former attorney general filed suit seeking a declaratory judgment that Uber and Lyft drivers are employees, which survived a motion to dismiss.[148] Furthermore, significant investment by gig platforms to resist the adoption of or repeal the ABC test in various states provides further evidence that such a test would likely classify gig workers as employees.[149] Although each state law

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[144] *Id.*; *see* Aaron Goldstein, *Independent Contractors Under U.S. Law: Knowing Your ABCs*, JDSUPRA (Feb. 12, 2020), https://www.jdsupra.com/legalnews/independent-contractors-under-u-s-law-12379 [https://perma.cc/NHW8-PKAY] (explaining that California, Connecticut, Delaware, Illinois, Indiana, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, Vermont, Washington, and West Virginia all employ the ABC test in some form).

[145] H.R. 842, § 101. Many states enacted similar ABC tests for the purposes of state labor law protections. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 149, § 148B(a) (West 2022) (providing Massachusetts's version of the ABC test), *preempted by* Carey v. Gatehouse Media Mass. I, Inc., 94 N.E.3d 420 (Mass. App. Ct. 2018); N.J. STAT. ANN. § 43:21-19(i)(6) (West 2023) (providing New Jersey's version of the test); WASH. REV. CODE ANN. § 50.04.140(1) (West 2023) (providing Washington's version of the test).

[146] *See generally* Brown, *supra* note 32, at 193–96 (reviewing the application of state ABC laws to the gig economy in relation to its effect on potential federal application); Pinsof, *supra* note 25, at 369 (arguing that the ABC test applied in many states serves as a model for federal reform).

[147] *See* People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 331 (2020) (upholding the trial court's grant of a preliminary injunction finding that Uber drivers are employees). Voters repealed the California ABC test after a well-healed proposition campaign backed by gig companies. CAL. LAB. CODE § 2750.3 (repealed 2020); *see* Lynn Rhinehart, Celine McNicholas, Margaret Poydock & Ihna Mangundayao, *Misclassification, the ABC Test, and Employee Status*, ECON. POL'Y INST. (June 16, 2021), https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/ [https://perma.cc/5TA4-VF54] (detailing the passage and repeal of the ABC test in California).

[148] Healey v. Uber Techs., Inc., No. 2084CV01519, 2022 WL 16839219, at *1 (Mass. Super. Ct. Feb. 28, 2022) (denying defendants' motion to dismiss on account of finding a viable claim for declaratory judgment, standing, adequacy of factual findings, and a valid claim for injunctive relief).

[149] *See generally* Shannon Liss-Riordan & Anastasia Doherty, *The Ongoing Battle of Worker Classification*, ABA (Nov. 19, 2021), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2021-issue/ongoing-battle-worker-classification/ [https://perma.cc/MF47-HNLR] (asserting that gig platform companies view the ABC test as a threat to the practice of labeling gig workers as independent contractors). There are multiple examples of gig platforms engag-

varies slightly, the clear implication from state legislation and judicial determination suggests that most gig workers would be classified as employees under the ABC test.[150]

## II. The Importance of Employee Classification to Industrial Peace

As more workers engage in the gig economy, the current employment status determination framework may no longer be viable.[151] The current statutory framework excludes gig workers, leaving many American workers without the protections necessary for future economic stability.[152] Section A of this Part details why employee status has particular significance for gig workers.[153] Section B of this Part then examines issues associated with applying the right to control test to determine that independent contractors are excluded from the NLRA.[154]

### *A. Why Employee Status Has Particular Significance for Gig Workers*

Although protections afforded by the NLRA are important for all employees, the gig economy's unique features intensify the need for federal protec-

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ing in campaigns to reform state laws for fear that their workers are employees under the ABC test. *See, e.g.*, Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-based Workers. Now, It's Also Unconstitutional*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), https://www.nelp.org/blog/prop-22-unconstitutional/ [https://perma.cc/F56N-7NE7] (detailing the $224 million campaign backed by gig-economy companies to enact Proposition 22 and repeal California's ABC test, which was established by AB5 and classified gig workers as employees); Kellen Browning, *The Next Battleground for Gig Worker Labor Laws: Massachusetts*, N.Y. TIMES (June 1, 2022), https://www.nytimes.com/2022/06/01/business/massachusetts-gig-workers-ballot.html [https://perma.cc/V87A-B5EW] (describing the campaign for a Massachusetts ballot initiative that would preserve the independent contractor status of gig workers and guarantee limited benefits).

[150] *See generally* Liss-Riordan & Doherty, *supra* note 149 (highlighting the history of the California ABC test).

[151] *See* DOUGLAS HOLTZ-EAKIN, BEN GITIS & WILL RINEHART, THE GIG ECONOMY: RESEARCH AND POLICY IMPLICATIONS OF REGIONAL, ECONOMIC, AND DEMOGRAPHIC TRENDS 2 (2017) (finding that data shows fast growth in the gig economy across three separate definitions). The gig economy can be divided in many ways, including the following: (1) the gig economy as independent contractors, consultants, and freelancers; (2) the gig economy as the first group plus temp-agency workers and on-call workers; and (3) the gig economy as the first two groups plus contract-company workers. *Id.*

[152] *See* 29 U.S.C § 152(3) (excluding agricultural workers, domestic workers, former employees who have found substantially equivalent employment, independent contractors, and individuals subject to the Railway Labor Act from the definition of employee); *see, e.g.*, Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 113, at 15 (finding that Uber drivers are not employees, but instead independent contractors exempt from the protections of the NLRA).

[153] *See infra* notes 155–187 and accompanying text.

[154] *See infra* notes 188–206 and accompanying text.

tion.[155] In particular, the precariousness, decentralization, and disproportionate share of risk borne by gig workers, coupled with the risk that government mandates will precipitate the end of the gig economy, presents a unique need for employee status under the NLRA.[156] Subsection 1 of this Section details various risks to workers commonplace in the gig economy.[157] Subsection 2 analyzes the risk to the very existence of the gig economy under a statutory regime where gig workers are employees for the purpose of federal labor law.[158]

### 1. Precariousness, Decentralization, and Worker-Borne Risk

Gig work's precarious nature highlights the need for federal labor protection.[159] Gig workers typically receive compensation on a per-task basis with no assurance of long-term employment.[160] This compensation model, while touted by employers as providing an opportunity for high wages and ultimate flexibility, frequently yields inconsistent pay at rates below minimum wage and without an opportunity for overtime pay.[161]

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[155] *See* Cherry & Rutschman, *supra* note 8, at 11–12 (arguing that gig economy workers always deserved rights equal to those enjoyed by traditional employees, but that the COVID-19 pandemic further highlighted inequities).

[156] *See* Justin Azar, Note, *Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy*, 27 GEO. J. ON POVERTY L. & POL'Y 409, 412 (2020) (contending that gig work echoes the changed preferences of a generation that appreciates decentralized work environments); Cunningham-Parmeter, *supra* note 24, at 387–88 (elucidating the precarious nature of gig work, including lack of decent pay, benefits, and legal safeguards against discrimination).

[157] *See infra* notes 159–182 and accompanying text.

[158] *See infra* notes 183–187 and accompanying text.

[159] Cherry & Rutschman, *supra* note 8, at 11; *see* Raluca Anderco, *Precarious Work: Legislative Challenges*, 8 PERSPS. L. & PUB. ADMIN. 149, 149–50 (2019) [hereinafter Anderco, *Precarious Work*] (explaining that precarious work is an irregular work relationship often plagued by unsafe, unstable, and unpredictable working conditions); Raluca Elena Anderco, *The Sources of Precarious Work* (explaining that precarious work is often the result of economic vulnerabilities such as unreliable working relationships with insufficient compensation), *in* INNOVATION AND DEVELOPMENT IN BUSINESS LAW 218, 227 (Thierry Bonneau & Cristina Elena Popa Tache eds., 2021). The erosion of the assumption of long-term employment enabled by an increasingly segmented workforce caused a greater gap between high- and low-skill service work. *See* DAU-SCHMIDT ET AL., *supra* note 16, at 16–17 (estimating that 18% of American workers are contingent employees). Starting in the 1970s and 1980s there was a shift in the global labor market toward more flexible work, which resulted in a greater share of precarious workers with substantially fewer rights. Anderco, *Precarious Work*, *supra*, at 149–50.

[160] *See* Stewart & Sanford, *supra* note 53, at 421 (defining gig work as labor often compensated on a per-task basis that does not involve an expectation of long-term employment). *See generally* Cunningham-Parmeter, *supra* note 24, at 387 (explaining that a consistent problem with the gig economy is that workers are unable to earn a decent living wage); Zipperer et al. *supra* note 10 (finding that gig workers labor under poor working conditions, even relative to other service industry workers).

[161] Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 678–79 (2017) (detailing the challenges of earning adequate compensation in the gig economy given that some employers pay less than half of the minimum wage); Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 LAW & CONTEMP. PROBS. 107, 112–13 (2018) (highlighting the trend among companies operating in the gig economy of emphasizing worker autonomy as a benefit to workers).

Furthermore, new forms of supervision and discipline exacerbate a gig worker's already precarious employment status.[162] Although employers often argue that gig workers go unsupervised, technology allows employers to surveil gig workers more closely than they would in a traditional work environment.[163] Instead of internal monitoring by hired supervisors, gig workers often receive scrutiny and evaluation from consumers directly through computerized monitoring software.[164] Not only is this model of supervision more intense, it is less personal and provides workers with less recourse to contest disciplinary findings.[165] Accordingly, NLRA protections allowing discussions regarding wages, hours, and working conditions—as well as the right to report unjustified employer discipline or discharge—would provide an outlet to rectify this power imbalance.[166]

Decentralization is another major feature of gig work that underlines the need for NLRA protections.[167] Although the decentralized nature of the gig economy is often a selling point, the resultant dispersion of the workforce is a challenge to unionization.[168] Unionization requires interaction, often achieved on site at a workplace.[169] Gig workers who have little to no direct contact with each other may find it nearly impossible to coordinate.[170]

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[162] *See generally* Kirven, *supra* note 61, at 282–83 (arguing that gig-economy platforms employ a type of supervision akin to the Foucault gaze wherein discipline takes the form of careful observation).

[163] *See id.* at 284 (explaining that the only difference between supervision inside and outside the gig economy is a shift in the locus of control).

[164] *See generally id.* at 285 (detailing how Uber and Lyft collect data based on a worker's real-time driving, consumer demand, and passenger input, all of which they use to impersonally manage their drivers).

[165] *See id.* (discussing the practice of gig economy companies taking ratings from customers at face value without further investigation); Cunningham-Parmeter, *supra* note 24, at 388–89 (explaining that customers are essentially uninhibited from providing biased reviews that can lead to discipline or even discharge).

[166] *See* Eve Tahmincioglu, *Three Reasons Why the PRO Act Won't Destroy Freelancing or the Gig Economy*, ECON. POL'Y INST. (Mar. 18, 2021), https://www.epi.org/blog/three-reasons-why-the-pro-act-wont-destroy-freelancing-or-the-gig-economy/ [https://perma.cc/8GZC-MPEG] (contending that extending coverage of the NLRA to gig workers is primarily designed to empower workers' voices).

[167] *See* Azar, *supra* note 156, at 412 (explaining that one selling point for gig work is that it provides a decentralized workplace).

[168] *See* Covert, *supra* note 13 (highlighting the difficulty of organization among gig workers because decentralization is inherent in the work, meaning that workers are never afforded the opportunity to comingle).

[169] *See* Vidu Badigannavar & John Kelly, *Why Are Some Union Organizing Campaigns More Successful Than Others?*, 43 BRIT. J. INDUS. RELS. 515, 526 (2005) (describing interaction among workers as essential to mobilization for union organizing efforts). A study comparing the unionization efforts among Welsh and Leads University recruiting staff found that the Leads staff, who had a more successful union organizing effort, were more likely to discuss workplace issues with employees at work. *Id.* at 526–27.

[170] Jin et al., *supra* note 27 (explaining that the nature of gig economy work means that employees do not have contact with one another in the same organic way that occurs in traditional labor relationships).

The Exit-Voice-Loyalty Framework highlights the difficulties of gig worker coordination.[171] This framework argues that when traditional employees are dissatisfied with work arrangements they have three options: (1) exit their employment, (2) voice their concerns, or (3) remain loyal.[172] Research shows that one of these three options, voicing concerns, is not available for gig workers.[173] The decentralized structure of gig work serves as an impediment to voicing concerns.[174] Without natural exchanges during work between gig workers they must actively seek out coworker interaction.[175] Although the NLRA's protections would not resolve the structural issues inherent in decentralized work arrangements, protections would at least ensure that workers will not face retaliation for efforts to coordinate.[176]

Moreover, the greater share of risk borne by workers commonplace in gig economy work relationships also highlights the need for reform.[177] The current structure of the gig economy facilitates "domestic outsourcing," wherein employers hire independent contractors rather than hiring employees and incurring various associated obligations.[178] Through this process of domestic out-

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[171] *See id.* (suggesting that Albert O. Hirschman's framework is apt to describe the problems with organizing workers in the gig economy because it highlights that voice is a substantially more difficult option for gig workers).

[172] *Id.*

[173] *See* Niloufar Salehil et al., *We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers*, 2015 CHI PROC. 1621, 1622 (explaining that in the case of online collective action, participants can exit a company or remain loyal, but not effectively voice their concerns).

[174] *See* Ashford et al., *supra* note 38, at 27 (detailing the physical isolation of gig work).

[175] *See generally* Jin et al., *supra* note 27 (explaining that platform worker voice often involves the use of online engagement through other platforms such as Twitch, Tik Tok, Instagram, and Facebook); Long, *supra* note 19, at 1245–46 (detailing the shortcomings of the current interpretations of the NLRA's coverage as it relates to speech on social media).

[176] *See* 29 U.S.C. § 157 (protecting the right to act for mutual aid or benefit). The various failed attempts by gig workers to unionize present clear evidence of the difficulty of gig worker unionization. S*ee, e.g.*, Michael Sainato, *Traffic, Tickets, Gas: Rideshare and Delivery App Workers Fight to Unionize*, THE GUARDIAN (Feb. 7, 2022), https://www.theguardian.com/us-news/2022/feb/07/rideshare-delivery-app-workers-fight-to-unionize [https://perma.cc/9BYX-GDN2] (detailing the recent attempts by gig workers to achieve unionization that have yet to materialize, including attempts made by rideshare and delivery workers in New York City); Noam Scheiber & Kellen Browning, *Washington State Advances Landmark Deal on Gig Drivers' Job Status*, N.Y. TIMES (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/business/economy/washington-gig-worker.html [https://perma.cc/2VQD-27YZ] (detailing recent legislation passed by the Washington State Senate granting drivers certain benefits, but noting that the passage of the Act solidified the status of these gig workers as outside the definition of employee, leaving them outside protections such as the right to unionize).

[177] *See* De Stefano, *supra* note 32, at 482, 481–82 (linking gig workers with the broader problem of "disguised employment" and the related trend of "demutualization of risks" in the economy and noting that scholars believe these problems contribute to a gap in the existing labor regulations (quoting MARK FREEDLAND & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS 433–46 (2011))).

[178] *See* Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 2017 U. CHI. LEGAL F. 63, 78–79

sourcing, employers shift the risk inherent in labor arrangements by transferring financial obligations to their workers and removing barriers to employee separation in the event of demand change.[179] Financial obligations that gig employers avoid include sick pay, healthcare, unemployment compensation, social security contributions, and more.[180] In addition, employers simply do not rehire, rather than fire, workers, saving significant tangible and intangible costs.[181] Although coverage under the NLRA will not end the downward pressure on risk in the gig economy, it will allow gig workers a more equal seat at the table for bargaining over the terms and conditions of their work.[182]

### 2. Employee Status as the End of the Gig Economy

Notwithstanding the unique structural challenges that gig workers face, which favor expanded access to labor protections, a response with too much government intervention runs the risk of limiting or even ending the gig economy.[183] Employee classification for workers imposes significant costs on employers.[184] Evidence suggests that the additional costs of a broad federal reclassification of gig workers as employees would cause employers to convert many flexible gig positions into a significantly smaller number of traditional employment opportunities.[185] This is particularly alarming because gig work-

(detailing how employers not only avoid costs traditionally associated with employee status, such as healthcare or sick pay, but are also significantly less restrained in separating from employees).

[179] *See id.* at 78–79 (detailing the rearranged employment structure that is commonplace in the gig economy).

[180] *See What's the Difference Between an Independent Contractor and an Employee?*, OFF. OF CHILD SUPPORT ENF'T, https://www.acf.hhs.gov/css/training-technical-assistance/whats-difference-between-independent-contractor-and-employee [https://perma.cc/J7DC-6UPC] (June 15, 2020) (charting the differences between employees and independent contractors).

[181] *See* Dau-Schmidt, *supra* note 178, at 78–79 (emphasizing that gig economy employment structures afford employers greater latitude in the purchase of labor). *See generally* Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 3–4 (2001) (defining a spot market where employers purchase labor like a producer purchases a commodity).

[182] *See generally* Kirven, *supra* note 61, at 264 (describing how workers in the gig economy feel like they take on significant risk while the business reaps the rewards).

[183] *See* JON O. SHIMABUKURO, CONG. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST 10 (2021) (explaining that critics of changing the federal worker classification system argue that disincentives to businesses under a different regulatory regime might result in gig job loss).

[184] *See generally* Robert Habans, *Exploring the Costs of Classifying Workers as Independent Contractors: Four Illustrative Sectors*, UCLA INST. RSCH. ON LAB. & EMP., Dec. 2015, https://irle.ucla.edu/wp-content/uploads/2016/03/IndependentContractorCost_20151209-1-2.pdf [https://perma.cc/2FA9-V56E] (finding that employers save between 29 and 39 cents for every dollar of pay by hiring independent contractors rather than employees).

[185] *See* LIYA PALAGASHVILI, CONSEQUENCES OF RESTRICTING INDEPENDENT WORK AND THE GIG ECONOMY 3–5 (2022), https://www.mercatus.org/research/policy-briefs/consequences-restricting-independent-work-and-gig-economy [https://perma.cc/4TMB-G3T3] (finding that reclassification of

ers often engage with the work because they cannot find other forms of work and gig workers overwhelmingly prefer their working arrangements to traditional employment arrangements.[186] Therefore, any solution involving government intervention must balance the intentional and unintentional costs of government intervention with intended benefits.[187]

### *B. The Inapplicability of the Right to Control Test*

The NLRA's definition of employee developed over time to meet the various needs of an evolving economy, and the gig economy presents new challenges to the old definition.[188] The NLRA's original broad definition implicitly rec-

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gig workers as employees would cause gig companies to both cut positions and offer different forms of work). *See generally* Dara Khosrowshahi, *The High Cost of Making Drivers Employees*, UBER NEWSROOM (Oct. 5, 2020), https://www.uber.com/newsroom/economic-impact/ [https://perma.cc/MZ6R-Y5H5] (detailing the Uber CEO's views on the effects of reclassification, including the assertion that Uber would offer significantly altered work opportunities). A report analyzing the effect of gig worker reclassification in Massachusetts found that it would result in the loss of 49,270 or 58% of all DoorDash, Instacart, Lyft, and Uber jobs, with an upper estimate of 87% job loss. TANER OSMAN, HOW MANY APP-BASED JOBS WOULD BE LOST BY CONVERTING RIDESHARE AND FOOD DELIVERY DRIVERS FROM INDEPENDENT CONTRACTORS TO EMPLOYEES IN THE COMMONWEALTH OF MASSACHUSETTS? 4–5 (2022), https://independentmass.org/wp-content/uploads/2022/07/Massachusetts_Drivers_Design-Final.pdf [https://perma.cc/R6XX-BLAC]. A report analyzing the same issue in California found that a calculation of the exact change in employment due to an employee classification was not possible, but that nonetheless the figure would be less than the current number of independent contractors. *Staffing to Address New Independent Contractor Test*, LEGIS. ANALYST'S OFF. (Feb. 11, 2020), https://lao.ca.gov/Publications/Report/4151 [https://perma.cc/JJ36-KYYQ].

[186] *See* PALAGASHVILI, *supra* note 185, at 7–9 (finding that a reduction in gig work offerings would harm individuals who turn to the work as an alternative to unemployment, caregiver gig earners who engage with the work because of its flexibility, and individuals who interacted with the criminal justice system); News Release, U.S. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements—May 2017 (June 7, 2018), https://www.bls.gov/news.release/pdf/conemp.pdf [https://perma.cc/F97U-K4RU] (surveying individuals earning their primary source of income from gig economy work and finding that 79% prefer their work arrangement over a traditional job compared to 10% who would prefer a traditional work arrangement). One study utilizing information from the Contingent Worker Supplement, the Current Population Survey, and the RAND American Life Panel, compared data over time and found that formerly unemployed workers are more likely to engage in alternative work arrangements than individuals who maintained steady employment. Lawrence F. Katz & Alan B. Krueger, *Income Inequality and Income Risk in the 21st Century: The Role of Unemployment in the Rise in Alternative Work Arrangements*, 107 AM. ECON. REV. 388, 388–89 (2017). Another study found that many women preferred gig work during the COVID-19 pandemic because of their need for flexibility as caregivers. Jocelyne Gafner, *Flexibility Over Stability: Women and Gig Work During COVID-19*, INDEED, https://www.indeed.com/career-advice/finding-a-job/women-and-gig-work [https://perma.cc/BH22-DD9G] (Nov. 2, 2022).

[187] *See generally* PALAGASHVILI, *supra* note 185 (suggesting that government interventions intended to improve working conditions for gig economy workers might unintentionally curtail work opportunities and, thus, do more harm than good).

[188] *See* Bentley et al., *supra* note 85 (explaining the evolution of the NLRA's definition of employee, which changed alongside the unsettled understanding of an employee in the American consciousness); HARRIS & KRUEGER, *supra* note 27, at 6 (explaining that the intermediary status of gig

ognized that all workers dependent on their employers deserved a right to act collectively to improve their working conditions.[189] Congress later excluded independent contractors from the definition of an employee on the grounds that independent contractors were not dependent on those that hired them.[190] To determine which workers get labeled employees, the NLRB and the courts apply a right to control test based on the principles of agency.[191] Although these principles are useful for determining whether an agent is authorized to act on behalf of a principal to establish liability, they are significantly less useful in determining who deserves labor protections.[192] This mismatch is clearly exemplified by the fact that dependent gig workers are considered independent contractors under the current right to control test.[193]

Taking a broad view, agency principles were not designed to determine when an employer has obligations to his employees.[194] On the contrary, princi-

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economy workers befuddles the ambiguous binary worker classification system developed nearly a century ago).

[189] National Labor Relations Act, Pub. L. No. 198, § 2, 49 Stat. 449, 450 (1935) (codified at 29 U.S.C. § 152); *see* DAU-SCHMIDT ET AL., *supra* note 16, at 25–26 (outlining the development from the initial consensus at the passage of the NLRA that the Act's protections extended to all workers to the eventual distinction between workers who need and workers who do not need protections); 79 CONG. REC. 9686 (1935) (detailing the statement by Congressman William P. Connery, a co-sponsor of the NLRA, that when the NLRA speaks of "labor," it is not simply invoking the workers of a particular union, but all employees).

[190] *See* DAU-SCHMIDT ET AL., *supra* note 16, at 25 (explaining that Congress intentionally overruled the initially broad conception of an employee under the NLRA to exclude independent contractors).

[191] *See id.* at 40 (asserting that irrespective of the right to control test's genesis in tort law, the Supreme Court utilizes it as the default test for application of federal labor protection).

[192] *See* Cunningham-Parmeter, *supra* note 24, at 407–08 (arguing that the common-law principles of agency in their current form are not well-equipped to distinguish between employees and independent contractors in the gig economy because those factors are not only contradictory, but also no longer useful in distinguishing an economically autonomous and economically dependent worker). The Supreme Court adopted the right to control test as the default rule for the applicability of labor-protective legislation without a clear definition of employee and with full knowledge that such a test was created and applied to determine tort liability. DAU-SCHMIDT ET AL., *supra* note 16, at 40.

[193] *See* Cunningham-Parmeter, *supra* note 24, at 406–07 (arguing that the application of the independent contractor distinction to gig workers is a mismatch). Although the challenge of distinguishing between dependent employees deserving of protections and independent contractors in business for themselves is ubiquitous, the use of a tort-based right to control test is a distinctively U.S. phenomenon and not universally applied in all areas of U.S. labor law. *See* DAU-SCHMIDT ET AL., *supra* note 16, at 26 (highlighting the use of intermediate categories with differing protection based on differing purposes in foreign labor law and the use of an economic reality test to determine coverage of workers under the Fair Labor Standards Act).

[194] *See* MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 135 (1989) (critiquing the application of an economic realities dependence test to justify the exclusion of independent contractors from twentieth-century labor protections); Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 282 (2011) (arguing that the utilization of a test designed to derive circumstances where employers are liable for the acts of their workers to determine

ples of agency emerged simply to clarify when employers were liable for worker conduct.[195] The principles of agency, which focus solely on organizational control, conflict with the purpose of labor law, which seeks to remedy economic inequality.[196] This is especially true in the context of gig workers, who, unlike the traditional employee, experience a high degree of worker autonomy, but are nonetheless economically dependent on their employers.[197]

Applying a specific right to determine economic autonomy in the gig economy makes this incompatibility become apparent.[198] For example, under the right to control test, an on-site worker is more likely an employee than an off-site worker, but with the prevalence of work from home and the ability to supervise work from afar post-COVID-19, the location where work is performed is a much weaker indicator of employment status.[199] The common-law right to control test also more likely considers a worker who provides the instrumentalities for their work an independent contractor, but the requirement that workers supply their own tools is more indicative of unequal bargaining in the gig economy than the worker's independence.[200] Additionally, payment on a per-task basis indicates a worker is an independent contractor, but the view that per-task payment represents independence presupposes negotiation, and gig workers rarely, if ever, negotiate the rates for their labor.[201] Therefore, gig workers often working at various locations, providing their own instruments,

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the protections afforded to those workers fails to account for the central aim to reduce economic inequality within labor law).

[195] Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 497 (2011) (explaining that the central principle behind the law of agency is that principles who hire agents to work on their behalf are liable for the foreseeable consequences of their agents' actions).

[196] *See* Kirven, *supra* note 61, at 282–83 (explaining that powerful firms utilize their economic prowess over their low paid workers to control workers without the need for formal systems); Zatz, *supra* note 194, at 282–83 (arguing that bureaucratic controls are superfluous when employees are economically dependent on their employer such that their employer can harness that dependence to shift economic uncertainties onto employees).

[197] *See* Zatz, *supra* note 194, at 282–83 (arguing that firms exploit the precariousness of low-wage workers by recasting the flexibility of their work as entrepreneurial opportunity).

[198] *See* Cunningham-Parmeter, *supra* note 24, at 408 (arguing that gig workers satisfy the common-law test for an irregular method of payment and location of work, but that these factors are not an indication of economic independence).

[199] *See* Pinsof, *supra* note 25, at 363–64 (arguing that the widespread prevalence of telecommuting and working remotely in the modern economy highlights how the location of work factor is outdated); Danielle Abril & Drew Harwell, *Keystroke Tracking, Screenshots, and Facial Recognition: The Boss May Be Watching Long After the Pandemic Ends*, WASH. POST. (Sept. 24, 2021), https://www.washingtonpost.com/technology/2021/09/24/remote-work-from-home-surveillance/ [https://perma.cc/B4LV-237H] (detailing various methods of corporate surveillance employed to track at-home workers).

[200] *See* Pinsof, *supra* note 25, at 365 (noting that courts find the source of tools a non-dispositive factor in part because of the existence of unequal bargaining power between employers and workers).

[201] *Id.* at 364 (highlighting the outdated nature of the method of payment factor utilized in the right to control test).

and receiving payment on a per-job basis hardly suggests that they are financially independent of their employers.[202]

This classification of gig workers as independent contractors is evidence itself that the right to control test is unable to properly distinguish employees from independent contractors.[203] This is only further evidenced by the many failed attempts by the D.C. Circuit and the NLRB to address the challenge of classifying gig workers by shifting the emphasis among the right to control factors.[204] The constant vacillation among the elements of agency principles, leaving the classification of gig workers an unsettled matter constantly in flux, highlights the need for a more enduring solution.[205] Therefore, the only permanent solution would be to amend the language of the statute.[206]

## III. THE ABC TEST AND THE POWER OF NEGOTIATION

There was no equivalent to the modern gig economy at the time the NLRA passed.[207] It is no surprise, therefore, that the current test to determine employment status fails to effectively distinguish between independent contrac-

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[202] *See generally* Stewart & Stanford, *supra* note 53, at 421 (explaining that gig workers typically provide the capital for their work, determine the location of their work, and receive compensation on a piecemeal basis).

[203] *See* Pinsof, *supra* note 25, at 353–67 (detailing the various shortcomings of each element of the right to control test as applied to gig workers).

[204] *See generally* Loc. 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. v. NLRB, 603 F.2d 862, 872–73 (D.C. Cir. 1978) (affirming the NLRB's application of agency principles and emphasizing the importance of supervisory control as the central factor to the determination of a worker's employment status); Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002) (upholding the NLRB's decision, at the behest of the General Counsel, to use entrepreneurial opportunity as the determinative factor between a worker's status as an employee or independent contractor); FedEx Home Delivery (*FedEx I*) v. NLRB, 563 F.3d 492, 495 (D.C. Cir. 2009) (reversing the NLRB's decision to classify drivers as employees on the grounds that the drivers had the potential for entrepreneurial opportunity); FedEx Home Delivery (*FedEx II*), 361 N.L.R.B. 610, 611 (2014) (finding that the evaluation of independent contractor status requires considering all principles of agency, declining to follow the D.C. Court of Appeal's instruction to elevate the status of entrepreneurial activity above other factors, and finding that the entrepreneurial opportunity factor is only relevant in so far as it is exercised); SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at 1, 23 (Jan. 25, 2019) (overturning previous NLRB precedent and reverting to a test that emphasizes entrepreneurial opportunity).

[205] *Compare* Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 124, at 29 (finding that Postmates food delivery drivers are statutory employees and not independent contractors), *and* Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 126, at 39 (applying the *FedEx II* independent contractor test and finding that the cleaners are employees and not independent contractors), *with* Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 124, at 15 (finding that Uber drivers are not employees, but rather independent contractors exempt from the protections of the NLRA).

[206] *See* Shaffer, *supra* note 29, at 1059 (arguing that only statutory change can rectify the strain that the sharing economy places on traditional worker classification law).

[207] *See id.* at 1055–56 (explaining that when worker classification law was developed there was no analog to the gig economy worker and, therefore, that the law as currently applied is ill-equipped to handle this new relationship).

tors and employees given this new economic relationship.[208] Rather than contort the common-law principles of agency to cover gig workers, Congress should amend the NLRA to replace the right to control test with the ABC test.[209] The ABC test focuses on factors more relevant to the economic realities of workers in the gig economy.[210] The application of the ABC test will lead to the inclusion of gig workers under the NLRA's protections and equalize bargaining power in the gig economy without endangering some of its unique features.[211]

Practically, replacing the right to control test with the ABC test would extend the NLRA's coverage to some gig workers and help ameliorate the incongruency between business stability and worker flexibility in the gig econo-

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[208] Micah Prieb Stolzfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-By-Worker Approach*, 68 WASH. & LEE L. REV. 311, 332–33 (2011) (contending that marginal workers, who lack the leverage to meaningfully bargain for better working conditions regardless of their apparent entrepreneurial control, should not be excluded from labor protections).

[209] *Id.* at 333–34 (arguing that attempts to reform the independent contractor distinction short of a substantive statutory reformation will fail because of the entrenched interpretations developed over the long history of vacillations among the meaning of each factor in the common-law right to control test).

[210] Pinsof, *supra* note 25, at 367 (finding that the ABC test better approximates the status of a worker than the right to control test).

[211] *See* 29 U.S.C. § 151 (asserting that the express purpose of the NLRA is to equalize bargaining power between employers and employees); *see, e.g.*, Liss-Riordan & Doherty, *supra* note 149 (detailing the effect that the ABC test had on the rights of gig workers in California). Proponents of excluding gig workers from the definition of employee argue that inclusion would bring with it so many legal rights that gig platforms will respond by offering traditional employment relationships. *See, e.g.*, DAVID LEWIN, WILLIAM HAMM & MIA KIM, ANALYSIS OF DRIVER JOB LOSSES IF GIG ECONOMY COMPANIES MUST RECLASSIFY DRIVERS AS EMPLOYEES RATHER THAN INDEPENDENT CONTRACTORS 2–3 (2020) (finding that if a California bill that would reclassify rideshare drivers as employees passed, nearly 80–90% of those drivers would lose employment); Derek Lidow, *Opinion: Employees or Independent Contractors? Fairness for America's Gig Workers Must Come from Entrepreneurs, Not Government*, MARKETWATCH, https://www.marketwatch.com/story/employees-or-independent-contractors-fairness-for-americas-gig-workers-must-come-from-entrepreneurs-not-government-11669019696 [https://perma.cc/VKA5-MYFF] (Nov. 26, 2022) (reasoning that recasting gig workers as employees will likely result in a low-wage position). *See generally* Tom Hebert, *New Biden Rule Would Destroy Gig Economy and Raise Taxes on Millions of Americans*, AMS. FOR TAX REFORM (Oct. 11, 2022), https://www.atr.org/new-biden-rule-would-destroy-gig-economy-and-raise-taxes-on-millions-of-americans/ [https://perma.cc/QWN4-Y6SR] (arguing that a proposed Department of Labor rule that would reclassify gig workers as W-2 employees would destroy the flexibility that many gig workers and gig companies prefer). Given that most gig employees prefer the contours of their current work relationship, but also recognizing the current precarious nature of that relationship, the ideal solution is to provide gig workers the protection of the NLRA, namely collective bargaining, to provide greater economic rights. *See* W.H. HUTT, THE THEORY OF COLLECTIVE BARGAINING 145–46 (2007) (finding that collective bargaining is most effective for the purposes of negotiating the terms of a work relationship that cannot be allocated by the market, such as rates of wages); News Release, U.S. Bureau of Labor Statistics, *supra* note 186 (finding that nearly 80% of independent contractors prefer their current work arrangements to traditional labor relationships); Cunningham-Parmeter, *supra* note 24, at 387–88 (highlighting that gig work is precarious work based on features such as the lack of decent pay, benefits, and legal safeguards against discrimination).

my.[212] Although businesses and workers alike benefit from the flexible business model developed by the gig economy, the system also creates significant instability for both workers and employers.[213] Currently, gig workers lack stable pay, protections for unionization, and a stable, centralized system for reporting grievances.[214] Employers also suffer from a lack of certainty as the application of the right to control test continues to produce litigation and change definitions of who qualifies as employees.[215]

Perhaps most importantly for gig workers, extending coverage of the NLRA would provide gig workers with the right to unionize.[216] Unionized workers, on average, receive higher pay, experience improvement in workplace conditions, and enjoy a more stable working environment.[217] Even without a union, the NLRA would protect the ability of gig workers to voice grievances about their working conditions, including those related to hours, pay, and discrimination.[218] These protections are all the more important for gig workers

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[212] *See* Pinsof, *supra* note 25, at 369 (arguing that under the statutes as written the current approach to labor classification fails to serve the stated purpose of promoting stability and financial security for working-class individuals). *See generally* Shaffer, *supra* note 29, at 1038 (arguing that gig economy workers choose their jobs based on flexible work schedules).

[213] *See* Robert Reich, *The Share-the-Scraps Economy*, ROBERTREICH.ORG (Feb. 2, 2015), https://robertreich.org/post/109894095095 [https://perma.cc/N92Y-2RPE] (explaining that a central premise of the gig economy is computerized systems handling programmable tasks and human beings performing unstable, odd jobs, with the owners of the computers reaping the vast majority of the rewards); Cherry & Aloisi, *supra* note 161, at 646 (explaining that reformation of the current employee classification laws could provide predictability to employers operating in the gig economy and more benefits to workers).

[214] *See* Cunningham-Parmeter, *supra* note 24, at 387 (discussing the precarious nature of gig work, including a lack of decent pay, benefits, and anti-discrimination protections).

[215] *See generally* Robert Iafolla, *Employees Almost Always Win with Trump NLRB Test Set for Change*, BLOOMBERG L. (Feb 22, 2022), https://news.bloomberglaw.com/daily-labor-report/employees-almost-always-win-with-trump-nlrb-test-set-for-change [https://perma.cc/NZM4-RHN4] (detailing recent changes to the NLRB's test for determining independent contractor status under the NLRA and predicting more change soon).

[216] *See generally* 29 U.S.C. § 157 (providing employees with the right to form, join and assist a union).

[217] *See* George I. Long, *Differences Between Union and Nonunion Compensation, 2001–2011*, MONTHLY LAB. REV., Apr. 2013, at 16, 16 (explaining that union members receive higher wages on average and have access to more employer-sponsored benefits than nonunion workers); McNicholas et al., *supra* note 136 (explaining that union engagement was a factor in job stability during the COVID-19 pandemic). Correlated with the decline in union membership in the United States is the disassociation of productivity growth and wage growth. DAU-SCHMIDT ET AL., *supra* note 16, at 19–22. The resultant dramatic increase in income inequality is linked to a number of societal ills, including declines in labor force participation and marriage rates and increases in out-of-wedlock births, incarceration rates, drug use, and suicide. *Id.* at 19–22.

[218] *See generally* 29 U.S.C. § 157 (highlighting that all employees regardless of unionization status have the right to engage in activities for mutual aid or protection).

who work precarious jobs, take on more risk, and work in more decentralized environments than a worker in a traditional employment arrangement.[219]

Businesses would also benefit from the stability that would come with implementing the ABC test.[220] Successful business require a stable legal environment, and application of the ABC test would likely settle the ongoing dispute between the NLRB and the D.C. Circuit on how to best categorize gig workers.[221] This resolution would provide certainty for the many businesses operating in the gig economy and is unlikely to dramatically injure a business's operations. [222]

Finally, the application of the ABC test will ensure that the NLRA achieves its original goals in the modern economy.[223] The NLRA seeks to

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[219] *See* Cunningham-Parmeter, *supra* note 24, at 387–88 (detailing the lack of decent pay, benefits, and legal safeguards against discrimination that are commonplace in the gig economy and attributes of precarious work); Azar, *supra* note 156, at 412 (detailing the decentralized nature of gig work through the example of an Uber driver who chooses when to work, what car to drive, and what location to offer services); Dau-Schmidt, *supra* note 178, at 78–79 (describing the link between the gig economy and the wider trend of downward pressure on risk in the workplace from employer to worker). Furthermore, gig workers often work in the gig economy because they do not have a significant choice in their employment. *See generally* Rani Molla, *More Americans Are Taking Jobs Without Employer Benefits Like Health Care or Paid Vacation*, VOX (Sept. 3, 2021), https://www.vox.com/recode/22651953/americans-gig-independent-workers-benefits-vacation-health-care-inequality [https://perma.cc/2PAD-89WF] (explaining that a significant portion of gig economy workers do not consider the choice to work for gig economy platforms to be entirely their own and that the portion that does consider it to be their own choice are often choosing between very bad options).

[220] *See, e.g.*, People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 331 (2020) (finding no reason to overturn the lower court's preliminary injunction that required Uber to recognize its drivers as employees); Healey v. Uber Techs., Inc., No. 2084CV01519, 2022 WL 16839219, at *1 (Mass. Super. Ct. Feb. 28, 2022) (denying defendants' motion to dismiss the claim for declaratory relief on account of finding an actual controversy over the duty of Uber & Lyft to categorize workers as employees).

[221] Pinsof, *supra* note 25, at 368 (arguing that reform of the independent contractor test should rest in a test with fewer factors than the right to control test because more factors introduce more uncertainty in its application); Daniella Ballou-Aares, Rhett Buttle & David Clunie, *America's Businesses Need a Stable Democracy to Thrive*, FORTUNE (Jan. 12, 2022), https://fortune.com/2022/01/12/american-business-needs-a-stable-democracy-to-thrive-biden-democrats-republicans-midterms-elections-reform-voter-rights-politics/ [https://perma.cc/6HYS-XPSX] (explaining the American economic system is built on the presumption of a stable government); David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, HARV. BUS. REV. (July 5, 2017), https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters [https://perma.cc/G9FV-EY6F] (explaining that misclassification is a pervasive practice that can result in significant penalties for employers who engage in it, most notably Uber, who recently reached a $100 million settlement, and that undermines more responsible employers who refrain from the practice).

[222] *See* Pinsof, *supra* note 25, at 369–70 (proposing the application of the ABC test as a solution to the problem of classifying gig workers); Richard B. Freeman & Morris M. Kleiner, *Do Unions Make Enterprises Insolvent?*, 52 INDUS. & LAB. RELS. REV. 510, 526 (1999) (finding that unions cause no discernable increase in the insolvency of firms or lines of business, rather they only reduce profits).

[223] *See* Shaffer, *supra* note 29, at 1056 (arguing that the current worker classification system fails to account for the entirely new work relationship that exists in the gig economy). *See generally* Pinsof, *supra* note 25, at 369–70 (arguing that the ABC test utilized in the states better distinguishes between employees and independent contractors). Furthermore, the popular alternative solution, the adoption

equalize bargaining power among dependent workers and employers, but it cannot achieve that goal with the application of an unclear ten-factor right to control test that presumes independent contractor status and labels dependent gig workers as independent contractors.[224] In contrast the conjunctive three-part ABC test presumes a worker is an employee and if applied would extend coverage of the NLRA to a higher proportion of dependent workers who need the Act's protections.[225]

One significant criticism of classifying gig workers as employees is the increased cost and reduced flexibility associated with the employee designation.[226] The argument states that the gig work business model is unsustainable if all workers qualify as employees and that a small number of employees would replace the larger, flexible workforce.[227] Furthermore, the vast majority of current independent contractors prefer their work relationship over a traditional job and many gig workers only engage with gig work platforms on a

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of an intermediate category, leaves the outdated right to control test in place. *See, e.g.*, HARRIS & KRUEGER, *supra* note 27, at 15–21 (proposing a litany of legislative reforms to establish a third category of worker); Azar, *supra* note 156, at 424 (advancing a third category of worker for the purposes of establishing portable benefits for gig workers); Clark, *supra* note 43, at 794–95 (arguing for the adoption of a marketplace contractor under Washington State laws); Shaffer, *supra* note 29, at 1059–60 (explaining that a third worker classification would better fit the new working relationships of the modern workforce); Tronsor, *supra* note 13, at 183–85 (proposing the adoption of a third category of worker under the NLRA); *see also* De Stefano, *supra* note 32, at 471 (advocating for various policy changes rather than the introduction of a new worker category); Cherry & Aloisi, *supra* note 161, at 676–77 (arguing that a third category of worker might appear to be an easier solution than it seems with respect to the problem of misclassification). In contrast, the ABC test resolves the inconsistency between the NLRA's stated goal to cover all workers and the desire to not extend the full force of federal labor protections to individuals who operate without dependency on, or direction from, those that hire them. *See generally* Cherry & Aloisi, *supra* note 161, at 676–77 (arguing that failure is the inevitable result of the application of a fact-specific and malleable test designed to classify workers into a binary to a category of workers that share characteristics of both groups within that binary); Dubal, *supra* note 79, at 54 (explaining that the original NLRA sought to include many of the workers classified as independent contractors today).

[224] *See generally* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at 1, 23 (Jan. 25, 2019) (holding that in determining the classification of workers, a reviewing body should apply agency principles through the lens of entrepreneurial opportunity); Nat'l Lab. Rels. Bd., Off. of the Gen. Couns., *supra* note 113, at 15 (finding that Uber drivers are not employees, but independent contractors who are exempt from the protections of the NLRA).

[225] H.R. 842, 117th Cong. § 101 (2021); *see* Pinsof, *supra* note 25, at 370 (arguing that the three factors of the ABC test are less manipulable than multifactor tests like the right to control test).

[226] *See* Michael Saltsman, *Unions Seek to 'Liberate' Gig Workers from Flexibility*, WALL ST. J. (Sept. 4, 2020), https://www.wsj.com/articles/unions-seek-to-liberate-gig-workers-from-flexibility-11599246887 [https://perma.cc/U67Y-FX5W] (explaining that union contracts provide stability, which in the context of gig workers most likely will transform these flexible work relationships into something more akin to the traditional job).

[227] *See id.* (arguing that reclassification of gig workers as employees would threaten the fundamental structure of the gig economy); *see also* LEWIN ET AL., *supra* note 211, at 2–3 (studying the effects of a California bill that would overhaul the worker classification system in favor of classifying workers as employees, and finding that the result would be an 80–90% reduction in gig economy based driving positions).

part-time basis.[228] Therefore, any change to the current legal structure must be flexible enough to avoid a fundamental restructuring of gig businesses.[229]

Compared to the current literature arguing for the adoption of the ABC test broadly across federal labor laws, the adoption of the ABC test for determining worker status under the NLRA achieves this delicate balance.[230] The NLRA, through its protections, equalizes the bargaining power between workers and employers by protecting rights to air workplace grievances, unionize, and engage in collective bargaining.[231] In the context of the gig economy, NLRA coverage will empower workers to bargain for better working conditions and will allow employers to offer improved, but feasible, working conditions that are memorialized in private contracts rather than through forced government imposition.[232] By giving gig workers employee status under the NLRA, the ABC test would grant workers and employers the opportunity to negotiate better working conditions for employees through collective bargaining without disincentivizing companies from offering gig positions in the first place.[233]

## CONCLUSION

Gig workers who experience a significantly higher degree of autonomy over their work, but who also remain economically dependent on the businesses who hire them, present a specific challenge to federal labor laws. The National Labor Relations Act (NLRA), considered one of the most important sources of federal labor protections in the United States, only covers statutorily

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[228] *See* News Release, U.S. Bureau of Labor Statistics, *supra* note 186 (explaining that 79% of independent contractors prefer their work arrangements to traditional labor relationships); LEWIN ET AL., *supra* note 211, at 1 (finding that 80% of rideshare drivers work less than twenty hours per week, with the majority of them working under ten hours a week, and that 70% of those drivers work less than twenty weeks a year, with the majority working less than five weeks a year); Anderson et al., *supra* note 11 (explaining that only 8% of gig workers work more than thirty hours a week).

[229] *See generally* James de Haan, Note, *The Über-Union: Re-thinking Collective Bargaining for the Gig Economy*, 12 CHARLESTON L. REV. 97, 101–02 (2017) (arguing that reclassification of gig workers as employees with benefits and the right to collective bargaining would likely lead to the end of the gig economy as it exists today).

[230] *See, e.g.*, Pinsof, *supra* note 25, at 367–69 (arguing for the adoption of the ABC test as the single test for all federal labor statutes to solve the plight of the gig economy worker); Cunningham-Parmeter, *supra* note 24, at 408 (arguing for judicial adoption of the ABC test for labor law broadly because it better tailors the law to the realities of the gig worker); Brown, *supra* note 32, at 207 (suggesting that federal adoption of the ABC test in place of all other currently applied employment status determination tests might resolve the classification issues faced by gig workers).

[231] 29 U.S.C. §§ 151, 157.

[232] *See generally* Tronsor, *supra* note 13, at 183 (emphasizing the importance of gig workers collectively bargaining over the terms and conditions of work).

[233] *See generally* HANNAH JOHNSTON & CHRIS LAND-KAZLAUSKAS, ORGANIZING ON-DEMAND: REPRESENTATION, VOICE, AND COLLECTIVE BARGAINING IN THE GIG ECONOMY 2 (2018) (finding that the thrust of history suggests that collective bargaining presents a promising opportunity for a compromise solution among the various needs of employers and workers in the gig economy).

defined employees. Independent contractors do not receive the NLRA's protections, which include the rights to collectively bargain, unionize, protest, and act concertedly for mutual protection. The right to control test used to determine whether a worker is an employee or independent contractor excludes gig workers in its current formulation. This exclusion is particularly troublesome due to the decentralization, precariousness, and greater share of risk borne by workers in gig employment arrangements.

The proper solution is to replace the right to control test with the ABC test. Application of the ABC test under the NLRA will allow employers and gig workers to negotiate for an employment structure that creates better working conditions without making the gig labor arrangement infeasible. Employers will benefit from a more stable statutory framework and employees will have the opportunity to bargain for better working conditions. Ultimately, the ABC test better differentiates employees from independent contractors, broadening the coverage of the NLRA so that it achieves its goal of equalizing bargaining power in the workplace.

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