

Employment Rights in the Platform Economy: Getting Back to Basics

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ABSTRACT

The employment status of workers for “platform economy” firms such as Uber, Lyft, TaskRabbit, and Handy has become a significant legal and political issue. Lawsuits against several such companies allege that they have misclassified workers as independent contractors to evade employment law obligations. Various lawmakers and commentators, pointing to the complexity of existing tests for employment and the costs of employment duties, have responded with proposals to limit platform companies’ liability. This article steps into such debates, using the status of Uber drivers as a test case. It argues that Uber drivers may not fall neatly into either the “employee” or the “independent contractor” category under existing tests. Nevertheless, an important principle underlying those tests—the anti-domination principle—strongly indicates that the drivers are employees. That principle also indicates that proposals to limit platform economy firms’ liability are premature at best and misguided at worst.

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INTRODUCTION

Who is an employee? This question is enormously important for “platform economy”¹ companies such as Uber, Lyft, TaskRabbit, Postmates, and Handy, all of which provide online platforms that match consumers with workers for short-term tasks.² Worker advocates and others on the left accuse such companies of misclassifying their workers as independent contractors in order to avoid a host of employment law obligations,³ and workers have sued several such companies for employment-related harms.⁴ The companies, in turn, typically deny that their workers are employees, casting themselves simply as technology firms, and pointing to those workers’ freedom to set their own hours and freedom from direct supervision.⁵ Handy executives, for example, responded to a misclassification lawsuit by stating that their workers are “independent contractors” who “choose the Handy platform because it provides much needed flexibility by allowing them to book whatever jobs best suit them.”⁶

¹ I use the term “platform economy” rather than “gig economy” because the “gig economy” is significantly larger, involving all sorts of contingent employment relationships. See Emily Hong, *Making It Work: A Closer Look at the Gig Economy*, PAC. STANDARD (Oct. 23, 2015), <http://www.psmag.com/business-economics/making-it-work-a-closer-look-at-the-gig-economy> [<https://perma.cc/7AQK-M7GH>] (defining “gig economy” as “a labor trend in which more Americans are making more of their livelihoods through some form of freelance or contract work”).

² See, e.g., *The Rise of the Platform Enterprise: A Global Survey*, CTR. FOR GLOBAL ENTERPRISE (Jan. 7, 2016), <https://thece.net/the-center-for-global-enterprise-releases-first-global-platform-survey-valuing-platform-based-companies-at-4-3-trillion/> [<https://perma.cc/QBS7-A8UZ>] (outlining global growth of “platform economy”).

³ See, e.g., Avi Asher-Schapiro, *Against Sharing*, JACOBIN MAG. (Sept. 19, 2014), <https://www.jacobinmag.com/2014/09/against-sharing> [<https://perma.cc/4HTB-RECE>] (arguing that “companies like Uber shift risk from corporations to workers, weaken labor protections, and drive down wages”); Katie Benner, *A Secret of Uber’s Success: Struggling Workers*, BLOOMBERG VIEW (Oct. 2, 2014, 4:00 PM), <http://www.bloombergvew.com/articles/2014-10-02/a-secret-of-uber-s-success-struggling-workers> [<https://perma.cc/EH5U-Z2G9>]; Sarah Kessler, *The Gig Economy Won’t Last Because It Is Being Sued to Death*, FAST COMPANY (Feb. 17, 2015), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> [<https://perma.cc/THZ9-GNPH>] (discussing lawsuit against Handy that accuses it of similar practices).

⁴ See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *Zenelaj v. Handybook, Inc.*, 82 F. Supp. 3d 968 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc. (Uber I)*, 58 F. Supp. 3d 989 (N.D. Cal. 2014). See generally Kessler, *supra* note 3. As this article went to press, Uber announced it had reached a settlement agreement covering the *O’Connor* suit and a similar suit in Massachusetts. The company will pay up to \$100 million and make various changes to its driver policies, but will continue to classify the drivers as independent contractors. See Mike Isaac and Noam Scheiber, *Uber Settles Cases With Concessions, but Driver Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), <http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html> [<https://perma.cc/63AZ-LXN8>].

⁵ See, e.g., *O’Connor v. Uber Techs., Inc. (Uber II)*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (summarizing Uber’s arguments against employment status); *Cotter*, 60 F. Supp. 3d at 1069 (describing Lyft’s arguments against employee status).

⁶ Kevin Montgomery, *Handy Sued for Being a Hellscape of Labor Code Violations*, VALLEYWAG (Nov. 12, 2014, 2:20 PM), <http://valleywag.gawker.com/handy-sued-for-being-a-hellscape-of-labor-code-violatio-1657889316> [<https://perma.cc/JH6Z-NW5P>].

The stakes are high. One journalist estimated the potential cost to Uber at over \$4 billion per year,⁷ and others have argued that employment duties would undermine other platform economy companies' business models.⁸ This has led various lawmakers and commentators to suggest legal reforms to ease that burden. Some proposals envision a new legal category of worker that would slot between "employee" and "independent contractor" and enjoy limited employment rights,⁹ while others envision new vehicles for employment-related benefits.¹⁰

This article builds on the Uber lawsuit to reframe such debates.¹¹ It argues that platform economy workers should typically be classified as employees, regardless of the economic impact on such companies, and that proposals to limit platform firms' duties are premature at best and misguided at worst.

Granted, existing legal tests for employment do not neatly resolve these questions, as illustrated by the cases against Uber and Lyft. In March 2015, two federal judges in San Francisco denied the companies' motions for summary judgment rejecting claims that they misclassified workers and therefore failed to pay minimum wages (in the Lyft case) and failed to reimburse drivers for work-related expenses (in both cases).¹² Each opinion held that the companies' drivers had raised material questions of fact as to whether they were employees or independent contractors, reasoning that the workers did not fit neatly into either legal category.

In the Lyft case, Judge Vince Chhabria struck a nice metaphor: if the case reached a jury it would be "handed a square peg and asked to choose between two round holes."¹³ Lyft drivers are not classic independent contractors since they are actually at the core of Lyft's business, and often work for the company for years. Yet they are not classic employees either. "We generally understand an employee to be someone who works under the direction of a supervisor," he wrote, "for an extended or indefinite period of

⁷ Steven Gandel, *Uber-nomics: Here's What It Would Cost Uber to Pay Its Drivers as Employees*, FORTUNE (Sept. 17, 2015, 2:12 PM), <http://fortune.com/2015/09/17/ubernomics/> [<https://perma.cc/X2EF-MNSR>].

⁸ Kessler, *supra* note 3 ("Not being responsible for employees' taxes and benefits allows companies like Handy to operate with 20% to 30% less in labor costs than the incumbent competition. . . . Lose this workforce structure . . . and you lose the gig economy.").

⁹ See, e.g., Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent' Worker 2* (Hamilton Project, Discussion Paper 15-10, 2015); James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits> [<https://perma.cc/UW2X-L5KP>].

¹⁰ Portable Benefits, *Common Ground for Independent Workers*, MEDIUM (Nov. 10, 2015), <https://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548f#92o9hh1mo> [<https://perma.cc/ZJ7Y-6CSL>] (proposal by coalition of companies, foundations, and some worker organizations to reform benefits laws).

¹¹ Here and elsewhere throughout the article, I use "Uber" as shorthand to refer to Uber, Lyft, and the "ride-sharing" platform economy generally.

¹² *Uber II*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015).

¹³ *Cotter*, 60 F. Supp. 3d at 1081.

time, with fairly regular hours, receiving most or all of his income from that [one] employer.”¹⁴ (As this article went to press, the court was considering a proposed settlement in the Lyft case, under which the company would pay \$12.5 million and make certain other changes but would not alter its drivers’ employment status.)¹⁵

Judge Chhabria is correct that the drivers’ legal status is ambiguous. Part of the problem is that courts often treat employment as a question of fact, or as a mixed question of fact and law, which implies that “employment” under the law matches up with “employment” in the economy and society.¹⁶ But this cannot be the case. For example, while “control” is the touchstone of the traditional common law test for employment, it is neither clear why control is key, nor which aspects of control should matter, nor how much control must be exercised before a contracting relationship becomes employment.¹⁷ The broader “economic reality” test that applies to certain employment statutes fares little better. The most coherent interpretations of that test view it as a means to determine whether workers are economically dependent upon a putative employer.¹⁸ But plenty of classic contractors are economically dependent upon their clients, and employers are often economically dependent upon their employees.¹⁹ These challenges have led many to criticize existing tests for employment as confusing and out of touch with contemporary economic practices.²⁰

We need a different approach. The starting point is to recognize that courts cannot resolve employment status questions in hard cases by mechanically determining issues of fact. Rather, such courts inevitably make substantive judgments regarding the fairness of imposing employment duties in particular instances. In this regard, employment is like the concept of duty in

¹⁴ *Id.* at 1069.

¹⁵ Class Action Settlement Agreement and Release, *Cotter v. Lyft*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (No. 13-cv-04065-VC). The settlement requires Lyft to clarify when driver termination will be appropriate, *id.* ¶ 37, but does not require the company to re-classify its drivers as employees. Compare *id.* ¶ 37 (listing changes to termination procedures), with *id.* ¶ 16 (denying wrongdoing, presumably including misclassification) and *id.* ¶ 34 (implying that drivers remain independent contractors rather than employees). As of February 29, 2016, the parties’ proposed settlement is still under consideration. See *Cotter v. Lyft, Inc.*, PLAINSITE, <http://www.plainsite.org/dockets/u8i561fd/california-northern-district-court/cotter-v-lyft-incl/> [<https://perma.cc/2XWV-7NUG>]; see also Tracey Lien, *Lyft Settles Worker Misclassification Suit for \$12.5 Million*, L.A. TIMES (Jan. 27, 2016), <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-20160126-story.html> [<https://perma.cc/LWX6-7X2W>].

¹⁶ See *infra* Parts I.C. & II.A.

¹⁷ See *infra* Part I.C.

¹⁸ See generally WAGE & HOUR DIV., U.S. DEP’T OF LABOR, OPINION LETTER ON FLSA TEST FOR EMPLOYMENT (July 15, 2015) (summarizing Department’s interpretation of that test as determining relationships of economic dependence) [hereinafter “Dep’t of Labor Memorandum”].

¹⁹ See *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1542 (7th Cir. 1987) (Easterbrook, J., concurring).

²⁰ See, e.g., Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 283 (2011); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187 (1999).

tort.²¹ As first year law students typically realize sometime around November, “duty” in modern tort law is a placeholder for “policy judgments about how to balance competing social priorities.”²² Or to paraphrase Prosser, employment is a battleground of social theory.²³ Courts in employment status cases inevitably draw on theories of the good to answer two questions: how much control or dependence is necessary to establish an employment relationship, and why control and dependence are important in the first place.

To resolve such questions, I argue that courts should go back to basics,²⁴ and focus on the role of basic employment regulations—such as laws requiring minimum wages and expense reimbursements—in a democratic society. This is a question of values and principles, not facts. Borrowing from recent legal scholarship on related questions of law and inequality,²⁵ and from basic republican commitments deeply rooted in our politics,²⁶ I argue that such laws are a crucial means of ensuring that workers are free from domination.²⁷ Basic employment duties deter economic and social practices that undermine workers’ individual dignity and equal social standing; such duties also prohibit excessive concentrations of wealth or power, encouraging a more egalitarian and democratic political economy.²⁸ Control and economic dependence are therefore important not in themselves, but as signals that workers are suffering domination.²⁹ I hope to fully develop this line of argument in future work, but in this article I simply introduce it and apply it to the Uber case.

²¹ In developing this argument, I am deeply indebted to Richard Thompson Ford’s recent essay. See generally Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381 (2014).

²² *Id.* at 1390.

²³ See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 14–15 (4th ed. 1971) (“[T]he law of torts is a battleground of social theory.”).

²⁴ My title is in part a nod to Alan Bogg & Cynthia L. Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics* (N.Y.U., Working Paper No. 439, 2013), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1441&context=nyu_plltwp [<https://perma.cc/FCX4-E96T>]. My analysis also builds on their argument that neo-republican theory may justify legal entitlement to contest managerial decisions.

²⁵ See, e.g., K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (forthcoming) (on file with author) (identifying concerns with domination common to Progressive-era economic reforms and neo-republican political theory); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 229 (2013) (discussing role of similar concept of “social equality” in employment law); Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 671, 673 (2014) (discussing role of anti-oligarchy concerns in constitutional law and labor law). For the direct application of neo-republican political theory to labor and employment rights, see Bogg & Estlund, *supra* note 24; Alex Gourevitch, *Labor Republicanism and the Transformation of Work*, 4 POL. THEORY 591 (2013).

²⁶ Or, more specifically, neo-republican commitments. See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997) (outlining neo-republican conception of freedom as non-domination). Regarding the historical influence of republicanism on the U.S. labor movement, see generally Gourevitch, *supra* note 25; William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985).

²⁷ See *infra* Part II.B.

²⁸ *Id.*

²⁹ As will be clear below, the notion of domination also captures what can be problematic about unequal bargaining power in the employment relationship. See *id.*

The threat of domination provides very good reasons to hold Uber to basic employment duties.³⁰ Uber's stunning innovations depend not just upon programmers' and engineers' technological savvy, but also upon drivers' labor and know-how. Imposing employment duties would require Uber to treat drivers more like citizens, or as co-participants in its success, rather than mere inputs to production. Doing so would also tack toward the political economy we need today: one that encourages innovation rather than clinging to outmoded forms of production, but that also shares the gains from innovation fairly with those whose work or data generation make innovations profitable. While imposing employment duties will increase fares for riders and cut into profits, that is a fair price to pay for a more egalitarian political economy.³¹

Part I, below, summarizes key issues in employment status litigation, using the Uber and Lyft cases as examples, and argues that the existing tests for employment are largely indeterminate. Part II argues that determining employment status inevitably involves contestable value judgments, defines and defends non-domination as a core value in modern democracies and in employment, and argues that anti-domination concerns strongly counsel for holding Uber to employment duties. Part III then considers how to move in that direction. It argues that courts should interpret existing multi-factor tests in light of anti-domination concerns, and could even hold Uber drivers to be employees as a matter of law. It then argues that any grand reformulation of employment duties should socialize rather than privatize employee benefits, while holding all firms to duties around economic questions like minimum wages, maximum hours, and collective bargaining. The conclusion considers the extension of this argument to other platform economy companies.

I. WHO IS AN EMPLOYEE?

Employment is notoriously difficult to define with precision, as the Uber and Lyft cases illustrate. Part I.A., below, discusses the key legal tests for employment, including the test under California law. Part I.B. summarizes Uber and Lyft's business models, and then summarizes the March 2015 orders in the Uber and Lyft employment status cases. Part I.C. then builds on those orders to argue that existing tests for employment are conceptually and empirically flawed.

I.A. *Legal Tests for Employment*

There are basically two legal tests for employment, both of which rely on lists of factual elements to determine the nature of the parties' relationship. The "control test" under the common law of agency, developed to

³⁰ *Id.* This argument builds on a previous article of mine. See generally Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543 (2014).

³¹ See *infra* Part II.C.

determine employers' vicarious liability for their employees' torts and since incorporated into many employment statutes,³² defines an employment relationship as a relationship of control: the employer gives orders, plans out jobs in minute detail, and monitors the employee's performance. An independent contracting relationship is different. The principal in such a relationship asks a contractor to complete particular tasks, but typically has neither the ability nor the desire to supervise that work because it requires such specialized skills.³³ As one judge put it, the "paradigm of an independent contractor" is one who sells "only expertise."³⁴

The control test accordingly instructs courts to consider multiple factors including the worker's skills, the duration of the parties' engagement, the method of payment, and the putative employer's ability to terminate the worker at will.³⁵ In a factory, the control test would distinguish an unskilled assembly line worker who stays with a company for many years and is paid by the hour from an electrician retained for a week by that factory to rewire a few machines and paid in lump sum for the full job. In a restaurant, it would distinguish a waiter or cook from a restaurant consultant hired to re-make the menu. On a farm, it would distinguish farm hands that perform whatever unskilled tasks are required of them from crop dusters who serve multiple farms each week.

Reflecting its origins in *respondere superior*, the control test is a relatively coherent means of determining which party is best positioned to prevent physical harms to third parties.³⁶ A bona fide independent contractor, in this view, bears the risk of her own torts, and the torts of her own employ-

³² See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (common law "control test" applies to ERISA); *NLRB v. United Ins.*, 390 U.S. 254, 256 (1968) (affirming that test for employment under the National Labor Relations Act (NLRA) is control test). The control test need not be applied mechanically. See *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (Sep. 30, 2014) (clarifying that under NLRA, the Board should evaluate "whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business").

³³ See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1540 (7th Cir. 1987) (Easterbrook, J., concurring); see also RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958) (listing factors that should be used to determine whether a relationship constitutes employment: "(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business").

³⁴ *Lauritzen*, 835 F.2d at 1545 n.3 (Easterbrook, J., concurring).

³⁵ RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

³⁶ *Id.* § 219. It also advances basic fairness considerations. See *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (appealing to concerns of fairness as alternative overlapping policy ground for vicarious liability, and noting "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities").

ees, because her human capital, physical capital, and skill presumably enable her to prevent those torts and to compensate those harmed, and because her temporary contract with the principal gives the principal less ability to control her work.³⁷

Yet the distinctions between employee and independent contractor become fuzzy quite quickly. Returning to the examples above, what about a manufacturing firm that hires a contractor to perform skilled tasks along its production line? A restaurant that hires a third-party staffing agency to supply workers as needed for low-skilled food preparation tasks, such as chopping vegetables? A farm that hires families to pick cucumbers? In each case, the principal might delegate control over the details of the work, requiring only sound performance of a task. But none of these are classic independent contractors. The production contractor at a factory comes closest given the skill level of its workers, yet its permanent relationship with the manufacturing firm and its integration into the overall operation indicate otherwise.

The control test also has obvious weaknesses as applied to employment regulations. The party best able to deter and compensate for workers' torts is often not the best party to bear employment duties.³⁸ As I have argued elsewhere, large firms are often better positioned to ensure compliance with employment laws than their thinly-capitalized contractors and suppliers.³⁹ Indeed, given its relatively narrow definition of employment, the control test affirmatively incentivizes companies to avoid employment law obligations by restructuring work relationships as contracting relationships.⁴⁰

Congress and the states have responded to such problems by defining employment more broadly for certain employment laws.⁴¹ For example, in the federal Fair Labor Standards Act (FLSA), Congress discarded the control test, instead defining "employ" as "suffer or permit to work."⁴² Its primary target was pre-New Deal sweatshops that placed multiple contractual intermediaries between workers and the garment manufacturers or "jobbers"

³⁷ See *Lauritzen*, 835 F.2d at 1544 (Easterbrook, J., concurring) ("Imposing liability on the person who does not control execution of the work might induce pointless monitoring.").

³⁸ See, e.g., Alan Hyde, *Legal Responsibility for Labour Conditions Down the Production Chain*, in *CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION* 83, 94 (Judy Fudge, Shae McCrystal & Kamala Sankaran eds., 2012).

³⁹ Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 *BERKELEY J. EMP. & LAB. L.* 1, 6 (2010).

⁴⁰ See generally Zatz, *supra* note 20, at 288–89 (discussing such incentives).

⁴¹ It is worth noting that the various economic reality tests apply in two distinct situations: (a) where an individual worker claims that she has been wrongly classified as an independent contractor by her putative employer, and (b) where the employees of a contractor claim that they are jointly employed by a firm that has retained that contractor's services. See Rogers, *supra* note 39.

⁴² Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. § 203(g) (2012)). See also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (FLSA definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of agency law principles"). Congress later applied the same definition of employment to agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1807–72 (1983).

who effectively set their terms and conditions of employment.⁴³ That language was previously used in state child labor statutes to “reach businesses that used middlemen to illegally hire and supervise children,”⁴⁴ such that companies had an affirmative duty to prevent child labor both within their enterprises and among their first-tier suppliers.⁴⁵ Courts and agencies applying the FLSA and certain state statutes have developed a set of multi-factor tests that seek to determine whether, “as a matter of economic reality, the individual is dependent on the entity.”⁴⁶

Various states, including California, also define employment somewhat more broadly than at common law, on the theory that employment statutes “must be liberally construed” “with particular reference to the ‘history and fundamental purposes’ of the statute[s]” at issue.⁴⁷ California law creates a presumption that anyone providing services to a business is an employee, shifting the burden of proof to the party seeking to avoid employment status.⁴⁸ In the leading case, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, the Supreme Court of California developed a multi-factor test to analyze the putative employer’s evidence that drew both on the control test and the FLSA “economic reality” test. Those factors include the following eight “secondary indicia” of employment that are meant to look beyond the strict, formal right of control:

- (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time

⁴³ Mark Anner, Jennifer Bair & Jeremy Blasi, *Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL’Y J. 1, 17 (2014).

⁴⁴ *Antenor v. D&S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996).

⁴⁵ Dep’t of Labor Memorandum, *supra* note 18, at 3.

⁴⁶ *Antenor*, 88 F.3d at 929. *Accord* Dep’t of Labor Memorandum, *supra* note 18.

⁴⁷ *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 403–05 (Cal. 1989). *Accord* *Laeng v. Workmen’s Comp. Appeals Bd.*, 494 P.2d 1, 1 (Cal. 1972). This approach is not inconsistent with the Restatement approach. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958) (stating that “following matters of fact, among others, are considered”) (emphasis added).

⁴⁸ *Nayaran v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (presumption of employment under California workers’ compensation and wage/hour laws). *See also* Catherine Ruckelshaus et al., *Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, NAT’L EMP. L. PROJECT, May 2014, at 35–36, <http://www.nelp.org/content/uploads/2015/02/whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf> [<https://perma.cc/9Q9V-2GPU>] (summarizing “ABC” test for employment status used in majority of state unemployment insurance laws, which require party seeking to evade responsibility to show that “(1) an individual is free in fact from control or direction over performance of the work; (2) the service provided is outside the usual course of the business for which it is performed; and (3) an individual is customarily engaged in an independently-established trade, occupation, or business”).

for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Those factors also include the following five factors meant to ensure that “employment” is defined “in light of the remedial purposes of the legislation”:⁴⁹

(1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business.⁵⁰

That is a dizzying array of factors, especially considering that several of the latter five factors overlap substantially with the eight “secondary indicia.” Adding to the complexity, the *Borello* court instructed that “[t]he individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.”⁵¹

Unsurprisingly, courts in both FLSA cases and California employment cases have struggled to make sense of the factors and their import. As Judge Frank Easterbrook argued in a leading opinion, the tests “offer[] little guidance for future cases . . . because any balancing test begs questions about which aspects of ‘economic reality’ matter, and why.”⁵² Some courts simply add them up, an approach that led Easterbrook to quip, “A score of 5 to 3 decides a baseball game, but [the FLSA] does not work that way.”⁵³ Other courts seem to analogize to a particular social image of employment: a long-term relationship, in a large facility like a factory, which is owned by the employer, and which is full of many workers doing the same repetitive task.⁵⁴ The most coherent substantive interpretations of the test view it as a means to determine whether particular workers suffer from significantly un-

⁴⁹ *Borello*, 769 P.2d at 407.

⁵⁰ *Id.* (citing *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748, 754 (9th Cir. 1979) (identifying factors for economic reality test under FLSA)). The only substantial difference from the FLSA factors in the Department of Labor Memorandum is that the memorandum focused on the *relative* investment of worker and company. See Dep’t of Labor Memorandum, *supra* note 18.

⁵¹ *Borello*, 769 P.2d at 404. See also 29 C.F.R. § 500.20(h)(5)(iv) (2012) (making clear that in determining closely related question of joint employment, “[t]he consideration of each factor, as well as the determination of the ultimate question of economic dependency, is a qualitative rather than quantitative analysis. The factors are not to be applied as a checklist.”).

⁵² *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

⁵³ *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 407 (7th Cir. 2007).

⁵⁴ See generally *Rogers*, *supra* note 39.

equal bargaining power or are economically dependent upon a particular employer.⁵⁵ All three of these approaches are apparent in the Uber and Lyft orders, as argued below. Yet, as also argued below, none of these approaches resolves Uber drivers' employment status.

I.B. The Uber and Lyft Cases

Uber and Lyft are two rising stars of Silicon Valley, and their business models are straightforward and similar.⁵⁶ Both have developed smartphone apps through which consumers looking for rides are matched with drivers who have contracted with one of the companies for ride referrals. Passengers must keep a current credit card on file with the companies. After a ride is completed, the companies draw on those credit cards to compensate the driver and to take their fee. While both companies describe this as "ride sharing," in reality nothing is shared. In Robert Nozick's memorable phrase, the apps enable "capitalist acts between consenting adults."⁵⁷ The companies are competing directly with, and sometimes displacing, traditional taxi and chauffeur services.⁵⁸

Both companies have grown explosively in recent years.⁵⁹ Their backers assert that their success stems from their creation of more efficient markets for taxi-like services.⁶⁰ Users can hail a car via the companies' apps while in their apartments, and then watch its progress toward their location. Uber and Lyft also prevent drivers from poaching one another's pre-committed fares, and deter passengers from taking a ride from someone other than their assigned driver, an issue that has undermined consumer confidence in some traditional taxi services.⁶¹

⁵⁵ See *infra* Part I.C.

⁵⁶ For the aspects of those companies' business models summarized in this paragraph, see generally *UBER*, <https://www.uber.com/> [<https://perma.cc/7BNR-P98G>], and *LYFT*, <https://www.lyft.com/> [<https://perma.cc/NC2V-AYNG>].

⁵⁷ ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 163 (1974).

⁵⁸ Reuben Fischer-Baum & Carl Bialik, *Uber Is Taking Millions of Manhattan Rides Away from Taxis*, *FIVETHIRTYEIGHT* (Oct. 13, 2015, 4:44 PM), <http://fivethirtyeight.com/features/uber-is-taking-millions-of-manhattan-rides-away-from-taxis/> [<https://perma.cc/Y6U3-S36K>] (analyzing displacement of taxis based on data from NYC Taxi and Limousine Commission).

⁵⁹ See Brian Solomon, *Leaked: Uber Financials Show Huge Growth, Even Bigger Losses*, *FORBES* (Jan. 12, 2016, 1:05 PM), <http://www.forbes.com/sites/briansolomon/2016/01/12/leaked-ubers-financials-show-huge-growth-even-bigger-losses/#4eda36b25c99> [<https://perma.cc/625L-GJ45>] (summarizing Uber's growth in recent years); Tracey Lien, *Lyft Defies Predictions by Continuing to Grow as a Rival to Uber*, *L.A. TIMES* (Jan. 5, 2016, 3:00 AM), <http://www.latimes.com/business/technology/la-fi-0105-lyft-growth-20160105-story.html> [<https://perma.cc/HR5N-SYTU>] (summarizing Lyft's recent growth).

⁶⁰ See Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 86–89 (2015) (describing Uber's potential transformation of this market); *Uber: The Feedback Loop Disrupting Transportation*, *PLATFORM THINKING*, <http://platformed.info/uber-network-effects/> [<https://perma.cc/MD52-R5U6>].

⁶¹ Uber, for example, now charges passengers five dollars for canceled rides. See *Updated Cancellation Policy*, *UBER* (May 1, 2015), <https://newsroom.uber.com/2012/05/updated-cancellation-policy/> [<https://perma.cc/XFJ3-8PSR>].

Uber and Lyft also aim to create a more efficient market by exploiting network effects among users of their app.⁶² The more users who sign up, the more likely it is that any driver will be able to find a fare at any given time. In the long run, the companies may be able to match drivers with passengers both at the beginning and the end of their rides—meaning, a driver could pick up a passenger at X, drive them to Y, pick up another passenger at Y, drop them at Z, pick up another at Z, and so on. The companies' vast network of drivers, and the data they collect on those drivers' behavior, may also enable them to predict times and locations of high demand and therefore to advise drivers on when to enter and exit the market, to adjust fares to market-clearing levels.⁶³ The end result could be a market for rides in which drivers spend far less time waiting at cab stands or cruising around looking for passengers, and therefore a market that enables better service at lower costs.

The companies' critics, however, accuse them of facially violating various local regulations that impose significant costs on taxis, and of saving money by violating employment laws through misclassification of their drivers as independent contractors.⁶⁴ The latter question is at the center of class action lawsuits filed against each company in 2013. In one case, former Lyft employees allege that Lyft failed to pay minimum wages and reimburse them for employment-related expenses; in the other, Uber drivers allege that the company had failed to pass on gratuities and to reimburse expenses.⁶⁵ (At least one subsequent case has alleged that Uber also violated minimum wage laws, and I will discuss Uber's potential liability for minimum wages in what follows.⁶⁶)

The contractual terms between the companies and their drivers are central to the cases, and relatively similar. Both explicitly state that drivers are independent contractors rather than employees.⁶⁷ Yet both hold drivers to various contractual duties designed to ensure good service. Prior to becom-

⁶² In this argument, I am indebted to Lior Strahilevitz' excellent analysis of the role of network effects in creating new business and profit opportunities. *See generally* Lior Strahilevitz, *Wealth Without Markets?*, 116 *YALE L.J.* 1472 (2007) (reviewing YOCHAI BEN-KLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)).

⁶³ *See, e.g.*, Neil Irwin, *Can Uber Live Up to Its \$40 Billion Valuation?*, *N.Y. TIMES* (June 13, 2014), <http://www.nytimes.com/2014/06/14/upshot/ubers-real-challenge-leveraging-the-network-effect.html> [<https://perma.cc/N7YJ-J5XH>]; *Uber: The Feedback Loop*, *supra* note 60.

⁶⁴ *See, e.g.*, Benner, *supra* note 3; Asher-Schapiro, *supra* note 3 (arguing that "companies like Uber shift risk from corporations to workers, weaken labor protections, and drive down wages").

⁶⁵ *See Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015); *Uber II*, 82 F. Supp. 3d 1133, 1135–36 (N.D. Cal. 2015); Second Amended Complaint at ¶¶ 27–28, 35, *Uber II*, 82 F. Supp. 3d 1133 (2015).

⁶⁶ *See* Heidi Turner, *Uber Lawsuit Alleges Driver Made \$80 Per Week*, *LAWYERSANDSETTLEMENTS.COM* (Feb. 15, 2016, 2:15 PM), https://www.lawyersandsettlements.com/articles/california_labor_law/california-labor-law-lawsuit-167-21273.html [<https://perma.cc/4NWN-DQF9>] (summarizing suit filed in Philadelphia against Uber claiming misclassification and minimum wage violations).

⁶⁷ *Cotter*, 60 F. Supp. 3d at 1070; *Uber I*, 58 F. Supp. 3d 989, 993–94 (N.D. Cal. 2014) (contract specifies independent contracting relationship).

ing “partners” with Uber, for example, drivers must provide their driver’s license and information about the car registration and insurance, pass a third-party background check, pass a “city knowledge test,” and be interviewed by Uber.⁶⁸ In the Uber litigation, drivers also alleged that the company exercised pervasive control over their day-to-day conduct as drivers. For example, Uber documents direct drivers to: “‘make sure you are dressed professionally;’ send the client a text message when 1–2 minutes from the pickup location (‘This is VERY IMPORTANT’); ‘make sure the radio is off or on soft jazz or NPR;’ and ‘make sure to open the door for your client.’”⁶⁹ Uber also requests that passengers rate their driver from one to five stars after each ride, and enables written feedback. The company “uses these ratings and feedback to monitor drivers and to discipline or terminate them,”⁷⁰ and it “regularly terminates the accounts of drivers who do not perform up to Uber’s standards.”⁷¹

Lyft’s contractual requirements for its drivers are somewhat less detailed than Uber’s, a fact that may have bolstered its argument that its drivers are contractors rather than employees. But the contract does require clean cars, requires drivers to ask passengers if they have a preferred route, and prohibits drivers from talking on the phone while driving or asking passengers for personal information so they can solicit business outside the app.⁷² Lyft also retains the right to terminate drivers if passengers report on their failure to follow certain policies, or even “for any or no reason,”⁷³ though it may change that policy pursuant to the pending settlement.⁷⁴

The judges in both cases denied the firms’ motions for summary judgment in separate orders on March 11, 2015.⁷⁵ While both opinions focused on control, their approaches differed. Judge Edward Chen’s opinion in the Uber case was a bit more mechanical. For example, it reasoned that the level of control exerted by Uber over drivers seemed analogous to that which FedEx exercised over its drivers in a case finding an employment relationship, especially given the role of customer feedback and complaints in ensuring a particular level of service.⁷⁶ It cited cases holding that workers may set their own hours and still be legal employees, so long as the putative employer exerts substantial control while they are on the clock.⁷⁷ It noted that Uber could apparently end contracts with drivers at will,⁷⁸ which it described as important because the right to discharge a worker at will gives a putative employer “the means of controlling the [putative employee’s] ac-

⁶⁸ *Uber II*, 82 F. Supp. 3d at 1136.

⁶⁹ *Id.* at 1149.

⁷⁰ *Id.* at 1151.

⁷¹ *Id.* at 1143.

⁷² *Cotter*, 60 F. Supp. 3d at 1072–73.

⁷³ *Id.* at 1079.

⁷⁴ See Lien, *supra* note 15.

⁷⁵ *Uber II*, 82 F. Supp. 3d at 1135; *Cotter*, 60 F. Supp. 3d at 1070.

⁷⁶ *Uber II*, 82 F. Supp. 3d at 1140.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1149 n.19.

tivities.”⁷⁹ Yet it held that the factors were inconclusive, especially given past courts’ divergent applications of them.⁸⁰

Judge Chen’s opinion did not explain, however, why any of those factors was especially important. For example, it stated that the key question was whether Uber retained “all *necessary* control” over the worker’s performance, but did not elaborate on what sorts of control are necessary or unnecessary.⁸¹ Nor did it seek to place the factors in a broader context, for example to explain why control itself was so important. In this regard, the Uber opinion is fairly typical of case law around the definition of employment: courts tend to compare the case at bar to past cases and to make a sort of gestalt judgment.⁸² This is not necessarily a criticism. The opinion hinged on the existence of numerous disputed facts and inferences, and no general theory of employment was necessary to hold that those disputes prohibited summary judgment.

Judge Vince Chhabria’s opinion in the Lyft case was quite different, and frankly refreshing, in two ways. First, as noted above, Judge Chhabria reasoned that the drivers are neither classic employees nor classic contractors, and that determining their status would require judgment.⁸³ Second, Judge Chhabria’s opinion appealed to extra-legal considerations. For example, he wrote that minimum wage laws target the “weakest and most helpless class” of workers,” because such workers need state protection “against the bargaining advantage employers have over employees,”⁸⁴ and therefore that such workers should typically be classified as employees for purposes of minimum wage laws. Contractors are different, he reasoned, because their skills afford them more power to negotiate favorable terms, and because they can more easily leave a bad work situation.⁸⁵ In this regard, the opinion paralleled the Department of Labor’s (“DOL”) recent argument that, under the FLSA, the key question is whether an individual is economically depen-

⁷⁹ *Id.* at 1139 (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014)).

⁸⁰ *Id.* at 1140–41 (summarizing cases that drew different inferences from requirements that drivers wear uniforms, and from drivers’ use of personal vehicles).

⁸¹ *Id.* at 1138.

⁸² See Rogers, *supra* note 39, at 21–27 (summarizing FLSA case law); Linder, *supra* note 20 (summarizing cases that decline to interpret employment statutes in line with statutory purposes). For recent cases that apply factors in a more mechanical way, see *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003); *Arredondo v. Delano Farms*, 922 F. Supp. 2d 1071 (E.D. Cal. 2013); *Zhao v. Bebe Stores*, 247 F. Supp. 2d 1154 (C.D. Cal. 2003).

⁸³ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (stating that Lyft drivers are not classic independent contractors because they “lack any power to negotiate their rate of pay,” and noting that Lyft did not exercise nearly as much control over drivers as did FedEx in *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 991 (9th Cir. 2014) (holding FedEx drivers to be employees)).

⁸⁴ *Id.* at 1074 (quoting *Martinez v. Combs*, 231 P.3d 259, 271 (Cal. 2010)).

⁸⁵ *Id.* (discussing Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EEMPL. L.J. 75, 139 (1997)); see also *id.* at 1075 (citing *Truesdale v. Worker’s Comp. Appeals Bd.*, 235 Cal. Rptr. 754, 759 (Ct. App. 1987) (holding worker to be employee because he “had little or no bargaining position. . . . There were no negotiations, no options.”)).

dent upon a company. Such dependence, the DOL wrote, contrasts with arrangements in which the individual is “truly in business for him or herself.”⁸⁶ Judge Chhabria’s opinion also paralleled *Borello*’s admonition that courts should interpret the definition of employment broadly, taking into account “the class of persons intended to be protected, and the relative bargaining positions of the parties.”⁸⁷ Because the various factors pointed in different directions, Judge Chhabria held that the drivers’ employment status would need to be evaluated by the finder of fact and denied Lyft’s motion for summary judgment.

I.C. The Deep Challenges of Defining Employment

The Uber and Lyft orders illustrate several basic problems with the multi-factor tests for employment. First, individual factors are often over- or under-inclusive of admitted employment or contracting relationships, and therefore their importance in particular cases is hard to discern. Take the central question of control over the performance of work. While that may in fact define most employment relationships, many others are not defined by rigid task definition and control. The Restatement gives the examples of a cook or gardener hired in a manor; both are unquestionably employees, but both might bristle if their employer sought to exert much control over their work.⁸⁸ Such workers may enjoy substantial autonomy in their work lives, and yet be poorly compensated for their work. Uber drivers, similarly, can work whatever hours they like, and dress however they like, so long as they follow (roughly) the company’s basic guidelines and satisfy passengers. The mere notion of “control” does not clarify how much control must be exercised for workers to be employees, nor how the aspect of control interacts with other aspects of the parties’ relationship.

Questions of skill levels and opportunities for profit or loss are also ambiguous. On one hand, Uber and Lyft are deskilling the car-hire sector insofar as cabbies’ traditional intimate knowledge of city streets is less necessary once GPS directions are integrated into the Uber and Lyft apps. This is nowhere more apparent than in London, where cabbies’ licensure has long depended on their ability to memorize over three hundred standard routes in a test called, in good British fashion, “The Knowledge.”⁸⁹ Once anyone can become a driver for hire, there are no special skills attached to the job. And

⁸⁶ Dep’t of Labor Memorandum, *supra* note 18, at 5.

⁸⁷ *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 406 (Cal. 1989).

⁸⁸ RESTATEMENT (SECOND) OF AGENCY § 220 cmt. d (AM. LAW INST. 1958); *see also* Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1540 (7th Cir. 1987) (Easterbrook, J., concurring) (stating focus on “right to control” is over broad, as it would sweep in nearly all suppliers as employees of their clients).

⁸⁹ *See generally* TRANSPORT FOR LONDON, THE ‘KNOWLEDGE OF LONDON’ EXAMINATION SYSTEM (2014), <http://content.tfl.gov.uk/knowledge-examinations-system.pdf> [<https://perma.cc/ZA8K-HYWA>]; *Taxi Cabs of the United Kingdom*, WIKIPEDIA, https://en.wikipedia.org/wiki/Taxicabs_of_the_United_Kingdom#The_Knowledge [<https://perma.cc/NY85-X9RB>] (summarizing United Kingdom licensure requirements including “The Knowledge”).

yet Uber and Lyft drivers exert managerial skill of a sort insofar as they decide when to work, how long to work, what areas to work in, which routes to take regardless of GPS recommendations, and which referrals to accept from the company.⁹⁰ Moreover, plenty of admitted employees are highly skilled—think of an associate at a law firm—such that lack of skills, standing alone, cannot determine employment status.

The drivers' degree of investment is also of unclear import. The Lyft opinion stated that the purchase of an automobile is not a significant investment,⁹¹ but the Uber opinion stated that it is.⁹² The DOL's position is that the "relative" investment of company and worker is critical, since the size of a worker's investment helps determine whether they are in business for themselves.⁹³ But what does that mean in the context of Uber and Lyft? The companies have enormous investments in technology, licensing, and other intangible assets, which dwarf drivers' investment in cars.⁹⁴ Yet since drivers own or lease their cars, they can use them for other business and personal purposes. The permanence of the parties' relationship will also vary widely. Some will drive for Uber or Lyft for a long time, others a short time. But that is true of many employment relationships, such as seasonal employment, and many outside contractors work a long time for one client.

The Uber and Lyft cases also illustrate a second, deeper problem with the tests. As other scholars have noted, employment relationships can be problematic for two independent reasons: that employment involves a "democratic deficit" since workers are subject to an employer's direction rather than determining their own work tasks, and that employment builds on and reinforces economic inequality.⁹⁵ This has led to arguments that employment status should turn on higher-order facts such as "unequal bargaining power" (which may signal a democratic deficit and/or inequality) and/or "economic dependence" (which may signal significant economic inequalities even in the absence of classic control over the performance of work).⁹⁶ Judge Chhabria's opinion, as noted above, appealed to both notions. The problem is that since bargaining power and dependence are factual matters, judges need

⁹⁰ Cf. *Lauritzen*, 835 F.2d at 1540 (Easterbrook, J., concurring) (migrant share farmers exercise similar managerial skill).

⁹¹ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1080 (N.D. Cal. 2015).

⁹² *Uber II*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

⁹³ Dep't of Labor Memorandum, *supra* note 18, at 9.

⁹⁴ Since neither company is yet public, no firm data on their valuation of their intellectual property is yet available. But venture capital investors clearly think Uber's propriety technology and intellectual property is valuable. Its latest round of funding, completed in late 2015, valued the company at \$62.5 billion. Eric Newcomer, *Uber Raises Funding at \$62.5 Billion Valuation*, BLOOMBERG BUS. (Dec. 5, 2015, 2:54 PM), <http://www.bloomberg.com/news/articles/2015-12-03/uber-raises-funding-at-62-5-valuation> [<http://perma.cc/57L5-QQSR>].

⁹⁵ See Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 377–86 (2002) (noting "democratic deficit" in employment relationships); Zatz, *supra* note 20, at 282–84 (discussing Davidov's work distinguishing these two dimensions).

⁹⁶ See Zatz, *supra* note 20, at 282–83 (noting how commission-based sales or piecework methods can create apparent "entrepreneurial opportunities" while in fact rendering workers economically dependent on employers).

guidance regarding *how much* power differential or dependence is necessary for employment duties to attach.⁹⁷

For example, Judge Easterbrook has argued that “dependence” is “frequently a euphemism for monopsony,” such that it is especially telling in classic company towns or other places where workers are immobile and other work is unavailable, as in the case of migrant workers.⁹⁸ In such situations, workers are at the employer’s mercy and state protection is clearly warranted. But unlike the migrants in Judge Easterbrook’s case, there is no evidence whatsoever that Uber and Lyft drivers lack other employment opportunities. Moreover, the fact that workers might be dependent on a particular company once they have passed up other work opportunities does not distinguish them from independent contractors. “A lawyer engaged full-time on a complex case,” Judge Easterbrook noted, “may take a while to find new business if the case unexpectedly settles.”⁹⁹ Indeed, employers are often economically dependent upon workers, a point that helps explain labor law’s longstanding hostility toward strikes during the course of a collective bargaining agreement.¹⁰⁰

“Inequality of bargaining power” takes us further, but also fails to determine many hard cases, despite its longstanding import in labor and employment law.¹⁰¹ Notably, Judge Easterbrook eventually appealed to a similar notion, arguing that migrant workers’ lack of skills rendered them employees of the farm; he was not clear why, but his logic seems to have been that the Fair Labor Standards Act was enacted to protect workers with virtually no human capital.¹⁰² This is a regulation, in other words, that even a conservative enamored of neoclassical economics could embrace, if not love. Company towns and other forms of monopsony epitomize unfair inequalities of bargaining power, since in such situations one party can effectively dictate terms.

The problem is that unequal bargaining power is a pervasive fact of life in capitalist economies. As a result, simply showing that one party enjoys a substantial advantage in bargaining power does not reliably distinguish contractual situations where regulation is warranted from those where it is not. Consider the counterfactual: do employment laws ensure *equal* bargaining power? Clearly not. Doing so would require some combination of vastly

⁹⁷ See *id.* at 286.

⁹⁸ *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1542 (7th Cir. 1987) (Easterbrook, J., concurring)

⁹⁹ *Id.*

¹⁰⁰ See 29 U.S.C. § 158(d) (2012) (strikes to obtain mid-contract modification of terms are unprotected).

¹⁰¹ For example, the Supreme Court appealed to inequality of bargaining power in the seminal case of *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 33–34 (1937), upholding the constitutionality of the NLRA (stating that “union was essential to give laborers opportunity to deal on an equality with their employer”); *accord* *Holden v. Hardy*, 169 U.S. 366 (1898) (appealing to unequal bargaining power in upholding statute limiting hours of work in mines).

¹⁰² *Lauritzen*, 835 F.2d at 1545 (Easterbrook, J., concurring) (“The migrant workers are selling nothing but their labor. . . . But those to whom the FLSA applies must include workers who possess *only* dedication, honesty, and good health.”).

improved collective bargaining rights and substantial redistribution of productive capital—in short, a fundamental reworking of basic capitalist institutions.¹⁰³ Simply appealing to unequal bargaining power does not explain when and why power differentials are sufficiently great that employment law duties are warranted.

To summarize, Uber and Lyft drivers are neither clearly employees nor clearly independent contractors under existing tests, as typically understood. The various factors developed in case law to determine employment status point in different and confusing directions. The notions of “unequal bargaining power” and “economic dependence” give somewhat greater content to those tests, but do not explain when bargaining power is sufficiently unequal or dependence sufficiently grave to warrant employment duties.

II. THE AFFIRMATIVE CASE FOR PLATFORM EMPLOYMENT DUTIES

The way out of this box is to return to first principles—to ask why substantial inequalities of bargaining power and/or economic dependence are problematic in the first place. This Part delves deeper into that question. Part II.A. lays the groundwork, drawing on legal realists’ treatment of similar questions in the early twentieth century to argue that defining employment is ultimately a matter of contestable value judgments.¹⁰⁴ Part II.B. then argues that employment law duties should be levied where doing so will discourage domination of workers by companies or by market forces. Part II.C. argues that holding Uber to employment duties is almost surely justified on these grounds.

II.A. *Employment as a Legal and Social Concept*

If the existing tests for employment cannot do the work we expect, they are hardly alone in the law. To ask whether someone is dependent upon another to determine whether they are an “employee” is a bit like asking “where” a corporation is located to determine whether a state’s courts have jurisdiction over it. I refer, of course, to Felix Cohen’s classic article “Transcendental Nonsense and the Functional Approach.”¹⁰⁵ Cohen mocked this reasoning as circular. His targets included then-Judge Cardozo, who had re-

¹⁰³ See Noah D. Zatz, *The Minimum Wage as a Civil Right: An Alternative to Antipoverty Arguments?*, U. CHI. LEG. F. 1, 18–19 (2009) (discussing theories of John Roemer and G.A. Cohen). See generally Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

¹⁰⁴ As this article goes to press, I’ve become aware of a fascinating and as-yet-unpublished historical study of these questions that, like this article, argues that the concept of employment has long been normatively contested terrain. See Veena Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities* (Feb. 4, 2016) (unpublished manuscript) (on file with author).

¹⁰⁵ See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

cently written for a unanimous New York Court of Appeals that “[t]he essential thing” for jurisdiction “is that the corporation shall have come into the state,” without explaining what it meant to “come into the state” or why doing so was “essential.”¹⁰⁶ As a legal and incorporeal entity, Cohen pointed out, a corporation cannot travel and cannot cross borders as people or goods might. Its agents might travel, of course, but that is a different matter. The only meaningful grounds of decision in such a case, Cohen argued, were value judgments such as the potential hardships faced by plaintiffs if they could sue corporations only in their state of incorporation, and the potential hardships faced by corporations if they needed to defend lawsuits in many different jurisdictions.¹⁰⁷

Another example is equally telling. Cohen criticized the lawyers for a union in a United States Supreme Court case¹⁰⁸ who argued that their client was not amenable to suit because “a labor union, being an unincorporated association, is not a person and, therefore, cannot be subject to tort liability.”¹⁰⁹ The problem is that whether a union is a legal “person” and whether it can be sued are in fact the same legal question.¹¹⁰ The grounds for decision again must be considerations of policy, such as whether it is better for society to allow a labor union to be sued.¹¹¹ If so, then a union should be legally classified as a “corporate person.”¹¹²

Employment tests that direct courts to consider “control,” “dependence,” or “bargaining power” encourage this sort of reasoning. “Employment” is a category into which the law places certain work relationships, a legal category that carries with it particular duties on employers, and that grants particular correlative rights to employees. After all, parties to a work relationship can generally arrange that relationship in many different ways via contract. They might contract for an hour, for a day, for a summer, or indefinitely; payment might be by the hour, by the piece, by tips, or by salary; tasks might be rigidly defined in advance, or the worker might enjoy near-total discretion to carry out the work. Most of the time, those relationships are formed in the shadow of the law, and formal legal processes of courts, administrative agencies, and the like do not touch them. In that regard, employment law is regulatory rather than enabling. It comes to bear upon relationships that are formed through social and economic processes enabled and constrained in the first instance by other bodies of law such as contract, tort, and property.

¹⁰⁶ *Id.* at 811 (citing *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917)).

¹⁰⁷ *Id.* at 810.

¹⁰⁸ *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922).

¹⁰⁹ Cohen, *supra* note 105, at 813.

¹¹⁰ *See id.* (“[T]o call something a person in law, is merely to state, in metaphorical language, that it can be sued.”).

¹¹¹ In fact, the Court did reason in this way, despite Cohen’s assertion that they followed the union counsel’s line of reasoning. *See United Mine Workers*, 259 U.S. at 387–91 (noting harms to plaintiffs if not allowed to proceed against union as corporate body).

¹¹² *See* Cohen, *supra* note 105, at 814 (“To criticize legal rules in purely legal terms is always to argue in a vicious circle.”).

“Employment” is also, however, a social and economic concept that applies to particular work relationships. Companies and their workers may commonsensically understand their relationship as one of “employment” without thinking about the particular legal entitlements and liabilities created by the legal category of employment. Workers may return to the worksite each day based on a promise that they will be paid at the end of the week, for example, and companies will implicitly or explicitly offer regular work for an indefinite period for those workers who do so. “Employment” is much like other legal concepts in this regard. The terms “property” and “contract” refer simultaneously to the legal relationships defined by property law and contract law and to the physical objects or economic relationships that are the subjects of property and contract law.¹¹³

Legal realists like Cohen pointed out the confusion that can result when courts must limn the relationship between legal concepts and their social and economic cognates. Such cases often lead to “errors of transposition,”¹¹⁴ meaning the “*unreflective* ascription of qualities of the physical, the mental, or the social object to the legal concept itself”¹¹⁵ We can see this at work in employment cases when courts describe as a legal employee “someone who works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving most or all his income from that one employer.”¹¹⁶ That is indeed our standard social and economic conception of employment. But the *Borello* test for employment is broader, and the FLSA’s legal definition of employment is significantly broader.¹¹⁷ The various multi-factor tests for employment, unfortunately, encourage just this sort of reasoning by calling courts’ attention to the traditional indicia of the social and economic concept of employment.

Errors of transposition are further encouraged by some statutes’ and courts’ treatment of employment as a question of fact,¹¹⁸ or as a mixed question of law and fact.¹¹⁹ The problem with either approach is that normative judgments are baked into the statutes and jurisprudence: remedial statutes in California, recall, “must be liberally construed” “with particular reference

¹¹³ See, e.g., Pierre Schlag, *How to Do Things with Hohfeld*, 78 L. & CONTEMP. PROBS. 185, 192–98 (2014) (discussing these relationships, drawing on Cohen, *supra* note 105, and Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16 (1913)).

¹¹⁴ *Id.* at 192–98.

¹¹⁵ *Id.* at 193–94 (emphasis in original). An earlier generation may have called this process the “reification” of legal concepts. See *id.* at 194 n.27.

¹¹⁶ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015).

¹¹⁷ See *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 403–07 (Cal. 1989).

¹¹⁸ See *id.* at 349; RESTATEMENT (SECOND) OF AGENCY § 220 cmt. c (AM. LAW INST. 1958) (master/servant relationship a question of fact). *But see* *Antenor v. D&S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) (employment under FLSA a question of law for purposes of appellate review) (citing *Aimable v. Long & Scott Farms, Inc.*, 20 F.3d 434, 440 (11th Cir. 1994)); *Patel v. Wargo*, 803 F.2d 632, 634 n.1 (11th Cir. 1986) (summarizing case law in other circuits, describing “weight of authority” as holding that employment under FLSA is question of law for appellate review).

¹¹⁹ See *Uber II*, 82 F. Supp. 3d 1133, 1145–48 (N.D. Cal. 2015).

to the ‘history and fundamental purposes’ of the statute.”¹²⁰ But if that is true, how could employment be a question of fact? Not in the sense that various aspects of the parties’ relationship—control, duration, skills, centrality to the business, etc.—determine, without more, whether they have established an employment relationship. In common understanding, facts are facts independent of considerations of value. Values might shape how one interprets the import of facts, but the facts simply are what they are. Courts that simultaneously describe a matter as a question of fact and articulate the policy goals they or a jury must consider in determining the existence of such facts either have a postmodern epistemology or are struggling to address a matter for which they lack the proper tools.¹²¹

The way out of this box is to bring policy considerations out into the open, as contemporary common law courts do. The concept of duty in tort law provides a helpful analogy, both in the sense that it is a threshold question that determines the existence of particular legal responsibilities, and in the sense that modern jurisprudence treats duty as a placeholder for substantive judgments. As the California Supreme Court put it in a leading case, “legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.”¹²² Duty is a matter of basic fairness and other policy considerations as well as *stare decisis* and other traditional doctrinal matters.¹²³ Courts could approach employment similarly, as a value-laden question, and still remain within traditional understandings of the common law judicial

¹²⁰ *Borello*, 769 P.2d at 403, 405; see also *Antenor*, 88 F.3d at 933 (courts must interpret FLSA and AWPB broadly to effectuate statutes’ “humanitarian and remedial” purposes); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (“Courts have adopted an expansive interpretation of the definitions of ‘employer’ and ‘employee’ under the FLSA, in order to effectuate the broad remedial purposes of the Act.”).

¹²¹ This may be the explanation behind the empty promise that an employment relationship is created when the putative employer exerts “all *necessary* control.” See *Uber II*, 82 F. Supp. 3d at 1138. “Necessary” can only logically mean “necessary to establish an employment relationship.” But to avoid circularity, that reasoning requires either appeal to the social concept of employment as a referent, or a policy-driven judgment that a particular degree of control should lead to a finding of employment. The notion that employment is a function of “dependence” suffers the same weakness. Since dependence is common in many contractual relationships, we need a theory telling us how much dependence is enough, at which point we might as well call it “all *necessary* dependence.”

¹²² *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976); see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 54, at 358 (W. Page Keeton ed., 5th ed. 1984) (stating duty “is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection”).

¹²³ For example, the factors used in California duty cases include both matters of fact and matters of policy. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (discussing following factors used to determine existence of common law tort duty: “the foreseeability of harm to the plaintiff, . . . the connection between the defendant’s [act and the plaintiff’s harm], the moral blame attached to the defendant’s conduct, the policy of preventing future harm, . . . the burden on the defendant and the consequences to the community of imposing a duty, . . . and the availability, cost, and prevalence of insurance”) (emphasis added); see also Ford, *supra* note 21, at 1390 (“[D]iscrimination” is an “umbrella concept under which we struggle over distinct, and sometimes conflicting, policy goals.”).

role. Or as one court refreshingly put it in an FLSA case, companies are “fully accountable” for wage and hour violations “whenever the facts suggest that *liability is fairly imposed*.”¹²⁴

II.B. *The Anti-Domination Principle*

Neo-republican political thought and recent scholarship in law and equality suggest a new approach: employment duties are fair when “economic dependence” and “unequal bargaining power” are sufficiently great that workers are at risk of *domination*. I use the term as it has been developed by neo-republicans, to capture a distinctive conception of freedom deeply rooted in the Western tradition and in United States politics, under which citizens are free insofar as they are not subject to another’s arbitrary power.¹²⁵ As a matter of principle—call it the “anti-domination principle”—a good and just democratic society must protect all its members against domination.

As K. Sabeel Rahman makes clear in a forthcoming book, contemporary market processes can lead to domination in two distinct ways. The first is what Rahman terms “dyadic domination,” where one party in a relationship has such disproportionate power that the other is subject to its arbitrary whims and demands.¹²⁶ Slavery is the paradigm case of dyadic domination: even if one’s master does not constantly interfere with an enslaved person’s actions, his power to do so renders the slave unfree.¹²⁷ But many other employment relationships can lead to less acute forms of domination that are also morally troubling.¹²⁸ The other is “structural domination,” which arises “when social processes put large groups of persons under systemic threat of domination or deprivation of the means to develop and exercise their capacities,” even when all individuals act “within the limits of accepted rules and norms.”¹²⁹ Workers with few skills suffer structural domination when they

¹²⁴ *Maldonado v. Lucca*, 629 F. Supp. 483, 489 (D.N.J. 1986) (emphasis added).

¹²⁵ PETTIT, *supra* note 26, at 9. While non-domination is central to neo-republican political theory, *see generally id.*, similar values are also central to some strands of Rawlsian liberalism. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 440 (Harvard Univ. Press rev. ed. 1971) (emphasizing that the “social bases of self respect” are the most important of the primary social goods); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 326 (1999) (defending conception of “democratic equality” that is concerned with whether income inequalities can be converted into “status inequality—differences in the social bases of self-respect, influence over elections, and the like”); Samuel E. Scheffler, *What Is Egalitarianism?*, 31 *PHIL. & PUB. AFF.* 5, 31 (2003) (outlining conception of equality similar to Anderson’s). Similar values are also central to left communitarianism. *See* MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 277 (1983) (democratic citizenship is “a status radically disconnected from every kind of hierarchy”).

¹²⁶ RAHMAN, *supra* note 25.

¹²⁷ Cecile Laborde, *Republicanism*, in *OXFORD HANDBOOK OF POLITICAL IDEOLOGIES* 513, 519 (Michael Freeden & Marc Stears eds., 2013).

¹²⁸ *See generally* Gourevitch, *supra* note 25, at 592 (summarizing history of nineteenth century labor republicanism that advocated “various kinds of democratic control over work”).

¹²⁹ IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* 54 (2011) (cited in RAHMAN, *supra* note 25). *See generally* Gourevitch, *supra* note 25 (criticizing mainline neo-republican theory

have no reasonable choice but to accept poor or degrading working conditions. The anti-domination principle therefore captures what is so problematic about work relationships characterized by economic dependence or grossly unequal bargaining power: they strip workers of important aspects of their freedom, or even turn them into second-class citizens.

This argument builds on recent efforts by other scholars to elucidate the distinctive role of labor and employment laws in a democratic society. For example, Samuel Bagenstos has recently argued that employment laws tend to encourage “a society in which people regard and treat one another as equals . . . a society that is not marked by social divisions such that one can place different people into hierarchically ranked categories.”¹³⁰ Bagenstos argues that this value of “social equality” helps explain employment law’s protections of individual privacy and employee speech,¹³¹ and I have argued in prior work that it helps explain minimum wage laws.¹³² Similarly, Joseph Fishkin and William Forbath have sought in recent work to resurrect what they call the “anti-oligarchy principle,” the notion, deeply rooted in our pre-New Deal constitutional tradition, that the Constitution’s commitment to a republican form of government prohibits excessive economic inequalities.¹³³ In practice, they argue, the anti-oligarchy principle requires positive legislative acts to disperse power within our political economy, including robust antitrust laws, laws enabling collective bargaining, and other power-sensitive employment regulations.¹³⁴

The anti-domination principle incorporates but also cuts across familiar considerations of liberty and equality. For example, it requires basic civil rights (rights to enter into contracts), robust civil liberties, and distributive justice—but it also requires more, namely rules and practices that reflect individuals’ “intrinsic worth,” or their dignity.¹³⁵ Indeed, the anti-domination principle helps explain why distributive justice and individual civil liberties are important in the first place: because gross maldistributions of wealth and power lead inexorably to social distinctions and hierarchies.¹³⁶ That principle also requires broadly dispersed *power* within a society and economy. In practice, that often means granting legal entitlements to particular groups—

for failing to account for structural domination, arguing that neo-republican concept of domination is broad enough to incorporate structural concerns).

¹³⁰ Bagenstos, *supra* note 25, at 227 (citing David Miller, *Equality and Justice*, 10 *RATIO* 222, 224 (1997)).

¹³¹ See generally Bagenstos, *supra* note 25.

¹³² See generally Rogers, *supra* note 30; Zatz, *supra* note 103 (liberal egalitarian approach to justice may justify minimum wage laws); Bogg & Estlund, *supra* note 24 (neo-republican theory may justify legal entitlement to contest managerial decisions).

¹³³ See Fishkin & Forbath, *supra* note 25, at 673 (2014).

¹³⁴ See *id.* at 684–85 (regarding antitrust and rights to organize and strike); Joseph Fishkin & William E. Forbath, *The Constitution of Opportunity* 5 (2016) (unpublished manuscript) (on file with author) (further elaborating the anti-oligarchy principle).

¹³⁵ See Nick Bromell, *Beyond Freedom and Equality: The Democratic Value of Dignity*, *BOS. REV.* (Feb. 8, 2016), <https://bostonreview.net/books-ideas/nick-brommel-dignity-obergefell> [<https://perma.cc/XS9X-7B8U>].

¹³⁶ See generally Anderson, *supra* note 125.

of workers, of “ordinary” citizens—while withdrawing entitlements from economic elites and corporate interests.

This analysis suggests two powerful alternatives to the efficiency arguments that practically dominate academic employment law theory.¹³⁷ As one example of that dominance, legal scholars have often endorsed the neoclassical analysis of minimum wage laws, which holds that those laws will depress demand for labor, leading to higher unemployment among unskilled workers.¹³⁸ Better, in this view, to address distributive inequities arising from the labor market through programs such as the Earned Income Tax Credit.¹³⁹

The anti-domination principle suggests, in contrast, that far more is at stake in employment regulation than ensuring efficient markets. First, employment law duties can ensure that workers enjoy a basic sense of dignity or interpersonal equality, goods thwarted by dyadic domination. The moral economy of labor and citizenship tends toward strong distinctions between persons based on their wages and their rights in the labor market—such that those with fewer rights become less human, and those with greater market power feel privileged to dominate them with impunity.¹⁴⁰ As a leading class theorist argued, this leads the working poor to become “imbued with a sense of their [own] cultural unworthiness.”¹⁴¹ Public debates around employment practices routinely condemn such distinctions. For example, the overwhelming public support for a higher minimum wage, which persists across time and cuts across racial and political lines,¹⁴² likely reflects such concerns.¹⁴³ Similarly, SEIU’s “Justice for Janitors” campaign frequently called janitors’ treatment a matter of “dignity” and “justice,” not just income, in part by publicly shaming large and profitable firms who used subcontracted and poorly-paid janitors.¹⁴⁴ As of this writing, a Florida-based worker organiza-

¹³⁷ Bagenstos, *supra* note 25, at 229 (arguing that employment law theory “[f]airly drips with economic efficiency analysis”).

¹³⁸ See, e.g., Rogers, *supra* note 30, at 1557–59 (summarizing liberal theorists’ criticism of minimum wage laws and unions); Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 406 (1997) (summarizing economic consensus that minimum wage will tend to contract low-wage labor market). *But see* Rogers, *supra* note 30, at 1586–87 (summarizing recent data indicating that minimum wage increases tend not to contract the low-wage labor market). See generally George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358 (1946) (examining the economic effects of minimum wage legislation and reviewing alternative policies).

¹³⁹ See generally Shaviro, *supra* note 138.

¹⁴⁰ See Rogers, *supra* note 30, at 1569–71.

¹⁴¹ See PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 251 (Richard Nice trans., 1984).

¹⁴² See JEROLD WALTMAN, *THE POLITICS OF THE MINIMUM WAGE* 50 tbls. 2 & 3 (2000) (summarizing public opinion data from 1945–1996); *id.* at 48 (“[The public] usually favor[s] setting the wage level higher than whatever Congress is considering at the moment.”).

¹⁴³ See Oren M. Levin-Waldman, *The Rhetorical Evolution of the Minimum Wage*, 3 RHETORIC AND PUB. AFF. 131, 132 (2000) (“[P]eople who work are entitled to an income that enables them to live in dignity and out of poverty because it is a matter of fairness.”).

¹⁴⁴ See generally Roger Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in *ORGANIZING TO WIN* 102–19 (Bronfenbrenner et al. eds., 1998) (overview of Justice for Janitors campaign, noting import of appeals to dignity and fairness). See also *Workers Across California Join Coast-to-Coast Marches Commemorating 25th Anniversary of “Justice for Janitors” Strike*, SEIU UNITED SERV. WORKS WEST, <http://>

tion has called for a consumer boycott against the Wendy's chain, which it says "stands alone" among the five largest fast food corporations as "the only one who has refused to . . . respect the rights and dignity of farmworkers in its supply chains."¹⁴⁵ Both efforts reflect the anti-domination principle in their arguments that large firms have responsibilities to treat their supply chain workers as equals.

Second, employment regulations also help establish and maintain an egalitarian political economy, thereby mitigating structural domination. As David Singh Grewal has argued, no society can ensure distributive justice entirely through transfers layered atop a free market, for it "may be naïve to assume that after letting the inequality-producing market run its course there will be any agent left . . . capable of demanding redistribution."¹⁴⁶ Economic power leads to political power; unequal economic power leads to unequal political power; and unequal political power makes it exceedingly difficult to ensure equity through tax-and-transfer programs. Law reforms to alter the background rules of employment are therefore essential so that workers enjoy a modicum of power vis-à-vis their employers, and so that employers and consumers must internalize some of the costs of utilizing low-wage work.¹⁴⁷ The low-wage worker campaigns cited in the preceding paragraph also built on this notion. Or to quote the Supreme Court of Canada in a 2015 decision, during a strike, "workers come together to participate directly in the process of determining their wages, working conditions," and other work rules, and "[t]his collective action at the moment of impasse is an affirmation of the *dignity and autonomy of employees in their working lives*."¹⁴⁸ Protecting the right to strike therefore both ensures that workers are treated fairly by their employers and encourages a more democratic political economy.

Threats of dyadic and structural domination, I would argue, help explain the results in many past employment status cases. For example, should families of cucumber pickers have FLSA rights vis-à-vis the farms that contracted with them, despite those pickers' near-total discretion over their own hours and work practices?¹⁴⁹ Should garment workers have FLSA rights vis-à-vis the apparel companies who contracted with their immediate sweatshop

www.seiu-usww.org/2015/06/19/workers-across-california-join-coast-to-coast-marches-com-memorating-25th-anniversary-of-justice-for-janitors-strike/ [<https://perma.cc/FR4E-9QL6>] (quoting janitor stating, "[t]oday we renew our commitment for justice, dignity, and equality").

¹⁴⁵ ALLIANCE FOR FAIR FOOD, <http://www.allianceforfairfood.org/take-action/#> [<https://perma.cc/7U3Y-5QBQ>].

¹⁴⁶ David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 665 (2014) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014)).

¹⁴⁷ See generally Rogers, *supra* note 30.

¹⁴⁸ See Saskatchewan Fed'n of Labour v. Saskatchewan, [2015] 1 S.C.R. 245, 249 (Can.) (emphasis added).

¹⁴⁹ See generally *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (upholding FLSA claim); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (upholding state wage and hour claim).

owner, despite the apparel company not exerting day-to-day control?¹⁵⁰ Should subcontracted janitors for a major retailer have claims for unpaid wages against that retailer, where the retailer simply contracted with the contractor for services?¹⁵¹ Should fast food workers for a franchisee have National Labor Relations Act rights vis-à-vis fast food brands?¹⁵² Such cases, as noted above, have tended to revolve around questions of control, economic dependency, or unequal bargaining power.¹⁵³

But in each situation, the putative employer enjoys arbitrary power over the workers, and the workers are so unskilled that we can safely presume they have few better options in the labor market. Farmers have duties toward pickers, garment brands toward garment workers, and retailers toward janitors because those companies can set wages by dictating prices and/or subjecting labor contracts to competitive bidding. Fast food brands have duties toward franchisees' workers because they enjoy substantial power to set work rules, which signals control, and to set prices for food and therefore wages, which signals market power. In each situation, workers are subject to dyadic domination by the putative employer and to structural domination by the market. Concerns of domination do not provide any bright line rule for when a relationship crosses the line into employment, but they do capture what is morally and structurally problematic about such work relationships.

What is then left of efficiency? Actually, quite a bit: it is a very important social good, albeit one that should be given less importance than preventing domination.¹⁵⁴ It is not important for present purposes whether the goals of ensuring workers' dignity and broadly distributed economic and political power receive absolute or relative priority over welfare and efficiency, so long as they do take precedence. As the "Varieties of Capitalism" literature shows, it is entirely possible for states to pursue efficiency and equality at the same time by building the right sorts of capitalist institu-

¹⁵⁰ See generally *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003) (upholding FLSA claim).

¹⁵¹ See generally *Vasquez v. USM Inc.*, No. 3:13-CV-05449-JD, 2016 WL 612906, at *1 (N.D. Cal. Feb. 16, 2016) (claim arising under Cal. Labor Code § 2810); Bob Egelko, *Janitors at Ross to Share \$1 Million Settlement*, SFGATE (May 27, 2015), <http://www.sfgate.com/business/article/Janitors-at-Ross-to-share-1-million-settlement-6290080.php> [<https://perma.cc/SS6P-KLLS>] (detailing settlement in *Vasquez* case). But see *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012) (upholding dismissal of FLSA, RICO and false imprisonment claims by subcontracted janitors).

¹⁵² See *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. No. 186 (2015) (a case that changed NLR's standard for joint employment and is widely expected to ease the way for fast food workers to bargain with fast food brands); Noam Scheiber & Stephanie Strom, *Labor Board Ruling Eases Way for Fast-Food Unions' Efforts*, N.Y. TIMES (Aug. 27, 2015), <http://www.nytimes.com/2015/08/28/business/labor-board-says-franchise-workers-can-bargain-with-parent-company.html> [<https://perma.cc/ZD7D-37EU>].

¹⁵³ See *supra* Part I.A.

¹⁵⁴ See RAWLS, *supra* note 125, at 37–39 (state should grant "lexical" priority to basic individual liberties, then ensure distributive justice, and then consider issues of aggregate welfare or efficiency).

tions.¹⁵⁵ Employment laws are one such institution, and should be interpreted in light of such commitments.

II.C. The Normative Case for Holding Uber to Employment Duties

The anti-domination principle strongly suggests that Uber should owe employment duties to its drivers, at least under wage and hour laws and laws requiring reimbursement of employment expenses.¹⁵⁶

The likelihood of dyadic domination is clear. For one thing, the company seems to enjoy the power to terminate drivers' contracts essentially at will,¹⁵⁷ which quite literally renders drivers subject to the company's whims. Drivers, if not guaranteed basic employment protections vis-à-vis the company, risk becoming an underclass of sorts. Indeed, Uber executives' behavior toward their drivers suggests they already view drivers that way. The company has cut driver fares and increased the percentage it takes from fares without notice, in an apparent effort to drive out the competition.¹⁵⁸ Such actions are especially punishing to drivers who have foregone other employment or leased cars in order to drive for Uber, and led one D.C. driver to remark that "the drivers are getting screwed over, and . . . don't really feel valued."¹⁵⁹ Discovery in the Uber lawsuit has also turned up evidence that Uber managers at times sought drivers to terminate simply because "business was 'slower than normal and we have too many drivers . . . [so] we have to look for accounts to deactivate.'"¹⁶⁰ The company claimed that its average driver in New York earned over \$90,000 a year, but a Slate writer found that claim so hard to verify that she called her article "In Search of Uber's Unicorn,"¹⁶¹ the implication being that the company intentionally

¹⁵⁵ Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001) (noting high aggregate performance but more equal distributions of wealth and income in coordinated market economies such as Germany and France compared to liberal market economies such as United States and United Kingdom).

¹⁵⁶ Notably, various wage and hour laws actually exempt taxi services from their overtime provisions. See, e.g., Sachin Pandya, *Are Ride-Sharing Companies Exempt from FLSA Overtime Because They Operate a Taxicab Business?*, WORKPLACE PROF. BLOG (July 1, 2015), http://lawprofessors.typepad.com/laborprof_blog/2015/07/are-ride-sharing-companies-exempt-from-flsa-overtime-because-they-operate-a-taxicab-business.html [https://perma.cc/YDD3-M3RK] (citing 29 U.S.C. § 213(b)(17) (2012) (FLSA exemption) and various state wage and hour law exemptions, including California). Because the companies insist they are not providing a taxicab service, I will place such concerns to the side for now, and just note that they further demonstrate how our regulatory apparatus is out of step with current practice.

¹⁵⁷ *Uber II*, 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015).

¹⁵⁸ See Alison Griswold, *Uber Just Caved on a Big Policy Change After Its Drivers Threatened to Strike*, SLATE (Sept. 12, 2014), http://www.slate.com/blogs/moneybox/2014/09/12/uber_drivers_strike_they_protested_cheap_uberx_fares_uber_backed_down.html [https://perma.cc/X589-EXCQ]; Jack Smith IV, *Uber Drivers Are Scrambling to Make Ends Meet After Latest Fare Cuts*, N.Y. OBSERVER (Feb. 9, 2015), <http://observer.com/2015/02/uber-drivers-are-scrambling-to-make-ends-meet-after-latest-fare-cuts/> [https://perma.cc/64W5-78TT].

¹⁵⁹ Smith, *supra* note 158.

¹⁶⁰ *Uber II*, 82 F. Supp. 3d at 1143.

¹⁶¹ Griswold, *supra* note 158.

misled drivers about their prospects. And Uber executives' apparent disdain for the media and their critics, manifest in apparent plans to surveil journalists who criticized them,¹⁶² led one Silicon Valley venture capitalist to deem the company "ethically challenged."¹⁶³

This is simply revolting. As I wrote elsewhere, "The company's name clearly evinces Nietzsche's vision of a new morality and a new class dedicated to human excellence. But in Uber executives' hands, that ideal has become little more than a defense of privilege."¹⁶⁴ These are moral flaws that point toward the need for rules protecting workers' dignity. They are also the natural result of enabling large institutions to exert unchecked power over others' lives.

Uber should also be held to employment duties to ensure broadly dispersed power within the society, mitigating both dyadic and structural domination. The company has grown very large, very fast, and wants to become something even bigger: a general urban transportation and logistics firm. That would place it among a handful of Silicon Valley giants who are achieving natural monopoly status—for example, Google dominates search, allowing it to monitor almost all online behavior, and Amazon is coming to dominate retail.¹⁶⁵ Those companies' growth, and their ability to gather real-time data on broad swaths of human behavior on a scale never before seen in our history,¹⁶⁶ threaten the principle that power should be broadly dispersed within our society. Assuming that Uber's growth continues, basic employment rights will be a key bulwark against its economic and political dominance.

Holding Uber drivers to be employees will also mitigate drivers' structural position of weakness in the labor market. Since drivers have few skills that are not present in the general adult population, they are particularly likely to be on the losing end of many labor market processes. Holding Uber to employment duties would therefore set an important standard for the platform economy more generally. While platform companies are a relatively small part of our economy today,¹⁶⁷ they are growing, and may take over other low-wage labor markets going forward. Imagine a platform economy

¹⁶² Ben Smith, *Uber Executive Suggests Digging Up Dirt on Journalists*, BUZZFEED (Nov. 17, 2014), <http://www.buzzfeed.com/bensmith/uber-executive-suggests-digging-up-dirt-on-journalists> [https://perma.cc/AE52-7EKD].

¹⁶³ Hailey Lee, *Uber Is 'Ethically Challenged': Peter Thiel*, CNBC (Sept. 17, 2014), <http://www.cnbc.com/id/102008782> [https://perma.cc/8LLB-MCEE].

¹⁶⁴ Rogers, *supra* note 60, at 102.

¹⁶⁵ See generally K. Sabeel Rahman, *Curbing the New Corporate Power*, BOS. REV. (May 4, 2015), <http://bostonreview.net/forum/k-sabeel-rahman-curbing-new-corporate-power> [https://perma.cc/NB5N-FJB3] (noting monopoly concerns around Google, Amazon, and Uber).

¹⁶⁶ See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015); see also PAUL MASON, *POSTCAPITALISM* 268, 277–78, 286–89 (2016) (discussing growth and power of "internet of things" dominated by Silicon Valley monopolies).

¹⁶⁷ See, e.g., Lawrence Mishel, *Uber Is Not the Future of Work*, ATLANTIC (Nov. 16, 2015), <http://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905/> [https://perma.cc/RU2N-HUJU].

company for general low-skill labor services, which provides temporary workers to restaurants, retailers, landscaping companies, factories, or really any other business that needs low-skilled workers. “Temporary,” here, can become all but permanent, inserting a contractual intermediary between companies and their workers and eroding employment protections in the process. I frankly worry that such a strategy could soon overhaul low-wage labor markets, and a precedent that Uber drivers are *not* employees would encourage steps in that direction. We need to instead encourage broadly dispersed wealth and power, so that we do not lock in an unjust political economy.

II.C.i. *Counterarguments*

There are of course counterarguments, the most important of which are rooted in concerns of aggregate welfare.¹⁶⁸ If Uber and Lyft must raise prices to cover employment expenses, consumers will face higher prices, and drivers may find less demand for their services.¹⁶⁹ One journalist calculated that it would cost Uber over \$4 billion per year to treat all its drivers as employees, \$2.6 billion of which would come from work-related reimbursements.¹⁷⁰ Assuming the company could survive that change, many such costs will be passed on to consumers. Putting aside the fact that inability to pay is no defense against basic employment duties, such higher rates strike me as a price worth bearing. While reliable data is scarce, the companies’ rider base appears relatively well off, at least in the United States.¹⁷¹ One must have a smartphone to use the services, and the services focus on relatively upscale areas.¹⁷² It therefore feels fair for urban and suburban consumers to pay higher prices for on-demand rides, where necessary to ensure equity.

¹⁶⁸ I place to the side arguments against employment status based on anti-paternalism, such as the notion that drivers prefer to be independent contractors rather than employees. *See, e.g.,* Harris & Krueger, *supra* note 9, at 1 (finding that “drivers who partner with Uber appear to be attracted to the platform in large part because of the flexibility it offers”); Dubal, *supra* note 104 (finding, through ethnographic study, that “[m]any workers . . . particularly immigrant men carved out of wage labor, embraced their precarious independent contractor status”). I do not find anti-paternalist arguments convincing in this context because legal rights so often shape social norms, *see id.*, making it circular to rely on norms as the basis for laws.

¹⁶⁹ At least one platform company, Homejoy, cited the risk of employment liability when it closed in July of 2015. *See* Carmel DeAmicis, *Homejoy Shuts Down After Battling Worker Classification Lawsuits*, RE/CODE (July 17, 2015), <http://recode.net/2015/07/17/cleaning-services-startup-homejoy-shuts-down-after-battling-worker-classification-lawsuits/> [<https://perma.cc/VHS3-U4BA>]. Readers might take assertions with a grain of salt given the political and economic stakes in this question.

¹⁷⁰ Gandel, *supra* note 7.

¹⁷¹ *See, e.g.,* Felim McGrath, *The Demographics of Uber US Users*, GLOBAL WEB INDEX (July 29, 2015), <http://www.globalwebindex.net/blog/the-demographics-of-ubers-us-users> [<https://perma.cc/U3SB-N3GD>] (finding that over a quarter of users come from the top income quartile).

¹⁷² *But see* Emily Badger, *Five Myths About Uber*, WASH. POST (Dec. 11, 2014), https://www.washingtonpost.com/opinions/five-myths-about-uber/2014/12/11/ef77b7fc-7fc9-11e4-9f38-95a187e4c1f7_story.html [<https://perma.cc/BJU9-NYMN>] (noting evidence that Uber serves poor and predominantly minority neighborhoods better than traditional cabs).

A harder issue is that levying excessive expenses on the companies may limit their growth at precisely the moment when they're trying to prove that their business model relies on a more efficient market. As argued above, the companies' core innovations lie in exploiting network effects among their riders and drivers. The more users and drivers who sign up, the more likely it is that any driver will be able to find a fare at any given time. But that customer network may need more time to mature. If the companies' growth is stunted unnecessarily, they may not gain the critical mass needed to fully exploit those network effects and build an optimally efficient market.¹⁷³ The companies' driver network might also need time to mature, and limiting market entry could make it harder for the companies to experiment with driver deployment patterns and driver incentives so as to determine the optimal supply and distribution of cars.¹⁷⁴

In addition to such positive potential welfare effects,¹⁷⁵ Uber's consolidation of the sector creates opportunities for low-cost regulation in the public interest. States and cities can partner with Uber to encourage environmentally friendly vehicles, consumer safety, and other important public goods. Uber could, given political will, root out discrimination against passengers of color. All of the above are far more difficult to do in fractured taxi sectors, since regulators need to work with many far-flung parties in complicated contractual relationships in order to ensure compliance. Uber, in contrast, can change labor standards and consumer safety standards by fiat, given their direct contractual relationship with drivers.¹⁷⁶ It would be a major loss if the companies were regulated out of existence before such goods are achievable.

Nevertheless, it is important not to confuse Uber the company with the technology that Uber has developed. Even if it turns out that Uber the company cannot sustain its pricing structure while ensuring that its drivers earn minimum wage and receive work-related reimbursements, a subsequent company could utilize the same technology, charge higher prices, and ensure decent wages for workers. It may simply be that ride-sharing at the very low costs that Uber has so far relied upon is flatly inconsistent with the anti-oligarchy and social equality principles. In these regards, Uber is analogous to the steel, auto, and other industrial megaliths of the twentieth century, and the retail megaliths of the twenty-first century. All revolutionized those markets, and all enabled enormous increases in consumer welfare. But robber barons were the disrupters of their age. As pervasive economic and social inequalities begin to infect our politics today, part of the solution lies in

¹⁷³ See Strahilevitz, *supra* note 62, at 1472.

¹⁷⁴ Cf. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977) (finding precedent for courts maintaining a hands-off approach to nascent industries, which explains why nineteenth century courts adopted negligence rather than strict liability as the basic regime for industrial accidents).

¹⁷⁵ Rogers, *supra* note 60, at 90–91 (discussing consumer welfare benefits from ride-sharing services).

¹⁷⁶ *Id.* at 95–101.

holding Uber to the same duties we imposed on industrial firms in an earlier era.

The lurking question of driverless cars does not, in my view, change this analysis. Yes, employment duties may create additional incentives for Uber to move in that direction. But it is unclear whether, when, or where they will do so, and also unclear whether doing so would eliminate all drivers or only some. Even assuming that transition is inevitable, it would be strongly preferable for it to be negotiated between Uber and an empowered workforce rather than imposed by Uber unilaterally. In the former scenario, drivers could make their case for retaining an appropriate share of work, or at least bargain for appropriate severance packages from the company, or for broader social supports from the state. The move to driverless cars would be a major social and economic transformation, and should be carried out pursuant to democratic processes and values. Again, employment protections are essential to realizing that goal.

Nor do some challenges of measuring work hours for platform economy companies alter this analysis. Harris and Krueger, for example, have argued that it is difficult or even impossible to measure work hours for Uber drivers, for two reasons: such drivers might perform personal tasks while they have the app turned on and are waiting for fares, and they might accept rides from multiple apps at the same time.¹⁷⁷ As a result, they argue, “it makes little sense to require [platform economy firms] to provide hours-based benefits, such as overtime and the minimum wage.”¹⁷⁸ I frankly find this argument difficult to follow. If the problem is that drivers now engage in personal business while on work hours, Uber could prohibit them doing so, using their ability to track drivers’ location.¹⁷⁹ If the problem is that drivers use multiple platforms, Uber could require drivers to use its platform exclusively, or platforms could jointly develop with some actuarial method to estimate workers’ hours for different platforms. The analysis is even simpler for some other platform economy companies; Handy, for example, dispatches workers to cleaning and other jobs, and workers have alleged that it pays by the job rather than by the hour, leading them to earn below minimum wage.¹⁸⁰ Rather than immunizing such companies from minimum wage laws, the appropriate response, in my view, is to require companies to ensure

¹⁷⁷ Harris & Krueger, *supra* note 9, at 13. As this article went to press, a new report from the Economic Policy Institute sharply disputed Harris & Krueger’s assertion that Uber could not monitor its drivers’ hours. Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New ‘Independent Worker’ Category*, ECON. POL’Y INST. (Mar. 17, 2016), <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/> [<https://perma.cc/T9H4-86SK>].

¹⁷⁸ Harris & Krueger, *supra* note 9, at 13.

¹⁷⁹ See Tom Warren, *Uber Is Tracking Its Drivers to See if They’re Speeding or Braking Too Hard*, VERGE (Jan. 26, 2016), <http://www.theverge.com/2016/1/26/10832314/uber-driver-tracking-gps> [<https://perma.cc/Z6LM-476D>] (noting that Uber has already implemented a pilot program in Houston to monitor for safe driving via drivers’ smart phones, which can sense sharp turns, speeding, and the like).

¹⁸⁰ See Kessler, *supra* note 3.

minimum wages, and then require them to alter business practices as necessary to achieve that goal.

III. WHO SHOULD IMPOSE EMPLOYMENT DUTIES?

If I am correct that the anti-domination principle strongly points in the direction of holding Uber to employment duties, the question remains how to achieve that goal. The ongoing cases, of course, will require courts to make that determination. Part III.A. outlines how that principle could inform employment status cases, and argues that courts in such cases could in fact hold Uber drivers to be employees as a matter of law. But a court-centric solution here may not be ideal: litigation is time-consuming and expensive, and individual cases are an imperfect vehicle for addressing broader considerations of distribution and social equality. Accordingly, Part III.B. considers how legislatures could address such questions. It argues that current proposals for a new “dependent contractor” category of employee are generally unwise, but that legislatures should strongly consider socializing employment-related benefits and imposing employment duties on an industry-specific basis.

III.A. *The Anti-Domination Principle in Employment Litigation*

At first glance, it might seem that the anti-domination principle is too abstract to inform employment cases. After all, common law jurisprudence is not a matter of applying philosophical or normative ideals to particular cases, but rather of deciding cases in accordance with precedents, statutory text, broader principles of law, and the like. Even if employment status is a “battleground of social theory,”¹⁸¹ I do not expect any court to begin deciding employment cases based on the notion of domination per se.

But analogies from adjacent fields of law suggest this principle can shape employment status cases in more subtle ways. For example, Fishkin and Forbath envision the anti-oligarchy principle working in the background of constitutional adjudication. A Supreme Court committed to the anti-oligarchy principle would not develop formalized tests or “tiers of scrutiny” to implement it. Rather, “[w]hen confronted with legislation whose aim and effect is to act as a constitutional bulwark against oligarchy,” such as campaign finance regulation, the courts should “apply[] a strong presumption, with deep roots in our constitutional tradition, toward upholding the law.”¹⁸² The anti-oligarchy principle would then counterbalance the Court’s recent tendency to rejuvenate a classical liberal political economy.¹⁸³

¹⁸¹ See PROSSER, *supra* note 23.

¹⁸² Fishkin & Forbath, *supra* note 25, at 698.

¹⁸³ See generally David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1–23 (2015) (outlining influence of neoliberalism on recent

Another analogy comes from civil rights and employment discrimination law. As Jack Balkin and Reva Siegel have argued, although our civil rights tradition is generally understood to enact anti-classification rules, or prohibitions on the state's treating individuals differently on the basis of race or sex, that tradition also reflects antisubordination concerns, or concerns about the "secondary social status of historically oppressed groups."¹⁸⁴ For example, Title VII classifies only some sex-based distinctions as problematic: an employer cannot treat women with school-age children differently from men with school-age children, but can require that women and men wear different clothing.¹⁸⁵ Why? Surely because the former sort of disparate treatment is viewed as creating barriers to women's equal participation in economic life while the latter (rightly or wrongly) is not. Yet neither would be permissible if the sole concern of civil rights law were sex-based classifications.¹⁸⁶ Social norms that incorporate antisubordination concerns help determine which policies fall on which side of the line. "As social protest delegitimizes certain practices," Balkin and Siegel argue, "courts are often moved, consciously or unconsciously, by perceptions of status harm to find violations of the anticlassification principle where they saw none before."¹⁸⁷

The anti-domination principle would play a similar role in employment status litigation, linking questions of employment status to social norms, our shared social history, and our tradition of employment regulations. Indeed, it is clearly embedded in statutory mandates and precedents. The Sherman Act's statement that "[t]he labor of a human being is not a commodity"¹⁸⁸ is simultaneously a statement of positive law and a rallying cry about the pernicious effects of unchecked labor markets on workers' dignity. In the landmark *West Coast Hotel* case upholding the constitutionality of a state minimum wage, the Supreme Court reasoned that state legislatures have wide latitude in employment relations because "peace and good order may be promoted through regulations designed to insure wholesome conditions

United States law generally); Cass Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 383 (2015) (outlining influence of libertarian ideas on D.C. Circuit).

¹⁸⁴ Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9, 9 (2003). Since domination and subordination are very similar concepts, it would be possible to cast my argument in terms of antisubordination values. I have not done so because "antisubordination" is a term of art in civil rights scholarship, one that focuses upon harms to protected classes rooted in racial, gender-based, and sexualized hierarchies. "Domination," as I use it above, is meant to focus attention on relationships of economic power, which cut across and reinforce the sorts of power relations targeted by civil rights laws.

¹⁸⁵ Compare *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (prohibiting differential treatment of women vs. men with young children) with *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979) and *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (upholding sex-based grooming code). See generally Balkin & Siegel, *supra* note 184, at 24–25.

¹⁸⁶ Balkin & Siegel, *supra* note 184, at 24–25.

¹⁸⁷ *Id.* at 13–14.

¹⁸⁸ 15 U.S.C. § 17 (2012).

of work and *freedom from oppression*,”¹⁸⁹ which evinces a concern with ending both dyadic and structural domination.¹⁹⁰

This should have several practical effects in employment status cases. For example, courts that are attentive to the anti-domination principle could draw on different sorts of considerations and arguments. Notably, current doctrine permits courts to draw on other factors they find important,¹⁹¹ and to weigh those factors as necessary,¹⁹² taking account of the “remedial purpose of the statute [and] the class of persons intended to be protected,”¹⁹³ which opens space to consider broader principles. Indeed, while the point is rarely acknowledged in employment litigation,¹⁹⁴ even the common law of agency ultimately incorporates broader notions of justice, including “whether or not it is just that the loss resulting from the servant’s acts should be considered as one of the normal risks to be borne by the business”¹⁹⁵ In employment litigation, then, courts could take account of the dignitary harms attending low-wage work, the need for workers to enjoy some power over their work lives and economic lives, and the responsibilities of large, powerful companies toward workers within their supply chains.¹⁹⁶

This suggests a revised approach to employment status cases. Workers should be presumptively classified as employees in two distinct situations: where they are subject to dyadic domination via a putative employer’s economic power or its power over their work; and where workers have so few skills that they are subject to structural domination in the market.

This approach would give additional weight to statutory presumptions of employment status, as under California law, making it very difficult for companies to avoid duties under such laws.¹⁹⁷ Recall the five factors that *Borello* identified as crucial to ensuring that employment status is interpreted “in light of the remedial purposes of the legislation,” which are basi-

¹⁸⁹ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937).

¹⁹⁰ For example, courts in FLSA cases also often appeal to Congress’ stated purpose to end “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997) (citing 29 U.S.C. § 202 (2012)); *Antenor v. D&S Farms*, 88 F.3d 925, 929 (11th Cir. 1996); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1542 (7th Cir. 1987) (Easterbrook, J., concurring).

¹⁹¹ See Dep’t of Labor Memorandum, *supra* note 18, at 4 (reporting that “[c]ourts routinely note that they may consider additional factors depending on the circumstances”); see also RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958) (“following matters of fact, *among others*, are considered”) (emphasis added).

¹⁹² *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

¹⁹³ *Id.* at 406.

¹⁹⁴ *But see Farragher v. City of Boca Raton*, 524 U.S. 775 (1997) (noting need for purposive account of agency law); *St. Joseph News-Press & Teamsters Union Local 460*, 345 N.L.R.B. 474, 483–87 (2005) (Member Liebman, dissenting) (arguing that economic dependence is a proper consideration under common law control test); *Zatz*, *supra* note 20, at 283–86 (discussing both cases).

¹⁹⁵ RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (AM. LAW INST. 1958), *cited in Zatz*, *supra* note 20, at 284.

¹⁹⁶ See generally *Rogers*, *supra* note 39.

¹⁹⁷ See, e.g., *Nayaran v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010).

cally identical to the key factors under the FLSA, as interpreted by the DOL.¹⁹⁸

(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.¹⁹⁹

Courts in minimum wage and expense reimbursement cases could read those factors as creating a very narrow exception from employment duties in situations in which the putative employer simply cannot exert arbitrary power over the worker, and where the worker has unusual skills that permit him or her to avoid structural domination in the labor market. A highly skilled worker (3), with significant investment in capital resources (2), hired for a short time (4), to perform a specialized function (5), and who owns their own business (1) would then be classified as an independent contractor. All others could be classified as employees. Such an approach would be justified based on the fact that minimum wage and expense reimbursement laws impose relatively meager duties on companies; that it is appropriate to place the burden of compliance with such laws on companies rather than workers; and that the violations of such laws significantly threaten to create an underclass of highly exploited workers. As noted above, I hope to develop this approach more fully in future work.

For now, however, it is clear that Uber is not a hard case. The company retains the ability to terminate drivers at will; it requires that drivers take a certain number of fares; it directs drivers to perform their tasks in a particular manner; it monitors their performance; the drivers' tasks are at the very center of its business model; and those tasks require relatively few skills.²⁰⁰ Moreover, the company is getting extremely large, such that its actions have political-economic impact. In my view, a court faced with such facts could find Uber drivers to be employees *as a matter of law* if the plaintiff moved for summary judgment on the question of employment.

Several caveats deserve mention. First, as always, such broader policy considerations should come into play within the parameters defined by employment statutes. Under the FLSA, for example, it should be more difficult for a company to escape employment duties than, say, under ERISA, which follows the narrower control test.²⁰¹ Second, judges can and often should

¹⁹⁸ S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 407 (Cal. 1989).

¹⁹⁹ *Id.* (citing *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979)). See *supra* note 50 (citing Dep't of Labor Memorandum, *supra* note 18, at 9–10).

²⁰⁰ See *Uber II*, 82 F. Supp. 3d 1133, 1138–48 (N.D. Cal. 2015) (discussing disputes over these facts).

²⁰¹ Though even the Restatement (Second) of Agency held that an unskilled laborer "is almost always a servant in spite of the fact that he may nominally contract to do a specified job

avoid relying on policy goals in their opinions where doing so is unnecessary. As noted above, both the Uber and Lyft opinions could be resolved at the summary judgment stage based on the disputed facts as read through various precedents. Such judgments represent, in a way, incompletely theorized agreements²⁰² about employment status, where one might reach the same result on the basis of a simple interpretation of facts, and comparison to precedent, or an appeal to broader policy goals. That will generally be preferable, as a matter of judicial form, than a stark appeal to one or another policy goal. Regardless, there is ample space under current doctrine for courts to adopt the approach outlined above, which would do justice far better than existing approaches.

III.B. *Employment Determinations by Legislatures*

Legislatures could also take up the question of Uber drivers' status, again building on the anti-domination principle. There may be real virtues to encouraging legislative action. Employment litigation is expensive and time-consuming, and often leads to minor changes in behavior rather than concrete changes in legal status; the Lyft settlement, for example, requires the company to compensate drivers in California and to alter its policies around termination, but does not require the company to classify those drivers as employees.²⁰³ Presumably Uber would pay dearly to not have to classify drivers as employees, and therefore may have substantial incentives to settle on similar terms if it begins to look as if its drivers will win before a jury. That would benefit existing drivers, and may force certain changes in the companies' procedures, but would largely kick the can down the road, such that the question of employment status would continue to come up in subsequent litigation.

Courts are also ill-suited to resolve complex matters of economic and social governance, since they have limited control over their caseload and must decide concrete disputes between particular parties.²⁰⁴ Employment litigation, for example, pits workers against companies, but can't easily take account of consumer welfare or other externalities of employment status, whether positive or negative. The efficiency considerations discussed in Part II.C. above are one example: a court cannot very well immunize a company from employment duties on the grounds that it needs time to develop network effects, but legislatures commonly exempt very small employers from

for a specified price." RESTATEMENT (SECOND) OF AGENCY § 220 cmt. i (AM. LAW INST. 1958).

²⁰² See generally Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

²⁰³ See *supra* Part I.B.

²⁰⁴ See generally Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978) (discussing difficulties of addressing "polycentric" problems through adjudication).

regulations.²⁰⁵ Similarly, a legislature could resolve some of the ambiguities around measuring hours noted above, for example by defining the number of hours that a worker must utilize a particular platform to qualify for employment rights, or by developing a guide for such actuarial calculations.

Legislatures also have the advantage of being able to clarify the employment status of particular categories of workers. Legislatures have often done this through statutory exclusions: the National Labor Relations Act, for example, explicitly excludes agricultural and domestic workers,²⁰⁶ and the Fair Labor Standards Act excludes, among others, certain seasonal workers,²⁰⁷ casual babysitters,²⁰⁸ and—for reasons I would love to learn—“any homemaker engaged in the making of wreathes composed principally of natural holly, pine, cedar, or other evergreens.”²⁰⁹ But states have also specifically defined certain classes of workers as employees. California law, for example, specifically defines various job classifications as employees, including volunteer fire fighters,²¹⁰ handymen who work for the owners of residential dwellings,²¹¹ and certain domestic workers providing “in-home supportive services.”²¹²

One solution to the challenge of defining platform employment would be for a state legislature to simply define Uber drivers as employees for purposes of state wage/hour and reimbursement laws on the grounds that doing so is necessary to ensure dignified work, equality of bargaining power, or other goods encouraged by the anti-domination principle. This would require a definition of drivers that clearly captures them, such as “drivers who receive passengers through an online on-demand application,” or some similar term, but the basic concept is straightforward enough. A legislature could do the same with regard to other platform economy workers.

Legislatures could also define Uber drivers as employees for purposes of some laws but not for others, though ideally not in the ways urged by platform economy firms and their allies. Some have proposed, for example, a new category of workers, often termed “dependent contractors,” who would be eligible for certain employment benefits but not others. Various commentators and even Senator Mark Warner have recently advocated for such a category, which would sit between employee and independent contractor, and to which companies would owe some duties (such as workers’ compensation and reimbursement of expenses) but not others (such as social security and Medicare taxes).²¹³

²⁰⁵ Title VII, for example, exempts employers with fewer than fifteen employees. 42 U.S.C. § 2000e(b) (2012).

²⁰⁶ 29 U.S.C. § 152(3) (2012).

²⁰⁷ *Id.* § 213(a)(3).

²⁰⁸ *Id.* § 213(a)(15).

²⁰⁹ *Id.* § 213(d).

²¹⁰ CAL. LAB. CODE ANN. § 3361 (2016) (West, Westlaw current with urgency legis. through ch. 14 of 2016 Reg. Sess. and ch. 3 of 2015-2016 2d Ex. Sess.).

²¹¹ *Id.* § 3351(d).

²¹² *Id.* § 3351.5(b).

²¹³ See Surowiecki, *supra* note 9 (discussing such proposals); see also Harris & Krueger, *supra* note 9 (advocating for new category of “independent worker”).

There are a couple serious problems with the “dependent contractor” proposals. For one thing, adding a third category of workers will only make employment status litigation even more confusing. The approach to this question in Canada is illustrative. Ontario, for example, defines a “dependent contractor” as one who “is in a position of dependence upon” a principal, whether or not they would qualify as an employee under existing law.²¹⁴ Other Canadian labor relations boards developed multi-factor tests for the “dependent contractor” category that look into skills, integration into the business, tools, entrepreneurial activity, and the like; others have held that a dependent contractor is one who receives at least eighty percent of their business from one principal.²¹⁵ Needless to say, none of these approaches would solve the problems identified in Part I, above. Allusions to “dependence” are already common in U.S. employment status litigation, and often do not clarify those cases.²¹⁶ Another multi-factor test, particularly one that overlaps with existing tests, would almost certainly sow further confusion rather than clarifying companies’ duties. An eighty percent threshold test may also be problematic, since many platform economy workers do not gain eighty percent of their work from one or another platform.²¹⁷

Perhaps most importantly, while at least some proponents of such ideas want to encourage firms to reclassify independent contractors as dependent contractors, it seems just as likely that such a reform would encourage firms to reclassify employees as dependent contractors.²¹⁸ In other words, establishing another category of worker would encourage leveling down instead of leveling up, leading to more domination rather than less.

The second proposal has been floated by a coalition of Silicon Valley companies, worker organizations, and some conservative organizations, and calls for legal reforms to enable greater portability of benefits including “workers’ compensation, unemployment insurance, paid time off, retirement savings, and training/development.”²¹⁹ The group’s declaration of principles is broad, but the basic idea seems to be to move those benefits to a 401(k)-type model, one that workers could carry from job to job, and to create a safe harbor from other employment liabilities for companies that experiment with

²¹⁴ Ontario Labour Relations Act, R.S.O. 1879, ch. 232 § 1(1) (1975), cited in Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMPL. & LAB. L. 143, 154 (2005).

²¹⁵ Kennedy, *supra* note 214, at 154–55.

²¹⁶ See *supra* Part I.C.

²¹⁷ Benjamin Sachs, *A New Category of Worker for the On-Demand Economy?*, ONLABOR BLOG (June 22, 2015), <http://onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy/> [https://perma.cc/Z6HG-9GF6].

²¹⁸ See Lydia DePillis, *This Is What the Social Safety Net Could Look Like for On-Demand Workers*, WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/07/this-is-what-the-social-safety-net-could-look-like-for-on-demand-workers/> [https://perma.cc/WHL6-UBRV] (quoting National Employment Law Project’s Rebecca Smith to that effect).

²¹⁹ Portable Benefits, *supra* note 10.

new benefits vehicles.²²⁰ While the group is diverse, at least some members seem to envision a wholly privatized benefits system rather than socialization of benefits. The R Street Institute, for example, has argued that, “[m]arkets could provide a portable vehicle for worker protections and benefits.”²²¹

There are sound reasons to rethink our system of employment-linked benefits, which serves neither employers nor employees that well. The current price tag for benefits is significant. According to the Bureau of Labor Statistics, in September 2015, insurance benefits made up 8.2% of costs for private employers, and Social Security, Medicare, unemployment insurance, and workers’ compensation made up almost 8% of costs.²²² Those additional costs surely deter job creation, and are part of the reason many firms seek to avoid employing their workers. The linkage of health care to work also makes it more difficult for workers to move between jobs; one important positive effect of the Affordable Care Act’s passage has been to encourage workers to leave jobs they were keeping simply to hold on to health care.²²³

But if, as a nation, we are going to begin considering substantial reform to our employment-linked benefits, we should strongly consider socializing them rather than creating private vehicles for them. The linkage of so many benefits to employment status, and their funding through taxes on or contributions by employers, is characteristic of the so-called “liberal” Anglo-American welfare states, and it is no accident that those states tend to have greater economic inequality than states that socialize more benefits, since they do relatively little to shape labor market outcomes in workers’ favor.²²⁴ Indeed, there is substantial evidence that the policies characteristic of “social democratic” welfare states—state-provided social insurance, high levels of unionization, and “active labor market policies” that enable workers to obtain state-funded job training and placement assistance—can ensure high aggregate economic performance and greater economic equality.²²⁵ By enabling workers to leave jobs more easily, moreover, such policies can also prevent domination in the workplace and market.

²²⁰ See, e.g., *id.* (“Businesses should be empowered to explore and pilot safety net options regardless of the worker classification they utilize.”).

²²¹ Ian Adams, *The Flexible Future of Work*, R STREET INST., (Nov. 10, 2015), <http://www.rstreet.org/policy-study/the-flexible-future-of-work/> [https://perma.cc/2ERZ-XHBV].

²²² BUREAU OF LAB. STAT., U.S. DEP’T OF LABOR, EMPLOYER COSTS FOR EMPLOYEE COMPENSATION (Dec. 9, 2015), <http://www.bls.gov/news.release/ecec.toc.htm> [https://perma.cc/JYY7-4CDS].

²²³ David Brodwin, *When Job Loss Helps the Economy Grow*, U.S. NEWS & WORLD REP. (Feb. 7, 2014, 11:50 AM), <http://www.usnews.com/opinion/economic-intelligence/2014/02/07/obamacare-lets-workers-leave-bad-jobs-and-start-businesses> [https://perma.cc/S22N-72XN].

²²⁴ See GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 26–27 (1990).

²²⁵ *Id.* at 27–28 (summarizing characteristics of social democratic welfare states); KATHLEEN THELAN, *VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY* 8–11, 30–31 (2014) (comparing the evolution of welfare states and economic performance in United States and United Kingdom to those in Scandinavian countries); Hall & Soskice, *supra* note 155, at 21 (noting economic performance of more coordinated market economies, many of which are social democratic).

This suggests that employment-related duties should be limited to those that advance goals that can only be achieved through changes to employer policies. I would put the following in that category: wage and hour laws, work-related reimbursements, workplace health and safety laws, workers' compensation, collective bargaining laws,²²⁶ and employment discrimination protections.²²⁷ Pensions have some link to employment on the principle that workers should contribute to general pension funds, but there is little to no reason that those funds should be employer-specific. Health care, Medicare, disability insurance, unemployment insurance, and job training funding could all be socialized and funded through progressive taxation, such that workers would be eligible for those benefits by virtue of being workers or citizens—not employees.

Now, I harbor no illusions that Congress would socialize many benefits, and state legislatures have limited power to address benefits issues in any event.²²⁸ For now, then, my main argument is cautionary: that exempting platform economy companies from various employment regulations would likely exacerbate rather than remedy economic and social inequality. Socialized benefits are probably a first-best solution, one worth pursuing if and when the political winds align; employer-borne benefits a second-best solution, one worth maintaining; privatization is a step backward.

As a final note, while a full consideration of the issue is beyond the scope of this paper, I would also advocate for Congress or the NLRB to ensure that Uber drivers are protected under labor laws so that they have the ability to organize and bargain collectively.²²⁹ Taxi drivers were unionized in many cities in the past, and have begun to unionize in some cities today,²³⁰

²²⁶ Notably, individual employers' participation in collective bargaining is not necessary in many European countries, where bargaining takes place at the national level, with terms of collective agreements extended by law or administrative practice to other employers in the industrial sector. *See generally* Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679 (2014).

²²⁷ Statutory protections against employment discrimination, like other employment laws, generally apply only to employees. *See* 42 U.S.C. § 2000e(f) (2012); *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 489 (8th Cir. 2003).

²²⁸ Employee benefits are governed by The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* (2012). Section 514(a) generally preempts state regulations. 29 U.S.C. § 1144(a) (2012).

²²⁹ Indeed, the NLRB may be moving in that direction. *See* AAA Transp./Yellow Cab & Tucson Hacks Ass'n, Case 28-RC-106979, Supplemental Decision and Direction of Election (Region 28 N.L.R.B., Oct. 23, 2015) (finding that cab drivers are employees under NLRA). While I am intrigued by Harris and Krueger's suggestion that antitrust law be amended to clarify that independent contractors can organize, Harris and Krueger, *supra* note 9, at 15, I do not understand why platform economy workers could not simply be defined as employees under the NLRA, and therefore entitled to bargain collectively. Proceeding under antitrust may encourage experimentation with new forms of concerted activity, but would ultimately require a new administrative structure to determine questions such as bargain unit status, unfair labor practices, and the like. Since we have an administrative agency with expertise over such matters—the NLRA—it strikes me as far preferable to grant that agency jurisdiction over platform workers.

²³⁰ *See* Steven Greenhouse, *Pinched by Ride-Sharing Services, Cabbies Seek a National Union*, N.Y. TIMES (June 6, 2014), <http://www.nytimes.com/2014/06/07/business/pinched-by-ride-sharing-services-cabbies-seek-a-national-union.html> [https://perma.cc/5A8N-GAGY]

and the world has not ended. In fact, collective bargaining rights could operate more smoothly at Uber than in many traditional cab sectors, since the company is a large, integrated actor with direct relationships with its drivers. Bargaining in fractured sectors with many small players is exponentially more difficult for workers, and raises challenging issues of equity among differently sized employers. There is no reason in theory that Uber could not operate far more democratically under the influence of labor laws and a powerful union of drivers. That may lead to lock-in costs and some rigidities in the companies' models, but a smart union of drivers would recognize that helping the companies to remain flexible until their business models mature is a smart strategy. More generally, unionization of drivers may be essential to ensure broadly dispersed economic and political power as Uber continues to grow.

CONCLUSION: TOWARD A NEW MODEL

Before closing, I will note that this analysis likely applies to other platform economy companies as well. Handy and TaskRabbit, both of which match consumers with workers for cleaning or other odd jobs, should absolutely be required to ensure that those jobs pay the minimum wage.²³¹ The firms know or should know how long workers are at particular job sites, and how much those jobs pay, and therefore can easily determine whether workers are earning minimum wage. Like Uber, those companies can presumably make reasonable estimates of work-related reimbursements such as supplies and travel costs, and compensate workers accordingly. Like Uber drivers, those workers may be subject to arbitrary changes in their working conditions, and of course to enormous market pressures. The analysis may be even simpler for drivers and workers for other platform economy firms such as Instacart, Washio, and Caviar, all of whom provide simple services such as driving and shopping, and whose hours can be easily tracked.²³²

Across the board, then, there are powerful reasons to hold platform economy companies to employment duties, at least around basic economic conditions such as wages and reimbursements. Imposing such duties would encourage the firms to adapt their business models to ensure workers' welfare as well as consumers' welfare, to ensure decent work as well as high

(describing efforts to unionize); *National Taxi Workers' Alliance*, WIKIPEDIA, https://en.wikipedia.org/wiki/National_Taxi_Workers%27_Alliance [https://perma.cc/PT5T-8ZJS] (discussing National Taxi Workers' Alliance, a new affiliate of the AFL-CIO).

²³¹ See generally HANDY, <https://www.handy.com/> [https://perma.cc/T4F9-BH2C]; TASK RABBIT, <https://www.taskrabbit.com/> [https://perma.cc/XVW8-R4Y5].

²³² Washio picks up and delivers dry cleaning and laundry to users' homes. See WASHIO, <https://www.getwashio.com/> [https://perma.cc/G9EX-G5EG]. Caviar provides food delivery from local restaurants. See CAVIAR, <https://www.trycaviar.com/> [https://perma.cc/6FYP-U4J3]. Instacart provides grocery delivery, see INSTACART, <https://www.instacart.com/> [https://perma.cc/8TQ8-7B4S], and notably has already made some of its in-store shoppers employees, see Sarah Perez, *Instacart Makes Some of Its Contractors Part-Time Employees*, TECHCRUNCH (June 22, 2015), <http://techcrunch.com/2015/06/22/instacart-makes-some-of-its-contractors-part-time-employees/> [https://perma.cc/S682-87CC].

quality services. As importantly, imposing such employment duties will have salutary effects on our political economy, ensuring that power is broadly dispersed within the society. The Uber case raises the weighty question of how the gains from so-called “disruptive” or innovative technologies will be distributed. As of now, those who hold intellectual property rights to such technologies are positioned to capture enormous rents from them. But those technologies do not produce profits on their own. Profitability depends also upon data gleaned from user behavior and upon the labor of those who work under such platforms.²³³ As a result, both consumers and workers have legitimate claims to participatory rights and equitable pricing from platforms.

As these technologies mature and our economy changes, one key means of ensuring equity will be an empowered workforce, one that does not suffer domination in the workplace or the labor market, and that can check Uber and other megaliths’ economic and political power. While the New Deal regulatory apparatus is imperfect, it exists to mitigate exactly the sorts of economic inequalities and social conflicts that are re-emerging today. In the long run, we need an innovation policy that credits workers for their contributions to such companies’ improvements to our social and economic lives. Employment duties cannot be the end of that policy, but they are an important beginning.

²³³ See generally Strahilevitz, *supra* note 62.