LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 8 SUMMER 2021 ISSUE 3

A TALE OF TWO SOCIETIES:

THE IMPACT OF "GIG ECONOMY" LAWS ON RURAL AMERICA

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According to preliminary results released by the U.S. Census Bureau in December 2020, approximately 332.6 million people live in America.[2] Most Americans live in what are defined as "urban," or densely populated, areas while a minority live in what are defined as "rural" areas. One way of viewing the difference between urban and rural populations is that eighty percent of Americans live on only three percent of the country's land mass (urban areas), whereas only twenty percent of the population occupies the remaining ninety-seven percent of the land mass (rural

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[2] CENSUS BUREAU RELEASES 2020 DEMOGRAPHIC ANALYSIS ESTIMATES, https://www.census.gov/newsroom/press-releases/2020/2020-demographic-analysis-estimates.html (last visited Feb. 25, 2021).

areas).[3] Thus, of the 332.6 million of us, approximately 66.5 million people live in rural America. Occasionally, questions arise regarding whether some of the laws and regulations designed to apply in urban areas are equally appropriate for rural communities.

In recent years, with the explosive growth of daily online interactions among millions of Americans, a new way of connecting workers and customers has developed: the "gig economy."[4] In the last five years, we have seen a vast proliferation of online services that offer to connect consumers who have a need with workers willing to meet that need. According to one study, more than twenty-five percent of all workers engage in "non-standard work," and more than ten percent of workers rely on gig work as their primary source of income.[5] Applications ("apps") such as Uber, Lyft, Grubhub, Instacart, Handy.com, TaskRabbit, and Care.com are just a few of the online platforms gig workers use to find work. Connecting consumers with workers and arranging for easy payment are facilitated by the app, but, and here is the rub, the people performing those services, by and large, are not considered to be employees of the company running the app. Instead, they are treated as independent contractors who have registered with the app to indicate their willingness to perform the particular services requested by the app's users. As explained by one commentator:

> [T]he argument centers on a debate as to whether a 'marketplace platform' is no more than a passive information clearinghouse offering 'disinterested' space for contractors and third parties to enter into a contractual

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[3] ONE IN FIVE AMERICANS LIVE IN RURAL AREAS, https://www.census.gov/library/stories/2017/08/rural-america.html (last visited Feb. 25, 2021).

[4] Other labels for this phenomenon include the "sharing economy," the "collaborative economy," and the "platform economy." Nicole Kobie, WHAT IS THE GIG ECONOMY AND WHY IS IT SO CONTROVERSIAL?, WIRED, https://www. wired.co.uk/article/what-is-the-gig-economy-meaning-definition-why-is-it-called-gig-economy (Sept. 14, 2018).

[5] HOW MANY GIG WORKERS ARE THERE?, https://www.gigeconomydata.org/basics/how-many-gig-workers-are-there (last visited April 27, 2021).

> relationship without the platform having any input into what happens thereafter.[6]

As is common with any new societal structure, legal disputes have arisen that highlight the significant impact these internet-based services have on traditional socio-economic foundations. Recently, U.S. Secretary of Labor Marty Walsh commented that "in a lot of cases gig workers should be classified as employees."[7] One commentator suggested that Secretary Walsh's comments "were interpreted as [a] signal that the Labor Department could move more aggressively to crack down on the use of contract labor."[8]

Two primary areas of concern have been identified: First, how much control can an app exert over its workers and still maintain that its workers are independent contractors and not employees? Second, who bears the legal risks in a situation where the actions of a gig worker cause damage or injury to another's person or property? In other words, can the app be held legally liable for the negligence of one of its workers? The purpose of this article is to highlight legal disputes that have arisen as a result of online applications classifying workers as independent contractors rather than employees and to consider whether such disputes should be viewed through different lenses when considering rural versus urban populations.

I. A BRIEF HISTORICAL CONTEXT[9]

As America emerged from the industrial revolution in the late nineteenth century, the agrarian culture of previous centuries gave way to mechanized production lines and technological innovations such as the steam engine, the

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[6] Michael C. Duff, *All the World's a Platform?: Some Remarks on 'Marketplace Platform' Employment Laws*, Social Science Research Network (Jan. 30, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3520723.

[7] Eli Rosenberg, "Labor Secretary Says Gig Workers Should Be Classified as Employees in 'A Lot of Cases,'" WASH. POST, April 29, 2021.

[8] *Id.*

[9] General historical information included in this article taken from: A CENTURY OF PROGRESS AND PERSPECTIVE: WORKERS' COMPENSATION IN TENNESSEE, Tennessee Bureau of Workers' Compensation (2019).

cotton gin, and the introduction of interchangeable parts. Millions of workers who previously would have labored on farms and in fields were now working in factories around heavy, fast-moving equipment. An inevitable result of this development was a dramatic increase in workplace injuries. In response to the social and economic impact of the industrial revolution, labor unions began to form in the nineteenth century to represent the collective interests of American workers.[10]

At the beginning of the twentieth century, as America entered the Progressive Era led by President Theodore Roosevelt, state and federal legislators began exploring ways to offer more protections to American workers. Laws such as the Federal Employers' Liability Act and state workers' compensation statutes were enacted in the early decades of the twentieth century to address workplace injuries.[11] In addition, regulatory agencies such as the U.S. Department of Labor were formed, and commentators such as attorney Crystal Eastman and novelist Upton Sinclair, as well as various labor unions, decried what they viewed as harsh working conditions in some American industries.

Over the course of the twentieth century, various other laws concerned with working conditions were passed such as the Fair Labor Standards Act,[12] the Federal Employees' Compensation Act,[13] the Occupational Safety and Health Act,[14] and the Family and Medical Leave Act.[15] As a result, given the myriad of employment laws in place today, any individual entering the American workforce as an "employee" is subject to and protected by laws and regulations that define certain aspects of his or her relationship with the employer.

As employment laws were implemented, companies and workers across the country explored the limits of the employer-employee definition by entering into arrangements intended to be outside that legal concept. Thus, workers

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[10] LABOR MOVEMENT, https://www.history.com/topics/19th-century/labor (last visited March 2, 2021).
[11] WHAT IS FELA?, https://www.railsafety.com/What-is-FELA-.aspx (last visited Apr. 13, 2021).
[12] 29 U.S.C. §§ 201-219 (2021).
[13] 5 U.S.C. §§ 8101-8152 (2021).
[14] 29 U.S.C. §§ 651-678 (2021).
[15] 29 U.S.C. §§ 2601-2654 (2021).

identified as "independent contractors," not employees, were offered "freelance" work not necessarily subject to the laws and regulations governing the employer-employee relationship. For example, if you started a lawncare service, you could enter into agreements with various individuals to care for their lawns without becoming those clients' employee. As a contract laborer, you would charge a certain amount for your services, and you would not expect to receive employee benefits such as paid vacation, FMLA leave, group health insurance, or workers' compensation coverage. Conversely, the client who entered into the agreement with you would understand they could not dictate your hours, prevent you from offering your services to others, or control the manner in which you performed the contract work as long as the end result met the specifications of the agreement. Hence, it is important to understand that "freelance" work has existed for decades, and the online "gig economy" is but a technological innovation facilitating this kind of work arrangement. "[I]t represents a digital version of the offline atypical, casual, freelance, or contingent work arrangements characteristic of much of the economy prior to the middle of the twentieth century."[16]

As a result of the increasing use of freelance or "independent contractor" agreements, courts and legislatures examining the employer-employee relationship in the context of various employment laws developed tests and protocols for determining whether someone was an employee or an independent contractor. One common hallmark of such tests is that the mere identification of a worker as an employee or independent contractor is legally insufficient to define the relationship. Courts and legislatures acknowledged that, in a typical negotiation for the provision of labor, companies and workers are not on even footing. Thus, in the view of many legislators, the law must impose safeguards to ensure that a company cannot use its superior negotiating leverage to impose a classification on workers who are ill-suited to argue the point.

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[16] Arne L. Kellerberg & Michael Dunn, *Good Jobs, Bad Jobs in the Gig Economy*, 20 PERSPECTIVES ON WORK 10, 11 (2016).

For example, Tennessee's Workers' Compensation Law sets out a test for evaluating whether a worker is an employee or an independent contractor.[17] This test requires the court or factfinder to consider seven factors:

1. The right to control the conduct of the work;
2. The right of termination;
3. The method of payment;
4. The freedom to select and hire helpers;
5. The furnishing of tools and equipment;
6. The self-scheduling of working hours; and
7. The freedom to offer services to other entities.[18]

Interestingly, the identification of a worker as an employee or an independent contractor is not one of the factors listed. In applying this test, the Tennessee Supreme Court has made clear that these statutory factors are not absolutes that preclude examination of other factors. The Court emphasized, however, that "the right to control the conduct of the work" is of particular importance to the analysis.[19]

II. CONSTITUTIONAL CONCERNS: FREEDOM OF CONTRACT AND DUE PROCESS

Article 1, section 10 of the United States Constitution prohibits states from impairing the obligations of contracts. However, early in the development of U.S. Supreme Court jurisprudence, this clause was narrowly interpreted to apply only to then-existing contracts.[20] Nevertheless, a powerful tool was found in the Fourteenth Amendment's due process clause.[21] In several notable dissents, Supreme Court justices

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[17] TENN. CODE ANN. § 50-6-102(12)(D) (2020).
[18] *Id.*
[19] *See, e.g.*, Masiers v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982).
[20] Ogden v. Saunders, 25 U.S. 213 (1827).
[21] The 14th Amendment to the U.S. Constitution states, in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

in the late nineteenth century argued that the due process clause "protects the right to pursue an occupation free from unreasonable government interference."[22] After several other cases included offhand discussions of the freedom of contract, the Supreme Court firmly established the right to contract as protected by the Fourteenth Amendment's due process clause in *Allgeyer v. Louisiana*.[23]

This freedom of contract, however, is not without its limits. In *Holden v. Hardy*, the Court acknowledged that states can invoke police powers to enact health and safety measures even if such laws and regulations interfered with the freedom of contract.[24] In the early part of the twentieth century, the Court upheld various state regulations as being within a state's police powers.[25] As explained by the Court in a 1923 case, "[t]here is no such thing as absolute freedom of contract. It is subject to a variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[26] As freedom-of-contract jurisprudence has developed in the decades since, some courts have been more willing to allow regulation of employment conditions as a proper application of a state's police powers, while others have struck down laws and regulations as having no rational basis.[27] The question becomes whether laws and regulations that compel online platforms to treat purported independent contractors as employees have a rational relationship to legitimate state goals.

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state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 2-4.

[22] Davie E. Bernstein, *Freedom of Contract*, George Mason Univ. Law and Econ. Research Paper Series, https://www.law.gmu.edu/assets/files/publications/working_papers/08-51%20Freedom%20of%20Contract.pdf (last visited April 6, 2021).

[23] *Id.* at 2.

[24] *Id.* at 3.

[25] *Id.*

[26] Adkins v. Children's Hospital, 261 U.S. 525, 546 (1923).

[27] Bernstein, *supra* note 20, at 8.

III. RECENT LEGAL DISPUTES

Legal disputes hinging on the employment status of individuals have become a "hot topic" in the context of online marketplace platforms. For example, in *Olson v. California*, a federal district court was asked to evaluate a new California law, known as Assembly Bill 5 ("AB 5"), that addresses the classification of workers as employees or independent contractors. In reviewing the state of the law on that issue, the district court judge noted a 2018 opinion from the California Supreme Court in which that Court commented on laws designed to protect workers:

> The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare.[28]

The manner in which California courts broadly define the term "employee" is known as the "ABC test," which deems all workers to be employees unless the hiring entity can prove the following three criteria:

- The worker is "free from the control and direction of the hirer in connection with the performance of the work";
- The worker "performs work that is outside the usual course of the hiring entity's business"; and
- The worker is "consistently engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."[29]

[28] Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 32 (2018).

[29] *Id.* at 964.

Thus, in California cases where the parties dispute the nature of the working relationship, the burden of proof is on the "hiring entity" to prove the worker is an independent contractor.[30] AB 5 codified the "ABC test" set out by the California Supreme Court and, as a result, several plaintiffs sued in federal court to enjoin the state from enforcing this law. These plaintiffs argued that AB 5 violates both the California and U.S. Constitutions. Two of the plaintiffs worked for Postmates and Uber, both of which maintain online marketplace platforms as described above.[31] Both of these plaintiffs argued that they value the flexibility and autonomy of working for a marketplace platform, they do not want to be considered "employees" of these companies, and the enforcement of AB 5 would adversely impact their lives.[32]

In denying the plaintiffs' claims for injunctive relief, the district court concluded AB 5 does not violate equal protection clauses of the state or federal constitutions by targeting "gig economy" marketplace platforms. After acknowledging the parties' agreement that the equal protection claims merit rational basis scrutiny, the court concluded, "the State's asserted interest in protecting exploited workers to address the erosion of the middle class and income inequality thus appears to be based on a 'reasonably conceivable state of facts that could provide a rational basis for any ostensible targeting of gig economy employers and workers."[33] The court then explained, "[w]ithout judging the wisdom, fairness, or logic of legislative choices, the Court finds that AB 5 furthers the State's legitimate interest in addressing misclassification [of workers]."[34]

The plaintiffs in *Olson* also argued that individual legislators had expressed animus toward marketplace platforms in pushing for the adoption of AB 5.[35] In response, the court explained that "such targeting, even if it rises to the level of animus toward gig economy companies, does not

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[30] *Id.*
[31] Olsen v. California, No. CV-19-10956-DMG, 2020 U.S. Dist. LEXIS 34710, at *6 (C.D. Cal. Feb. 10, 2020).
[32] *Id.* at *9.
[33] *Id.* at *15 (quoting RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1154 (9th Cir. 2004)).
[34] *Id.* at *21 (internal citation omitted).
[35] *Id.* at *22-23.

establish an Equal Protection violation where the statute addresses legitimate concerns of deleterious misclassification of workers in many industries, not just the gig economy."[36] The trial court also rejected the plaintiff's arguments with respect to the due process and right-to-contract clauses.[37] Consequently, the court declined to award injunctive relief and prevent the implementation and enforcement of AB 5.[38]

IV. JOB TRENDS IN RURAL COMMUNITIES

Online marketplace platforms have expressed concern that legislation like AB 5 and decisions like *Olson*, which mandate that certain workers be classified as employees rather than independent contractors, ignore the realities of evolving economies. According to one Canadian commentator, as of 2017, almost fifty percent of millennials in Canada already used marketplace platforms for "freelance" work and over fifty percent of *new* Canadian jobs were considered "non-standard."[39] Seventy percent of Canadian gig workers participate in that employment model by choice, and such workers value the flexibility, control, and freedom that comes with gig work.[40] Such findings are reflected in American studies, one of which noted that many gig workers report "appreciating the control this work allows them over their time and the flexibility of scheduling."[41] Finally, most gig workers report they look for gig work by choice rather than out of necessity.[42]

Another commentator noted that, in rural areas where job opportunities are more limited, "online platforms could provide a valuable lifeline."[43] With a lower cost of living in rural communities, online platforms offer "passive

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[36] *Id.* at *23.
[37] *Id.* at *24-33.
[38] *Id.* at *46.
[39] Mary Doyle, "Should Rural Embrace the 'Gig' Economy," https://ruralonpurpose.com (last visited Feb. 24, 2021).
[40] *Id.*
[41] MOST GIG WORKERS REPORT BEING SATISFIED BY THEIR WORK ARRANGEMENTS, https://www.gigeconomydata.org/ basics/what-are-experiences-gig-workers (last visited April 27, 2021).
[42] *Id.*
[43] GIGONOMY, RURAL WORK IN THE GIG ECONOMY, https://gigonomy.info/rural-work-in-the-gig-economy/ (July 8, 2020).

income" sources and a better work/life balance.[44] "Studies worldwide have shown that freelancers have a higher level of job satisfaction in their work lives than those with traditional jobs by choice[, and] job satisfaction is directly linked to higher productivity."[45] A concern often expressed in rural communities is that there are not enough work opportunities to keep young people from leaving for more populated areas. Marketplace platforms give such people work opportunities that can incentivize them to live in and contribute to rural communities.[46]

And yet, as with most issues where strong, opposing views are held, especially by those on the far ends of the spectrum, the middle ground may be closer to the truth.

> The reality of the gig economy is more nuanced: the gig economy produces both good and bad jobs. Understanding this variability in the quality of jobs helps to better assess the conflicting benefits and costs associated with the spread of this emerging work arrangement[47]

As discussed above, some states' legislatures have reacted to this proliferation of non-traditional work opportunities by trying to "exercise control and impose regulations that they believe are necessary to protect workers from what they call 'precarious employment.'"[48] Other legislatures, in contrast, have passed laws that mandate the identification of gig workers as independent contractors in most circumstances. Neither position, at its most extreme, serves the interests of a majority of workers.

> The problem with trying to control naturally occurring trends by imposing countermeasures is that there are usually unintended consequences. . . . If we can agree

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[44] *Id.*
[45] *Id.*
[46] Mary Doyle, SHOULD RURAL EMBRACE THE 'GIG' ECONOMY, https://ruralonpurpose.com (last visited Feb. 24, 2021).
[47] Kellerberg & Dunn, *supra* note 14.
[48] Mary Doyle, SHOULD RURAL EMBRACE THE 'GIG' ECONOMY, https://ruralonpurpose.com (last visited Feb. 24, 2021).

> that employer and worker motivations can (and do) vary, and that a solution for one can have negative consequences for another, the natural conclusion is that we need to embrace and support choice in our communities. Choice is the smart mantra for a new era of work and our ability to support and promote choice is going to give rural communities a competitive edge.[49]

Therefore, it is critical that legislators representing rural communities consider both the positive and negative aspects of non-traditional employment opportunities for their constituents. Such legislators should recognize that the advent of freelance work is not a new phenomenon. Workers have, for many decades, relied on gig work for income, and the online marketplace platform is but a new tool to facilitate such arrangements. Workers in rural counties, where traditional employment opportunities may be more limited, can use easy access to online platforms to increase opportunities for income, which, in turn, can increase standards of living for the community as a whole.

Legislators should also recognize that laws and regulations are already in place that are designed to protect workers from overreaching companies. In those instances where an online platform attempts to exert too much control over the conditions of employment, courts can address those situations and craft appropriate legal remedies using already-existing laws and well-established legal concepts. In sum, laws that force all marketplace platforms to conform to traditional employer-employee paradigms, while possibly more appropriate in an urban setting, may unnaturally restrict job opportunities in rural areas by increasing overhead costs and forcing both parties into roles neither intended.

V. CONCLUSION

The "gig economy" is alive and well, and marketplace platforms are here to stay. Instead of seeking to force a square peg into a round hole, legislators should consider

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[49] *Id*. (emphasis omitted).

ways to educate potential workers as to the pros and cons of such arrangements and use laws and regulations already in place to maintain certain minimum protections. Legislators should keep in mind that marketplace platforms can provide additional job opportunities and sources of income in rural communities that can improve living standards, reduce dependence on government assistance, and incentivize young workers to stay in and contribute meaningfully to the rural way of life.