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# ***Dynamex Is Dynamite, but Epic Systems Is Its Foil – Chamber of Commerce: The Sleeper in the Trilogy***

*William B. Gould IV\**

## I. INTRODUCTION

Disputes about whether individual workers are employees or independent contractors have emerged with increasing frequency as the twenty-first century has unfolded.<sup>1</sup> Many of these disputes focus on the so-called “gig economy,” which is a labor market characterized by the flexibility and the prevalence of short-term work as opposed to permanent jobs.<sup>2</sup> The Department of Labor refers to the gig economy phenomenon as providing alternative work arrangements,<sup>3</sup> while Audrey Freedman calls it the “contingent workforce.”<sup>4</sup> In Europe, the gig economy is referred to as “atypical employment.”<sup>5</sup>

Though the issue of the dependent laborer – a concept thus far judicially unrecognized in the United States – was addressed more than a half-century ago,<sup>6</sup> the definition of what constitutes a gig economy has been described only

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1. Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1683–84, 1688 (2016).

2. *See id.* at 1684–88. A gig economy is “[r]ooted in an economic model in which individuals sell service to one another, [and] online platforms help facilitate varied forms of peer-to-peer work.” *Id.* at 1684.

3. *See* BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS – MAY 2017 1 (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>.

4. Louis Hyman, *Where Are All the Uber Drivers? Not in These Government Statistics*, L.A. TIMES (July 27, 2018), <http://www.latimes.com/opinion/op-ed/la-oe-hyman-contingent-temp-workers-20180729-story.html>. Audrey Freedman was a labor economist at the Bureau of Labor Statistics. *Id.* She used the term “contingent work” for the first time in 1985 at a conference on employment security. *Id.*

5. *See* Paul Schoukens & Alberto Barrio, *The Changing Concept of Work: When Does Typical Work Become Atypical?*, 8 EUR. LAB. L.J. 306, 312 (2017). It is also known as “crowdwork.” *Id.* at 317 n.80.

6. *See, e.g.,* H.W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89 (1965); *see also* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L.

within the past decade.<sup>7</sup> Traditionally, the gig economy has mostly been associated with chance engagements in a variety of venues for a short duration<sup>8</sup> – for example, labor lasting only for an evening, a weekend, or a week at clubs, restaurants, concert halls, shopping centers, open stadiums, and fairgrounds. Scholars best describe the gig economy as follows:

The term “gig” originated in the music industry, where musicians go into the studio to record one song or play in a band for one performance. The musicians with such gigs have no expectation of recording at the same studio the following day or playing with the same band the following night. Borrowing from the music industry, we define “gig employment” as one-time jobs where workers are employed on a particular task or for a defined period of time . . . . [A] gig worker is not paid a wage or salary; does not have an implicit or explicit contract for a continuing work relationship; and does not have a predictable work schedule or predictable earnings when working. Applying this definition, some sole proprietors, some independent contractors, and anyone who

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& POL’Y J. 187 (1999). An earlier discussion of the British law on the subject is contained in O. Kahn-Freund, *Notes of Cases, Servants and Independent Contractors*, 14 MOD. L. REV. 505 (1951). The Canadian situation is best summed up by Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL’Y J. 7 (1999). See also Judy Fudge et al., *Changing Boundaries in Employment: Developing a New Platform for Labour Law*, 10 CANADIAN LAB. & EMP. L.J. 329 (2003); Judy Fudge et al., *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada*, 10 CANADIAN LAB. & EMP. L.J. 193 (2003).

Some of the issues relate to relatively affluent professionals as well. See Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors”*, 26 BERKELEY J. EMP. & LAB. L. 143, 155–60 (2005). For discussion on the contemporary scene, see Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017); Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *The Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017); Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Rights in the On-Demand Economy*, 40 SEATTLE U. L. REV. 987 (2017); Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U. S.F. L. REV. 51 (2017) [hereinafter Lobel, *Gig Economy & the Future*]; Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577 (2016); Miriam A. Cherry, *People Analytics and Invisible Labor*, 61 ST. LOUIS U. L.J. 1 (2016); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016).

7. *Gig Economy*, OXFORD ENGLISH DICTIONARY, [https://en.oxforddictionaries.com/definition/gig\\_economy](https://en.oxforddictionaries.com/definition/gig_economy) (last visited Oct. 10, 2018) (describing the origin of “gig economy” as the “[e]arly [twenty-first] century”). The Cambridge English Dictionary defines “gig economy” as “a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer.” *Gig Economy*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/gig-economy> (last visited Oct. 10, 2018).

8. See Lobel, *Gig Economy & the Future*, *supra* note 6, at 51–52.

is a day laborer or on-demand/platform worker should be considered a gig worker.<sup>9</sup>

The description of this concept had its initial inspiration in the practice of musicians –disproportionately jazz musicians.<sup>10</sup> But members of symphony often engaged in separate gigs beyond their “regular” work as well.<sup>11</sup> This Article examines the concept of the independent contractor classification – a characterization at issue in early litigation involving the question of whether particular workers are employees or independent contractors. It describes the early cases arising in transportation, including over-the-road trucking, the taxi-cab industry, and package delivery companies like Federal Express (“FedEx”). The Article takes the position that the concept of flexibility, frequently used by employers to classify or reclassify employees as independent contractors, is a false justification for determining that employees are independent contractors. It also takes the position that engaging in part-time work for numerous employers is consistent with a finding of an employment relationship.

The Article focuses upon a “trilogy of cases,” beginning with the Supreme Court of California’s unanimous, landmark decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*,<sup>12</sup> which established a presumption in favor of employee status<sup>13</sup> – a holding that has provoked considerable resistance from the business community.<sup>14</sup> The second case is the United States Supreme Court’s 5-4 majority decision in *Epic Systems Corp. v. Lewis*,<sup>15</sup> which sustained prohibitions against employee class actions by upholding binding individual arbitration clauses – or “unbargained-for”<sup>16</sup> individual arbitration clauses, as Justice Ruth B. Ginsburg’s powerful dissenting opinion describes

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9. KATHARINE G. ABRAHAM ET AL., U.S. CENSUS BUREAU, MEASURING THE GIG ECONOMY: CURRENT KNOWLEDGE AND OPEN ISSUES 10 (2017), <https://ay-sps.gsu.edu/files/2016/09/Measuring-the-Gig-Economy-Current-Knowledge-and-Open-Issues.pdf>.

10. See Lora Keenan, *One Gig at a Time: Contract Lawyers and the New Economy*, OR. ST. B. BULL., May 2018, at 16, 18.

11. See *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 569–70 (D.C. Cir. 2016) (discussing the capability of symphonic musicians to “gig” with other symphonies in the area and pursue teaching and other musical endeavors while still “gigging” with the orchestra at hand). Cf. ROBERT J. FLANAGAN, *THE PERILOUS LIFE OF SYMPHONY ORCHESTRAS: ARTISTIC TRIUMPHS AND ECONOMIC CHALLENGES* (2012).

12. 416 P.3d 1 (Cal. 2018).

13. *Id.* at 40.

14. See generally Memorandum from DoorDash et al. to David M. Lanier, Sec’y of the Cal. Labor & Workforce Dev. Agency, & Keely Martin Bosler, Cabinet Sec’y to the Governor (July 23, 2018), <https://www.documentcloud.org/documents/4639019-Follow-Up-Letter-to-Secretary-Lanier-Keely.html>.

15. 138 S. Ct. 1612 (2018).

16. *Id.* at 1649 (Ginsburg, J., dissenting).

them.<sup>17</sup> The Article also discusses the transportation exemption from the strong pro-individual arbitration strictures of the Federal Arbitration Act of 1925 (“FAA”),<sup>18</sup> an issue recently addressed in United States Supreme Court in *New Prime, Inc. v. Oliveira*.<sup>19</sup> Finally, the third case, *Chamber of Commerce v. City of Seattle*,<sup>20</sup> examines Seattle’s unprecedented ordinance<sup>21</sup> that provided for collective bargaining for for-hire drivers, including taxicab drivers, as independent contractors and was deemed not to be preempted by the U.S. Court of Appeals for the Ninth Circuit.<sup>22</sup> The Article concludes that the court’s treatment of Seattle’s legislation under antitrust law is questionable but contends that the court’s analysis has nonetheless established a roadmap for state legislation – an avenue opened more clearly by the court’s conclusion that state and local governments are not preempted by federal law and have authority to legislate in this arena.<sup>23</sup>

## II. IMPLICATIONS OF THE INDEPENDENT CONTRACTOR STATUS

While traditional employment continues to be the rule rather than the exception, the advent of ride-sharing companies, like Uber and Lyft, as well as other gig companies, like TaskRabbit and Instacart, has raised concerns that the gig economy represents a new phenomenon that undercuts traditional employment through exploitation. In 2018, a study conducted by the U.S. Department of Labor reported that the number of workers who are characterized as independent contractors in today’s workforce had declined since 2005.<sup>24</sup> The statistics for this category only included workers who were mainly or exclusively independent contractors;<sup>25</sup> thus, the study excluded workers who sup-

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17. *Id.* at 1632 (majority opinion) (“The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written.”).

18. Federal Arbitration Act of 1925, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2018)).

19. See 139 S. Ct. 532 (2019). See discussion of *Oliveira* *infra* notes 210–13 and accompanying text.

20. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

21. Seattle, Wash., Ordinance 124968 (Dec. 14, 2015).

22. *Chamber of Commerce*, 890 F.3d at 781, 795 (finding “the Ordinance authorizes a per se antitrust violation” and finding that the ordinance was not preempted).

23. *Id.*

24. BUREAU OF LABOR STATISTICS, *supra* note 3, at 6. In May 2017, they note a 6.9% total employment – the largest of any alternative work arrangements – in comparison with 7.4% in February 2005. *Id.*; see also Ben Casselman, *Maybe the Gig Economy Isn’t Reshaping Work After All*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/business/economy/work-gig-economy.html>.

25. BUREAU OF LABOR STATISTICS, *supra* note 3, at 1 (“The measures of . . . alternative employment arrangements[, which includes independent contractors,] apply only to a person’s sole or main job. For individuals with more than one job, this is the job in which they usually work the most hours.”).

plemented their primary income with a second or third job as independent contractors. Because the U.S. Department of Labor report was designed to examine only a worker's primary work responsibilities, and thus only a general decline in the alternative work arrangements was shown, the report did not provide insight into whether the slight decline was due to an expanding traditional labor market or to high levels of underreporting by individuals taking on independent contractor work as a secondary source of income.<sup>26</sup>

Despite the fact that, according to the U.S. Department of Labor report, the number of workers characterized as full-time independent contractors has declined in recent years,<sup>27</sup> the issues surrounding the gig economy remain more pertinent in our society than ever before. Characterization of a worker as an independent contractor rather than an employee has several important implications. First, it may categorize gig workers as unemployed, therefore painting an erroneous national economic picture based upon flawed data and consequent policy.<sup>28</sup> Second, a worker who is characterized as an independent contractor rather than an employee is excluded from the basic safety net policies created during the New Deal era of the 1930s – such as the Social Security Act of 1935 (“SSA”),<sup>29</sup> the National Labor Relations Act of 1935 (“NLRA”)<sup>30</sup> or the Fair Labor Standards Act of 1938 (“FLSA”)<sup>31</sup> – and further developed during the New Frontier and Great Society eras of the 1960s.<sup>32</sup> These legislative efforts, originating under President Franklin D. Roosevelt's New Deal, were developed largely in response to perceived widespread unemployment and job shortages and included measures that were designed to increase the number of

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26. *See id.* at 5–7 (evidencing decrease in three surveyed alternative employment arrangements since the 2005 study but not speculating on the cause).

27. *Id.* at 6. As the result of this study, Professors Katz and Kreuger have confessed error. *See* Lawrence F. Katz and Alan B. Krueger, *Understanding Trends in Alternative Work Arrangements in the United States 2* (Nat'l Bureau of Econ. Research, Working Paper No. 25425, 2019); Josh Zumbrun, 'Gig Economy' Authors Say Work Flawed, *WALL STREET J.* (Jan. 8, 2019).

28. *See* Mary Dorinda Allard & Anne E. Polivka, *Measuring Labor Market Activity Today: Are the Words Work and Job Too Limiting for Surveys?*, *MONTHLY LAB. REV.*, Nov. 2018, at 1.

29. *See* Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. ch. 7).

30. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. §§ 151–169 (2018)); *see also* 29 U.S.C. § 152 (defining “employees” covered under the NLRA and excluding independent contractors).

31. The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–04, 206–07, 209–18, 218b, 218c, 219).

32. *See* Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended 42 U.S.C. § 2000e); *see also* 42 U.S.C. § 2000e(f) (“The term ‘employee’ means an individual employed by an employer” for purposes of Title VII of the Civil Rights Act of 1964); *cf.* William B. Gould IV, *Title VII of the Civil Rights Act at Fifty: Ruminations on Past, Present, and Future*, 54 *SANTA CLARA L. REV.* 369 (2014).

jobs available in the United States, to increase wages, and to decrease the length of the laborer's average work week.<sup>33</sup>

Under the New Deal, the SSA included provisions providing special assistance to covered workers in the form of unemployment compensation,<sup>34</sup> while the FLSA, in its original form, “set the minimum hourly wage at [twenty-five] cents[] and the maximum workweek at [forty-four] hours”<sup>35</sup> and established overtime hours during which employees must be paid.<sup>36</sup> Although initially the FLSA only applied to a limited scope of industries, the successive economic and social reform efforts of Presidents John F. Kennedy and Lyndon B. Johnson in the New Frontier and the Great Society eras successfully expanded the scope of the FLSA to encompass a broader range of industries, therefore allowing more employees to avail themselves of its protections.<sup>37</sup>

The NLRA provided covered employees the right to “join together to improve their wages and working conditions, with or without a union.”<sup>38</sup> However, with the passage of the Taft-Hartley Act in 1947,<sup>39</sup> the NLRA has reversed extant authority<sup>40</sup> and circumscribed employee rights to a relatively narrow common law definition.<sup>41</sup>

However, independent contractors do not enjoy the minimum wage and maximum hour benefits of the FLSA or the unemployment compensation provisions of the SSA.<sup>42</sup> Some states, however, provide special assistance for the

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33. See Philip Harvey, *An Analysis of the Principal Strategies That Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 BERKELEY J. EMP. & LAB. L. 677, 686–98 (2000).

34. Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, Social Security Bulletin, Vol. 66 (Nov. 1, 2005), <https://www.ssa.gov/policy/docs/ssb/v66n1/v66n1p1.html>.

35. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LABOR, <https://www.dol.gov/oasam/programs/history/flsa1938.htm#1> (last visited Oct. 30, 2018); see also 29 U.S.C. § 206.

36. 29 U.S.C. § 207.

37. *Chapter 6: Eras of the New Frontier and the Great Society, 1961–1969*, U.S. DEP'T LAB., <https://www.dol.gov/oasam/programs/history/dolchp06.htm> (last visited Oct. 30, 2018).

38. *Employee Rights*, NAT'L LAB. RELATIONS BD., <https://www.nlrb.gov/rights-protect/rights/employee-rights> (last visited Nov. 4, 2018).

39. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended 29 U.S.C. ch. 7).

40. See *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 129 (1944), *superseded by* National Labor Relations Act, 29 U.S.C. § 2(3), *as recognized by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

41. See *NLRB v. United Ins. Co.*, 390 U.S. 254, 258–59 (1968); *Darden*, 503 U.S. at 324–25. The common law criteria apply to the definition of employer as well. *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

42. See Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. ch. 7).

self-employed and therefore in some instances gig workers.<sup>43</sup> In addition, workers classified as independent contractors do not fall within the covered scope of the anti-discrimination legislation prohibiting discriminatory conduct on the basis of race, sex, religion, national origin, sexual orientation and age<sup>44</sup> or the Family and Medical Leave Act of 1993<sup>45</sup> and comparable statutes at the state level providing an employee with time off without pay.<sup>46</sup>

Independent contractors constitute a sort of precariat class, which includes those working in part-time or unscheduled jobs. In contrast to traditional jobs, independent contractor jobs frequently have a foreseeable expiration date. Benefits more likely available in the private sector to traditional employees, such as health care, sick pay, and vacations, are generally unavailable to the gig economy workforce. However, “The effects of growing inequality and loss of worker power are shared by workers in the standard and nonstandard jobs alike – stagnant wages, lack of access to workplace benefits, insufficient hours, wage theft, retaliation when trying to organize.”<sup>47</sup> It is thought that this second tier of the workforce is responsible for static wage growth in the midst of a full employment economy, which has been present since at least 2014.<sup>48</sup>

New, successful rideshare companies, like Uber and Lyft, have undercut the taxicab industry, which already had their drivers characterized as independent contractors. Ridesharing companies have been more lightly regulated than taxicabs in multiple ways. First, greater latitude is accorded to ridesharing companies in the hiring of drivers.<sup>49</sup> Second, ridesharing companies are not

42. See Andrew L. Yarrow, Opinion, *Update Labor Laws to Meet Needs of ‘Gig’ Economy*, S.F. CHRON. (June 10, 2018), <https://www.sfchronicle.com/opinion/openforum/article/Update-labor-laws-to-meet-needs-of-gig-12981182.php> (“Nine states have started . . . Self-Employment Assistance programs.”).

43. *Id.*

44. See 42 U.S.C. § 2000e-2(a) (2018).

45. See Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (codified as amended at 5 U.S.C. §§ 6381–6387; 29 U.S.C. §§ 2601, 2611–2619, 2631–2636, 2651–2654).

46. See, e.g., HAW. REV. STAT. ANN. § 398–4 (West 2018).

47. Annette Bernhardt, *Making Sense of the New Government Data on Contingent Work*, U.C. BERKELEY LAB. CTR. (June 10, 2018), <http://laborcenter.berkeley.edu/making-sense-new-government-data-contingent-work/>.

48. See Phillip Monar, *How Much Does the Gig Economy Pay? It’s Complicated*, SAN DIEGO UNION-TRIB. (Sept. 3, 2017), <http://www.sandiegouniontribune.com/business/economy/sd-fi-labor-day-gig-20170705-story.html> (“Estimates for how much someone can make in the gig economy vary wildly but there is typically one constant – pay is pretty low.”). For an extensive discussion of the relationship to labor unions see *Workers of the World, Log On! Technology May Help to Revive Organised Labor*, ECONOMIST, Nov. 15, 2018, at 23; cf. SARAH KESSLER, *GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK* (2018).

49. See *Checker Cab Operators, Inc. v. Miami-Dade Cty.*, 899 F.3d 908, 914 (11th Cir. 2018) (claiming “disparate regulatory frameworks,” taxicab license holders brought this list of treatment as a show of evidence). Cf. *Joe Sanfelippo Cabs, Inc. v.*



subject to hefty insurance coverage requirements.<sup>50</sup> Third, ridesharing companies are permitted to conduct their own independent background checks, while taxicab companies must conduct greater background checks of its drivers.<sup>51</sup> Fourth, ridesharing vehicles are not required to undergo vehicle inspections.<sup>52</sup> Fifth, taxicabs have been “bound by more onerous vehicle-appearance standards.”<sup>53</sup> And sixth, there have been maximum fare rates established for taxicabs but not for ridesharing.<sup>54</sup> The U.S. Court of Appeals for the Eleventh Circuit has upheld the constitutionality of this two-tier regulation, which has given advantages to ridesharing.<sup>55</sup>

The well-chronicled consequences of unregulated ridesharing in New York City highlight the fact that these differences are hardly ephemeral but rather are more consequential. Reputable studies have established that the wages of ridesharing and taxicab drivers, when one deducts all expenses associated with running an automobile, do not amount to enough to for the drivers to afford even a modest lifestyle in New York City.<sup>56</sup> In the case of ridesharing drivers,

Nine out of [ten] drivers are immigrants and approximately [fifty-four] percent are responsible for providing more than half of their family incomes. Beyond that, . . . the number of drivers for ride-hailing services

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City of Milwaukee, 839 F.3d 613 (7th Cir. 2016); Ill. Transp. Trade Ass’n v. City of Chicago, 839 F.3d 594, 599 (7th Cir. 2016) (“Beginning in the 1970s a deregulation movement swept the country, powered by the belief that competition is often superior to alternative regulation. Entire agencies vanished, such as the Civil Aeronautics Board, which had greatly limited competition in the airline industry. Many cities loosened the regulatory limitation on taxi services—and this well before there were any [Transportation Network Providers (“TNPs”)] . . . . The deregulation movement has surged with the advent of the TNPs. Chicago, like Milwaukee in [the] companion *Sanfelippo* case, has chosen the side of deregulation, and thus of competition, over preserving the traditional taxicab monopolies. That is a legally permissible choice.”).

50. *Checker Cab Operators, Inc.*, 899 F.3d at 914.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 924.

56. See Ginia Bellafante, *Uber and the False Hopes of the Sharing Economy*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/uber-nyc-vote-drivers-ride-sharing.html> (“[N]early two thirds of drivers who worked for ride-hailing services did so full time. They held no other jobs; approximately [eighty] percent bought cars for the purpose of making a living by driving them. Many were in debt from those acquisitions and making very little money.”); Winnie Hu, *Taxi Medallions, Once a Safe Investment, Now Drag Owners into Debt*, N.Y. TIMES (Sept. 10, 2017).

grew [ten] times faster than the rate of blue-collar employment[] or employment in the city overall. The gig, in effect, was the lifeline and the lifeline was insufficient.<sup>57</sup>

The outlook is even bleaker for taxicab drivers. In New York City, the lifeline was so insufficient that within a period of six months, six drivers committed suicide, causing the unions, which purport to represent their interests, to decry “widespread exploitation.”<sup>58</sup> The decline in profitability in the taxicab industry is so pervasive that, in 2018, taxi medallions that were once valued at over \$1 million dropped to a value as low as \$175,000.<sup>59</sup>

There have been two major responses to all of this by the state governments. The first is a legislative response, as showcased through the Seattle ordinance discussed *Chamber of Commerce* below.<sup>60</sup> The second and more recent response is New York City’s decision not only to curb the growth of ridesharing cars but also to establish a minimum wage of \$17.22 after expenses are established for drivers.<sup>61</sup> Defenders of the status quo, however, have protested the “burden of the loss of independent contractor’s status which . . . costs only [sixty-six] cents on the dollar for every hour worked for a full-time employee.”<sup>62</sup>

57. Bellafante, *supra* note 56.

58. Emma G. Fitzsimmons, *Taxi Drivers in New York Are Struggling. So Are Uber Drivers.*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/nyregion/uber-taxi-drivers-struggle.html>; cf. Holly Honderich, *Will S.F.’s Reforms Save Troubled Taxi Industry?*, S.F. CHRON. (Oct. 13, 2018) (describing taxicab driver issues in San Francisco).

59. *Id.* A taxi medallion is a mechanism that New York City used to restrict the number of cabs in business. Joe Nocera, *The Taxicab Bubble Couldn’t Last Forever*, BLOOMBERG (June 19, 2018, 12:15 PM), <https://www.bloomberg.com/opinion/articles/2018-06-19/uber-taxi-medallions-and-new-york-city-s-cab-bubble>. Drivers are required to buy a medallion in order to own a cab. *Id.*

60. See *infra* Section III.B.3.

61. See Glenn Fleishman, *New York Freezes Ride-Sharing Vehicles, Orders Minimum Wage for Uber, Lyft Drivers*, FORTUNE (Aug. 8, 2018), <http://fortune.com/2018/08/08/new-york-freeze-ride-sharing-vehicles-minimum-wage-lyft-uber/> (“The regulation didn’t specify a dollar amount, but a report presented to the city’s Taxi and Limousine Commission . . . suggested \$17.22 an hour, which would be \$15 plus the overhead costs of operating a vehicle.”).

62. IAN ADAMS & BRIAN JENCUNAS, R STREET, ECONOMIC COSTS AND POLICY ALTERNATIVES TO CALIFORNIA’S DYNAMEX DECISION 3 (2018), <https://2o9ub0417chl2lg6m43em6psi2i-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/145.pdf>; see also ROBERT HABANS, UCLA INST. FOR RES. ON LAB. AND EMPLOYMENT, EXPLORING THE COSTS OF CLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS: FOUR ILLUSTRATIVE SECTORS 1 (2015), [http://www.bollettinoadapt.it/wp-content/uploads/2015/12/IndependentContractorCost\\_20151209.pdf](http://www.bollettinoadapt.it/wp-content/uploads/2015/12/IndependentContractorCost_20151209.pdf) (“For the scenarios presented here, independent contractor status saves business between [twenty-nine] and [thirty-nine] cents for every dollar of pay – possibly more for certain classes of construction workers.”).

What else or what more can be done? As Ginia Bellafante, a New York Times journalist, said, “What is astonishing about the current legislation is how tepid much of it actually is and how ferociously it was fought by the companies involved.”<sup>63</sup> Both *Dynamex* and the legislative responses of Seattle and New York City constitute reasonable first steps to address the above noted rampant abuses promoted through the two-tier worker categorization of the gig economy.<sup>64</sup>

### III. LITIGATION RELATED TO THE EMPLOYEE-INDEPENDENT CONTRACTOR STATUS

Knowing how the law has evolved and developed on the question of status in the workplace is important to understanding the current debate. Section A of this Part details the early cases that attempted to differentiate between employees and independent contractors. Section B examines a trilogy of recent cases that revisit this important question.

#### A. The Early Cases – A Conflict of Interpretation

The economic reality that independent contractor jobs are, in part, responsible for stagnancy in wages present among the traditional workforce accounts for the host of litigation that has emerged in state courts across the nation, particularly in California,<sup>65</sup> over whether workers are independent contractors or employees. The actions are usually brought in state courts or before the California Labor Commissioner by workers seeking recovery for minimum wage loss and overtime protection.<sup>66</sup> State law, which is – for the most part – predicated upon the restrictive common law criteria for defining “employee,” has

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63. Bellafante, *supra* note 56.

64. See generally John Herzfeld, *NYC Council Advances Bills Protecting Taxi, Ride-Hailing Drivers*, BLOOMBERG LAW (Nov. 14, 2018), <https://www.bna.com/nyc-council-advances-n57982093868/> (describing the most recent legislative initiatives in New York City); cf. Pippa Crerar, *Gig Economy Workers’ Rights to be Given Boost in Overhaul*, GUARDIAN, Nov. 8, 2018 (describing initiatives undertaken in Great Britain).

65. California is now the world’s fifth-largest economy, surpassing that of the United Kingdom. Jonathan J. Cooper, *California Now World’s 5th Largest Economy, Surpassing UK*, USA TODAY (May 5, 2018, 1:29 PM), <https://www.usatoday.com/story/news/nation-now/2018/05/05/california-now-worlds-5th-largest-economy-beating-out-uk/583508002/>.

66. See also, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1073 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015); see *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at \*1 (Cal. Dept. Lab. June 3, 2015). See generally William B. Gould IV, *The Future of the Gig Economy, Labor Law, and the Role of Unions: How Will They Look Going Forward?*, in NATIONAL ACADEMY OF ARBITRATORS 70TH ANNUAL PROCEEDINGS 2017: THE NEW WORLD OF WORK, 112–13 (2017).

produced uncertainty, lengthy litigation,<sup>67</sup> and relief in the form of damages and attorneys' fees and costs.

In cases involving the right to organize under the NLRA, the National Labor Relations Board ("NLRB") has defined what constitutes an employee<sup>68</sup> and has determined that taxicab drivers are independent contractors and thus, as a practical matter, fall outside the protection of the NLRA, even though the industry is within its jurisdiction.<sup>69</sup> In the 1990s, the NLRB interpreted the NLRA to include some truck drivers as employees.<sup>70</sup> However, the NLRB continued to classify some truckers as independent contractors.<sup>71</sup> It is now ever more apparent that the increased use of independent contractors in trucking has produced enormous inequality:

Many truck drivers are paid on a per-mile basis, which means that some earn less than the federal minimum wage of \$7.25 an hour. The economics of trucking can be bleaker still for drivers who are classified as independent contractors. Some even wind up owing trucking companies money because a truck lease, insurance, fuel and other expenses can add up to more than their per-mile reimbursement rate . . . .<sup>72</sup>

Dominic Oliveira has firsthand experience with this problem . . . [as he] work[ed] for New Prime . . . in 2013 and 2014 [and spent] much of that time as an independent contractor. Some weeks he owed the company . . . money after driving more than 1,000 miles. He made so little that he could not always afford rent and he spent long stretches – six months,

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67. The difficulties and limitations involved in this litigation have been chronicled in V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739 (2017); see also Martin H. Malin, *Protecting Platform Workers in the Gig Economy: Look to the FTC*, 51 IND. L. REV. 377 (2018).

68. 29 U.S.C. § 152(3) (2018).

69. See sources cited *infra* note 71.

70. *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842, 854 (1998) (concluding that pick-up and delivery drivers are employees under the NLRA and not independent contractors) (Chairman Gould, concurring).

71. *Dial-a-Mattress*, 326 N.L.R.B. 884, 894–95 (1998) (Chairman Gould, dissenting). Earlier, the NLRB and the courts had impeded trade union organizing in the taxicab industry by virtue of their conclusion that taxicab drivers were frequently independent contractors. The leading cases here are *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (11th Cir. 1983); *Local 777, Democratic Union Org. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978); and *Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983). See also Veena Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi and Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73 (2017) and Veena Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65 (2017). But see *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008); *City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980).

72. Opinion, *The Trouble with Trucking*, N.Y. TIMES (Aug. 11, 2018), <https://www.nytimes.com/2018/08/11/opinion/sunday/the-trouble-with-trucking.html>.

at one point – living out of his truck. Mr. Oliveira’s contract said he was free to drive for other trucking companies but there were numerous conditions that bound him to New Prime.<sup>73</sup>

Meanwhile, the plot thickened, as the independent contractor-employee dispute spread to the product packaging industry. Most of the litigation leading up to 2018 has involved FedEx workers who had some measure of autonomy in deciding the speed and order in which their work was performed.<sup>74</sup> In the final analysis, courts have held that the company required work in a particular time period and that the FedEx workers should have been properly regarded as employees.<sup>75</sup> In *FedEx Home Delivery v. NLRB*,<sup>76</sup> however, the U.S. Court of Appeals for the District of Columbia Circuit reversed the NLRB and held that FedEx drivers were independent contractors inasmuch as they could operate routes, hire additional drivers and helpers, and sell routes without permission.<sup>77</sup> In so reversing, the District of Columbia Circuit endorsed the view that the NLRB did not possess the “special administrative expertise” in the NLRA cases that normally applies.<sup>78</sup> In so reasoning, the District of Columbia Circuit ignored the United States Supreme Court’s admonition that the NLRB’s position should not be reversed where it involves a “choice between two fairly conflicting views.”<sup>79</sup> The court focused on the level of entrepreneurial opportunity

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73. *Id.*; see also *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019). This is a phenomenon that Steve Viscelli, a sociologist at the University of Pennsylvania, detailed in his 2016 book, *STEVE VISCELLI, THE BIG RIG: TRUCKING AND THE DECLINE OF THE AMERICAN DREAM* (2016).

74. See Gould, *supra* note 66, at *passim*.

75. *Id.* at 101–02.

76. 563 F.3d 492 (D.C. Cir. 2009) [hereinafter *FedEx I*].

77. See *id.* at 504.

78. See *id.* at 496 (quoting *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 598 (D.C. Cir. 1989)); see also *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1128 (D.C. Cir. 2017) [hereinafter *FedEx II*] (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968)) (“[T]he question whether a worker is an ‘employee’ or ‘independent contractor’ under [NLRA] is a question of ‘pure’ common-law agency principles ‘involv[ing] no special administrative expertise that a court does not possess.’”). The court of appeals in *FedEx II* held that, given the United States Supreme Court’s finding that no special administrative expertise was involved in these cases, “this particular question under the [NLRA] is not one to which we grant the [NLRB] *Chevron* deference . . . .” *FedEx II*, 849 F.3d at 1128; see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“If [a] statute is silent or ambiguous with respect to the specific issue, the question for the court whether the agency’s answer is based on a permissible construction of the statute.”).

79. *FedEx I*, 563 F.3d at 496 (quoting *C.C. E., Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995)); see also *United Ins. Co.*, 390 U.S. 254, 260 (1968). Over time, the Court has established a set of standards for interpreting the NLRA. See, e.g., *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398–99 (1996) (quoting *Chevron*, 467 U.S. at 843) (“If a statute’s meaning is plain, the [NLRB] and reviewing courts ‘must give effect to the unambiguously expressed intent of Congress.’”); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 93–94 (1995) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S.

as the dominant factor to consider when making a determination that a worker is an independent contractor.<sup>80</sup> Chief Judge Merrick B. Garland’s well-reasoned dissent instead stressed the role that control and the essential nature of the work performed to the employer’s business play in the analysis and expressed fidelity to the standard of deference mandated by the United States Supreme Court.<sup>81</sup>

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883, 891 (1984)) (“[W]hen reviewing the [the NLRB]’s interpretation of the term ‘employee’ as it is used in [the NLRA], we have repeatedly said that ‘[s]ince the task of defining the term employee is one that has been assigned primarily to the agency created by Congress to administer the [NLRA], . . . the [NLRB]’s construction of that term is entitled to considerable deference . . . .”); *Sure-Tan*, 467 U.S. at 891; *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982) (“Congress’ refusal to intervene indicated that it intended to leave to the [NLRB]’s specialized judgment the resolution of conflicts between union and employer rights that were bound to arise in multiemployer bargaining.”); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (“Of course, the judgment of the [NLRB] is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the court might prefer another view.”); *Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (“The judicial role is narrow: The rule which the [NLRB] adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the [NLRB]’s application of the rule, if supported by substantial evidence on the record as a whole, must be enforced.”); *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957) (“The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [NLRB], subject to limited judicial review.”).

80. *FedEx I*, 563 U.S. at 504 (“Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the [NLRB] cannot be said to have made a choice between two fairly conflicting views.”). This ruling seems to be ignored in *FedEx II*. *FedEx II*, 849 F.3d at 1128 (“[T]his particular question under [NLRA] is not one to which we grant the Board *Chevron* deference . . . .”). Of course, *Chevron* invokes the standards which the United States Supreme Court established for the NLRA itself in cases alluded to above. See sources cited *supra* note 79. The NLRB General Counsel has taken the position that misclassification is not inherently unfair labor practice. Memorandum from Jayme L. Sophir, Assoc. Gen. Counsel, Nat’l Labor Relations Bd. to John J. Walsh, Jr., Reg’l Dir., Nat’l Labor Relations Bd. (Apr. 23, 2018), <https://apps.nlr.gov/link/document.aspx/09031d458275a5e9>. However, an administrative law judge has held to the contrary. *Velox Express, Inc. & Jeannie Edge*, Case 15-CA-184006, 2017 WL 4278501 (N.L.R.B. Sept. 25, 2017) (“Thus, where it is a ‘close call,’ agencies and courts should err on the side on finding employee status.”).

81. See *FedEx I*, 563 F.3d at 504–19 (Garland, J., dissenting). Judge Garland protested the majority’s almost exclusive reliance upon the entrepreneurial opportunity as a basis for concluding that the drivers were independent contractors and noted that there was not an actual single instance of such opportunity. *Id.* at 507. Judge Garland said, “It is not unreasonable for the NLRB to take the position that a material number of workers must actually take advantage of an opportunity before it will conclude that the opportunity is significant and realistic rather than insubstantial and theoretical.” *Id.* at 517.

Curiously, in 2016, the very same court appeared to adopt the position established in Judge Garland's dissent in its decision of *Lancaster Symphony Orchestra v. NLRB*.<sup>82</sup> The *Lancaster Symphony Orchestra* case involved musicians employed on a regular basis by the Lancaster Symphony.<sup>83</sup> Ordinarily, the musicians in question did not hire someone to serve in their place, although they were obliged to find replacements for last-minute cancellations.<sup>84</sup> The District of Columbia Circuit noted that even though the musicians were able to back out of a series of programs and play for a higher-paying "gig" with another symphony, the entrepreneurial opportunity was "limited" and provided "miniscule support" for the conclusion that they were independent contractors.<sup>85</sup> The court stated that

[u]nlike FedEx drivers, the Orchestra's musicians – even with their ability to back out of a concert in order to take advantage of a more profitable gig – can increase their income only by accepting jobs with other employers. Were this quite minor entrepreneurial opportunity given much weight, it might lead to almost automatic classification of many

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Similarly, Judge Fletcher for the U.S. Court of Appeals for the Ninth Circuit has said, "There is no indication that California has replaced its longstanding right-to-control test with the new entrepreneurial-opportunities test developed by the D.C. Circuit." *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 993 (9th Cir. 2014).

I have long been of the view that the control attributable to government regulation is irrelevant and should not be distinguished from employer control. As I said,

I would reverse current [NLRB] precedent and find that controls mandated by Governmental regulation should be considered probative of an employer-employee relationship.

. . . [C]ontrols placed by the employer upon workers are indicative of an employment relationship, regardless of whether the employer imposes the controls because of [g]overnment regulation or for independent business reasons.

. . . .

It is true that the [g]overnment is the source of the regulations and that the carriers have no choice but to impose the regulations if they wish to do business. However, it is also true that the [g]overnment does not directly interact with the drivers or owner-operators.

. . . .

[T]hat, in my view, is the heart of the matter. To the extent that the [g]overnment sets regulations, it relies on the carriers to impose and enforce them. The only "face" the drivers see is that of the carrier, not the [g]overnment. The reality of such a situation is that of an employment relationship where the carrier has significant control over the drivers' job performance.

*Roadway Package Sys., Inc.*, 326 NLRB 842, 854–55 (1998) (Chairman Gould, concurring).

82. 822 F.3d 563 (D.C. Cir. 2016).

83. *Id.* at 564.

84. *Lancaster Symphony Orchestra*, 822 F.3d at 569.

85. *Id.* at 570.

part-time workers as contractors. Yet as the [NLRB] explained, “[p]art-time and casual employees covered by the [NLRA] often work for more than one employer.”<sup>86</sup>

This Article argues that *Lancaster Symphony Orchestra* is at odds with portions of the court’s reasoning in *FedEx Home Delivery*, given that the latter gave weight almost exclusively to the entrepreneurial opportunity. As noted, *Lancaster Symphony Orchestra* allows for entrepreneurial opportunities that might exist through a “gig” with another employer. This is a theme that emerges anew in some of the ridesharing cases involving Uber and Lyft.<sup>87</sup> The fact is that many casual or part-time employees are similarly situated to musicians in *Lancaster Symphony Orchestra* and will work for a number of employers. The District of Columbia Circuit noted this critical point in *Lancaster Symphony Orchestra*, where it affirmed the NLRB’s conclusion and held that the exclusion of workers as employees on the ground that they are part-time or casual is inconsistent with the NLRA’s coverage.<sup>88</sup>

Moreover, the idea of a “prohibition on moonlighting” is unknown today – indeed, even the word itself is strange to most millennials. The term moonlighting was taken from the practice of working a second job by the light of the moon, which – a half century ago – was regarded as irregular.<sup>89</sup> For instance, when employers unsuccessfully sought to exclude “salt” employees – persons getting a job at a specific workplace with the intent of organizing a union – from their workforce, they did not contend that a policy against “serving two masters” applied to other employers besides unions.<sup>90</sup> This is because the practice of employment with more than one employer has become widespread,

86. *Id.* (citing *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011)).

87. In the ridesharing context, control is more sophisticated and autonomy in terms of schedules and ability to work elsewhere substantial. *See, e.g.*, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015); Gould *supra* note 66, at 90; *see also* Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html>.

88. *Lancaster Symphony Orchestra*, 822 F.3d at 565, 570.

89. *See Moonlight*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/moonlight> (last visited Oct. 11, 2018).

90. Here the union acted as an employer because the union employed “salts” to organize employers. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 96 (1995); *see also, e.g.*, *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 432–33 (6th Cir. 1997) (an employer may lawfully adopt neutral policy against moonlighting if there is no discriminatory intent against the union); *Tualatin Elec., Inc.*, 319 N.L.R.B. 1237, 1237, 1241 (1995) (holding that employer’s no-moonlighting policy violated NLRA because it was enacted to avoid hiring salts). Arbitration decisions from the 1950s and 1960s have established the principle that moonlighting itself is not just cause for discharge short of the moonlighting employee negatively affecting the business interests of the primary employer. *See, e.g.*, *Firestone Retread Shop*, 38 BNA LA 600, 601 (1962); *Janitorial Serv., Inc.*, 33 LA 902, 908–09 (BNA 1959).



moving beyond the traditional “moonlighting” practice that employers attempted to prohibit based on concerns that employees were not well-rested.

Because of the demise of such employer practices, the phenomenon of working for more than one employer cannot be viewed as dispositive on the employee-independent contractor issue. Flexibility in hours is something frequently associated with employee status as well as independent contractor status. This point was duly noted by both the NLRB and the District of Columbia Circuit in *Lancaster Symphony Orchestra*.<sup>91</sup> A fundamental problem with the early case law was that its reference to numerous criteria – such as entrepreneurial opportunity and flexibility in hours – lacked clarity that the parties could rely upon and provided an opportunity for judicial predilections. As a result of these cases, it became clear that the criteria should (1) be simplified to be more easily understandable and to act as guidance and (2) promote protection for workers in trucking, ridesharing, and elsewhere who are exposed to bad working conditions that promote inequality. The problem with the NLRA, however, is that its Taft-Hartley legislative history has locked labor and management into the more numerous and thus imprecise common law standards.<sup>92</sup>

### *B. The 2018 Independent Contractor-Employee Trilogy*

In early 2018, the federal and state courts handed down several decisions that will have a major impact upon the independent contractor-employee legal arena. The first of them, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*,<sup>93</sup> decided by the Supreme Court of California, provided a strong framework for determining whether drivers are independent contractors or employees and also provided a favorable ruling on the question of whether workers wishing to challenge their status can do so through class action litigation.<sup>94</sup> In the second ruling, *Epic Systems Corp. v. Lewis*,<sup>95</sup> the United States Supreme Court held in a 5-4 decision that binding arbitration agreements mandating that all employees waive their ability to utilize class actions in disputes with their employers – a tactic that has been frequently used in employment contracts<sup>96</sup> – are enforceable under the FAA;<sup>97</sup> however, Justice Ginsburg, in her dissent, characterized this tactic as “unbargained-for.”<sup>98</sup> The third ruling, *Chamber of Commerce v. Seattle*,<sup>99</sup> which arose in Washington, involved the question of whether legislation enacted at the municipal level

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91. *Lancaster Symphony Orchestra*, 822 F.3d at 568.

92. See *supra* notes 39–41.

93. 416 P.3d 1 (Cal. 2018).

94. See *generally id.*

95. 138 S. Ct. 1612 (2018).

96. *Id.* at 1634.

97. *Id.* at 1624–29.

98. *Id.* at 1649 (Ginsburg, J., dissenting).

99. 890 F.3d 769 (9th Cir. 2018).

that “authorize[d] a collective-bargaining process” between ridesharing companies, such as Uber and Lyft, and independent contractors who worked for those companies as drivers could stand in light of both federal antitrust law and labor law standards set forth by the NLRA.<sup>100</sup>

It is difficult to estimate which of these decisions is the most important; but because *Dynamex* was heard by the Supreme Court of California and *Epic Systems* was heard by the United States Supreme Court, both have the potential to be lasting. The Supreme Court of California ruling was significant because, unless eviscerated by special interest political pressure in 2019 and beyond, it will result in a major, positive transformation of many employment relationships within California – which has the fifth largest economy in the world – by allowing drivers to challenge their status as independent contractors as a class rather than as individuals.<sup>101</sup>

But the United States Supreme Court’s *Epic Systems* decision takes much of this positive impact of *Dynamex* away, except possibly in some aspects of transportation, as developed below.<sup>102</sup> The U.S. Court of Appeals for the Ninth Circuit in *Chamber of Commerce*, while interpreting antitrust law in a manner that accepts the essential contention of the new ridesharing companies – i.e., that there are new sectors of the economy not contemplated or addressed by existing state statutes<sup>103</sup> – nonetheless paves the way for state regulation of independent contractors who are not characterized as employees through rejection of NLRA preemption. The preemption doctrine strips jurisdiction from the states and provides a roadmap under federal antitrust law. Under the Ninth Circuit’s opinion, however analytically flawed, the way is open for the new legislation by states that wish to promote collective bargaining in the independent contractor arena.

### 1. *Dynamex Operations West, Inc. v. Superior Court of the Los Angeles County*

In *Dynamex Operations West, Inc. v. Superior Court of the Los Angeles County*,<sup>104</sup> the first of these three groundbreaking decisions, Chief Justice Tani G. Cantil-Sakauye, writing for a unanimous court, held that, in the California wage order context, a worker will be presumed to be an employee rather than an independent contractor unless the business meets several criteria proving otherwise, known as the “ABC” test.<sup>105</sup>

Dynamex is a nationwide, same-day courier service that operates a number of business centers in California and has large corporate customers, such

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100. *Id.* at 775–76.

101. Cooper, *supra* note 65.

102. *See infra* Section III.B.2.

103. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 784–85 (9th Cir. 2018).

104. 416 P.3d 1 (Cal. 2018).

105. *See generally id.*

as Office Depot and Home Depot.<sup>106</sup> Drivers were converted into independent contractors in order to generate economic savings; thus, drivers were “required to provide their own vehicles and pay for all their own transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers’ compensation insurance.”<sup>107</sup> The ultimate issue before the court was whether the classification of the drivers as independent contractors violated California wage orders related to California minimum wages and overtime pay, as well as unlawful business practices under state law.<sup>108</sup>

In *Dynamex*, “two individual delivery drivers, suing on their own behalf” as well as a class of similarly situated drivers in one action, protested their classification as independent contractors.<sup>109</sup> The “[d]rivers of Dynamex [were] generally free to set their own schedule but [had to] notify” the company a number of days in advance.<sup>110</sup> The drivers paid for a cellular telephone to contact Dynamex.<sup>111</sup> The drivers were assigned deliveries by the dispatchers at Dynamex’s sole discretion and had no guarantee on the number and type of deliveries they would be offered.<sup>112</sup> The drivers could choose the sequence by which they made deliveries, however, like FedEx drivers, they were required to make the delivery on the day of assignment.<sup>113</sup>

The Supreme Court of California premised its discussion by noting that, in some circumstances, “classification as an independent contractor [could] be advantageous to [a] worker[] as well as to [an employer] . . . .”<sup>114</sup> The court stated that

the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue

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106. *Id.* at 8.

107. *Id.*

108. *Id.* at 5, 9.

109. *Id.* at 5.

110. *Id.* at 8.

111. *Id.*

112. *Id.*

113. *See id.* at 5.

114. *Id.*

and millions of workers of the labor law protections to which they are entitled.<sup>115</sup>

As a preliminary matter, the court was asked to determine whether the *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*<sup>116</sup> decision – Supreme Court of California precedent that was long characterized within the state as “embodying the common law test or standard for distinguishing employees and independent contractors” – was the only appropriate “standard” under California law for resolving the independent contractor issue.<sup>117</sup> In *Dynamex*, the court determined that the preexisting *Borello* approach regarding employees and independent contractors focused primarily upon the scope and purpose of the particular statutory scheme involved and was not “limited by common law principles,” as the *Borello* court had once stated.<sup>118</sup>

In *Dynamex*, the Supreme Court of California adopted the “suffer or permit to work” definition of the employee for the purposes of state law,<sup>119</sup> which is a more expansive approach to coverage principally associated at the national level with the cases addressing the FLSA.<sup>120</sup> In *Dynamex*, the court held that the “suffer or permit to work standard is relevant and significant in assessing the scope of the category of workers that the wage order was intended to protect.”<sup>121</sup> Accordingly, the court explained that the “suffer or permit to work” standard allows the exclusion of a worker as an independent contractor only if

the worker is the type of traditional independent contractor – such as an independent plumber or electrician – who would *not* reasonably have been viewed as working *in the hiring business*. Such an individual would have been realistically understood . . . as *working only in his or her own independent business*.

The federal courts, in applying the suffer or permit to work standard set forth in the FLSA, have recognized that the standard was intended to be broader and more inclusive than the preexisting common law test for distinguishing employees from independent contractors, but at the same time, does not purport to render every individual worker an employee rather than an independent contractor.<sup>122</sup>

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115. *Id.*

116. 769 P.2d 399 (Cal. 1989).

117. *Dynamex Operations W., Inc.*, 416 P.3d at 19, 25 (citation omitted).

118. *Id.* at 19 (italics omitted) (quoting *S. G. Borello & Sons, Inc.*, 769 P.2d at 405).

119. *Id.* at 26.

120. *Id.* at 33.

121. *Id.* at 30. This is why the “suffer or permit to work” standard in California wage orders “finds its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied.” *Id.* at 31–32.

122. *Id.* at 33 (alterations in original) (citations omitted).

The *Dynamex* court referenced the appropriateness of the economic realities standard in its expansive protection beyond the relatively restrictive common law standard and noted that a “multi-factor standard” possessed a substantial number disadvantages – “particularly in the wage and hour context.”<sup>123</sup> The first of these disadvantages is that the standard is inherently vague, provides little guidance to both the worker and employer, and instead utilizes criteria that result in “often considerably delayed judicial decisions.”<sup>124</sup> Second, the standard incentivizes evasion of “fundamental responsibilities” by allowing an employer to “divid[e the] workforce into disparate categories and varying the working conditions of individual workers” so as to utilize the many circumstances which may be relevant.<sup>125</sup> The court noted that

a number of jurisdictions have adopted a simpler, more structured test for distinguishing between employees and independent contractors – the so-called “ABC” test – that minimizes these disadvantages. The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity’s business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.<sup>126</sup>

Thus, joining Massachusetts<sup>127</sup> and New Jersey,<sup>128</sup> the Supreme Court of California adopted the ABC test.<sup>129</sup> The first criterion of the ABC test is control.<sup>130</sup> Control is a longstanding requirement that was present in the common law definition of employee as well as the more recent NLRA decisions.<sup>131</sup> The second criterion is that the work that is done must be “clearly comparable” to

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123. *Id.*

124. *Id.*

125. *Id.* at 34.

126. *Id.* (alteration in original). *See generally* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53 (2015) (evaluating the many state jurisdictions have a place for a common law test with more simplified standards, which allow for less evasion than the common law test that was substituted for *Hearst*).

127. *See Ives Camargo’s Case*, 96 N.E.3d 673, 680 (Mass. 2018). *Cf. Fleece on Earth v. Departments of Employment and Training*, 181 Vt. 458, 464 (2007).

128. *See Hargrove v. Sleepy’s, LLC*, 106 A.3d 449, 463 (N.J. 2015).

129. *Dynamex Operations W., Inc.*, 416 P.3d at 35.

130. *Id.* at 36.

131. *Id.*; *see, e.g., Crew One Prods., Inc. v. NLRB.*, 811 F.3d 1305, 1311 (11th Cir. 2016).

the work done in the ordinary course of business.<sup>132</sup> This replicates the approach taken by the courts in employment cases transcending the independent contractor-employee scenario, where the employer seeks to subordinate a second group of workers, hired on, for instance, on an annual renewal basis, with both groups performing the same task or functions.<sup>133</sup> The third criterion – “that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity” – is the most straightforward.<sup>134</sup> For example, if the worker is a plumber and working for another plumber or an employer who conducts a separate business, then this third criterion would be satisfied.<sup>135</sup>

The significance of *Dynamex* lies not only in its simplified approach to making independent contractor-employee determinations but also in its requirement that the employer carry the burden with respect to each of the ABC test’s criteria.<sup>136</sup> But there are also a host of unanswered questions that stem from the *Dynamex* decision. The first question is whether the decision applies retroactively. This is an issue of considerable consequence given the damages liability that would flow from retroactivity.<sup>137</sup> If the decision applies retroactively, defendants might argue that they relied upon other pro-employer criteria in good faith to side-step liability.<sup>138</sup>

The second and more basic question is whether and to what extent the court’s holding in *Dynamex* applies to other employment controversies beyond the wage order context. The court in *Dynamex* emphasized the application of the ruling to “wage orders,” and it seems clear that the new standard would apply to disputes about overtime and maximum hours as well as rest and meal periods inasmuch as those were the issues presented in the case.<sup>139</sup> But the court specifically did not address the question whether employees could obtain

132. *Dynamex Operations W., Inc.*, 416 P.3d at 37.

133. *Id.*; see, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997); *Kalksma v. Konica Minolta Bus. Sols. U.S.A., Inc.*, No. CIV. 10-2829 DRD, 2011 WL 3703471 (D.N.J. Aug. 22, 2011); *Oplchenski v. Parfums Givenchy, Inc.*, No. 05 CV 6105, 2009 WL 440959 (N.D. Ill. Feb. 19, 2009); *Contracts – Independent Contractor Agreements – Ninth Circuit Finds That Misclassified Employees Are Eligible for Federally Regulated Employee Benefits*, 111 HARV. L. REV. 609 (1997).

134. *Dynamex Operations W., Inc.*, 416 P.3d at 8.

135. *Id.* at 38–39.

136. *Id.* at 35.

137. See *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978 (2002) (“The general rule that judicial decisions are given retroactive effect is basic in our legal tradition”). Orange County Superior Court in California has also ruled *Dynamex* applies retroactively. *Johnson v. VCG-IS, LLC*, No. 30-2015-00802813 (Cal. Sup. Ct. July 25, 2018) (deciding to apply the ABC test from *Dynamex* because the Court did not give directions to depart from the general rule that court decisions will apply to retroactive and pending cases).

138. William Baude & Eugene Volokh, Comment, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 203 (2018) (concluding that the good faith exception to retroactivity is substantially circumscribed).

139. *Dynamex Operations W., Inc.*, 416 P.3d at 5, 14.

reimbursement for expenses incurred, as that issue was not put forward.<sup>140</sup> Moreover, the question of whether the standard applies in workers' compensation and in Private Attorney General Act ("PAGA")<sup>141</sup> actions remains to be resolved. Unless there is another basis for declining to extend *Dynamex* to other employment scenarios, the ABC test should apply in the interest of uniformity and the need for employers to conduct business under one standard.

Litigation has been commenced in the wake of the case.<sup>142</sup> Presumably, criterion A will likely be the easiest factor for the courts to apply. *Borello* held that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired,"<sup>143</sup> and the *Dynamex* decision appears to retain control as critical.<sup>144</sup>

Criterion B will likely be the most difficult factor for the courts to apply. This is because determining whether a job constitutes "same business" or "comparable work" may be more difficult for courts to quantify. For example, consider a plumber or electrician who is hired at one particular outlet where such workers are not considered employees but another who is considered employed elsewhere.

Criterion C will not be entirely without its difficulties either. For instance, courts will be asked to determine the extent to which an independent tradesperson must be informally established as an independent enterprise. In making such a determination, courts must consider whether the tradesperson's business must be incorporated and whether there is a threshold advertising requirement associated with independent contractor status. In addition, the court may be asked to answer complex, context-specific questions. For example, if a retired electrician does work for an employer, would that retired electrician be deemed an independent contractor within the meaning of criterion C?

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140. *Id.* at 7 n.5. Subsequently, some courts have assumed that *Dynamex* does not apply to expense reimbursement. *Garcia v. Border Transp. Grp., LLC*, 2239 Cal. Rptr. 3d 360, 370–71 (Cal. Ct. App. 2018); *Rosset v. Hunter Eng'g Co.*, No. A148819, 2018 WL 4659498, at \*3 n.2 (Cal. Ct. App. Sept. 27, 2018); *Salgado v. Daily Breeze*, No. B269302, 2018 WL 2714766, at \*15 n.6 (Cal. Ct. App. June 2018); *Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18–04176, 2018 WL 5809428, at \*3–4 (N.D. Cal. Nov. 6, 2018); *Alvarez v. XPO Logistics Cartage LLC*, No.: CV 18–03736, 2018 WL 6271965, \*4, \*7 (C.D. Cal. Nov. 15, 2018). *But see Estrada v. FedEx Ground Packages Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Cal. Ct. App. 2007) (providing for expense reimbursement).

141. Private Attorney General Act of 2004, 2003 Cal. Leg. Serv. ch. 906 (codified as amended CAL. LAB. CODE § 2699 (West 2018)).

142. *See, e.g., Goro v. Flowers Foods, Inc.*, No. 17-CV-02580-JLS-JLB, 2018 WL 3956018, at \*3 n.3 (S.D. Cal. Aug. 17, 2018); *Brown v. Wal-Mart Store, Inc.*, No. 09-CV-03339-EJD, 2018 WL 3417483, at \*4 (N.D. Cal. July 13, 2018); *Curry v. Equilon Enters., LLC*, 233 Cal. Rptr. 3d 295, 312 (Ct. App. 2018).

143. *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 403–04 (Cal. 1989) (citations omitted).

144. *Dynamex Operations W., Inc.*, 416 P.3d at 36.

On the face of it, criterion B is the factor that should prove most troublesome for employers who seek to show that workers maintained skills and experience that are not comparable to the skills and experience of the employees in their respective workforce. Another issue may arise if the employer seeks to establish the independent contractor category by contracting work out to other employers and promoting a kind of “fissurization” – i.e., the breakup of tasks and functions of work previously performed by others.<sup>145</sup>

There are uncertainties about the viability of *Dynamex* and its adoption of the ABC test as it relates to trucking.<sup>146</sup> These cases are triggered by the preemption issue, which arises by virtue of the confluence of Article VI and Article I, Section 8 of the U.S. Constitution – the Supremacy Clause and the Commerce Clause. These clauses provide for the dominance of federal law over state law on the ground that Congress has intended to displace the latter.

The Federal Aviation Administration Authorization Act (“FAAAA”)<sup>147</sup> was enacted in 1994 to guard against backdoor attacks on the policies of deregulation enacted by Congress in the 1980s, which were designed to “ensure that the trucking industry would be shaped by competitive market forces against a backdrop of uniform federal regulation.”<sup>148</sup> As a way of “complet[ing] deregulation of the trucking industry,” Congress placed a preemption provision in the FAAAA, providing that states cannot enforce laws “relat[ing] to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”<sup>149</sup>

145. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 99–101 (2014). Weil was the Administrator of the Wage and Hour Division at the Department of Labor under the Obama Administration. Weil was also the Peter and Deborah Wexler Professor of Management at Boston University Questrom School of Business until he became the Dean of the Heller School of Social Policy and Management at Brandeis University in 2017.

146. The deregulation of the trucking industry culminated in the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. For an examination of practices and policies antedating the deregulation era, see e.g., *American Trucking Ass’n v. United States*, 344 U.S. 298, 307 (1953); J. B. GILLINGHAM, *THE TEAMSTERS UNION ON THE WEST COAST* 35–36 (1956). See generally MICHAEL H. BELZER, *SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION* (2000); ESTELLE JAMES & RALPH C. JAMES, *HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER* (1965); VISCELLI, *supra* note 73.

147. Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (codified as amended in scattered sections of 49 U.S.C.).

148. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1050–51 (7th Cir. 2016); see also *FAAA Preemption: Clarifying the Law to Reestablish Congress’ Original Intent*, <https://www.trucking.org/F4A%20Advocacy/F4A%20Preemption%20Overveiw.pdf> (last visited Nov. 4, 2018).

149. *Costello*, 810 F.3d at 1051; *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1051 (9th Cir. 2009); see also 49 U.S.C. § 14501(c)(1) (2018).



In *Schwann v. FedEx Ground Package System, Inc.*,<sup>150</sup> the U.S. Court of Appeals for the First Circuit stated that “[e]xactly where the boundary lies between permissible and impermissible state regulation is not entirely clear.”<sup>151</sup> In *Schwann*, the First Circuit was asked to determine whether individuals who contracted with FedEx as pick-up and delivery drivers should have been classified as employees – and therefore should have reaped the financial benefits of employee status, such as reimbursement of business expenses – rather than independent contractors according to the Massachusetts Independent Contractor Statute – a statute that adhered to the ABC test.<sup>152</sup> The drivers argued that, under Massachusetts law, they should have been considered employees because FedEx could not satisfy criterion B – dealing with whether “the service is performed outside the usual course of business.”<sup>153</sup>

With respect to the court’s analysis of criterion B, it noted that “the decision whether to provide a service directly, with one’s own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business.”<sup>154</sup> The First Circuit concluded that because criterion B would mandate reimbursement for business expenses, “[t]he logical effect of [Massachusetts statute] would thus preclude FedEx from providing for first-and-last mile pick-up and delivery services through an independent person who bears the economic risk associated with any inefficiencies in performance” because the requirement of reimbursement would indirectly dictate a change in its method of doing business.<sup>155</sup> According to the court, this was inconsistent with the savings for employers contemplated by the deregulation approach.<sup>156</sup> Accordingly, the Massachusetts statute was deemed to be preempted and thus unconstitutional.<sup>157</sup>

But in *Dilts v. Penske Logistics, LLC*, the U.S. Court of Appeals for the Ninth Circuit concluded that the same could be said of any state legislation affecting employee rights.<sup>158</sup> For instance, minimum wage legislation could, in some circumstances, constrain an employer’s ability to render a service in precisely the same manner as it had previously. In *Dilts*, the Ninth Circuit addressed the question of whether the Supreme Court of California’s affirmation of an employer obligation to provide a meal break of thirty minutes for workdays exceeding five hours and an additional meal break of thirty minutes for workdays exceeding ten hours “related to” the employer’s provision of

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150. 813 F.3d 429 (1st Cir. 2016).

151. *Id.* at 437.

152. *Id.* at 432; *see also* Mass. Gen. Laws ch. 149, § 148B(a).

153. *Costello*, 813 F.3d at 433–34. The drivers also claimed that FedEx could not satisfy criterion C – dealing with whether the individual is engaged in an independent business that is “of the same nature as that involved in the service performed.” *Id.*

154. *Id.* at 438.

155. *Id.* at 439.

156. *Id.* at 439–40.

157. *Id.* at 432.

158. 769 F.3d 637, 648 (9th Cir. 2014).

routes or services.<sup>159</sup> The court held that no preemption was triggered by the meal and rest break statutes because such statutes “do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly.”<sup>160</sup> The Ninth Circuit was most persuaded by the fact that the

carriers [would] have to take into account meal and rest [period] requirements when allocating resources and scheduling routes – just as they must take into account state wage laws, . . . or speed limits, and weight restrictions . . . – the laws do not ‘bind’ motor carriers to specific prices, routes or services . . . .<sup>161</sup>

The U.S. Court of Appeals for the Seventh Circuit reached a similar conclusion in *Costello v. Beavex, Inc.*<sup>162</sup> The *Costello* case involved an Illinois statute that provided for the complete and timely payment of wages without retaliation.<sup>163</sup> The Seventh Circuit held that criterion B itself, in contrast to the conclusion reached by the First Circuit in *Schwann*, was not preempted because “virtually any state law, at some level, has an effect on the market price[,] . . . [such as] minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations[, which all] affect the cost of labor, and in turn, the price at which a motor carrier offers a service.”<sup>164</sup>

The Seventh Circuit further noted that the appropriate question should be whether “the cost of labor is too tenuous, remote or peripheral to have a significant impact on . . . setting of prices . . . .”<sup>165</sup> The thrust of the First Circuit’s position in *Schwann*, on the other hand, was to declare virtually all state labor laws unconstitutional on the ground that they affect price and service,<sup>166</sup> which is a position that is surely inconsistent with the promotion of the collective bargaining process itself.<sup>167</sup> The better view is that held by both the Seventh and Ninth Circuits, which allows for accommodation between deregulation and collective bargaining.

In 2018, the Ninth Circuit held that independent contractor-employee regulation under the standards set forth in *Borello* (referenced in *Dynamex*) was

159. *Id.* at 640–41. The Supreme Court of California had affirmed this principle in *Brinker Restaurant v. Superior Court*. *Id.* at 642 (citing 273 P.3d 513 (2012)).

160. *Id.* at 647.

161. *Id.* (citations omitted) (quoting *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011)).

162. 810 F.3d 1045 (7th Cir. 2016).

163. *Id.* at 1050.

164. *Id.* at 1053 (citations omitted) (quoting *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012)).

165. *Id.* at 1055.

166. *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 436 (1st Cir. 2016).

167. *See generally* 29 U.S.C. ch. 7 (2018).

not preempted.<sup>168</sup> But the court suggested that its reasoning was predicated upon the fact that the “. . . standard is neither mechanical nor inflexible; different cases can do demand focus on different factors.”<sup>169</sup> It stressed the point that *Borello* – not *Dynamex* itself – was at issue and that *Dynamex* “. . . did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California’s labor protections.”<sup>170</sup> The unanimous panel ruling sounded a warning that its prior decisions had deemed legislation compelling uniform standards inconsistent with preemptive dictates of the FAAAA.<sup>171</sup> The road to state trucking regulation of independent contractor misclassifications may be a difficult one.

Like all labor protections, *Dynamex* will cost employers more money and require either corporate savings, diminished profit margin, or increased prices. Realistically, the *Dynamex* decision promotes the dignity of workers who desire both flexibility, which can be properly afforded to employees themselves, and the reduction of inequality that so often accompanies the independent contractor status.

But there are more troubles ahead; the most prominent of them being the United States Supreme Court’s decision in *Epic Systems*, which could completely eviscerate *Dynamex* through “unbargained-for” waivers of the right to bring class actions.

## 2. *Epic Systems Corp. v. Lewis*

The most formidable obstacle to the success of the *Dynamex* decision may lie in the United States Supreme Court’s holding in *Epic Systems Corp. v. Lewis*<sup>172</sup> – a case that will undercut the rights of workers through employer-promulgated and employer-imposed binding dispute resolution systems,<sup>173</sup> notwithstanding the consequences of the holding in *Dynamex*. In *Epic Systems*, several employees filed a class action lawsuit in federal court, alleging that their employer violated FLSA and related state law.<sup>174</sup> Under the NLRA, employees are afforded the right to protest together and engage in concerted activity.<sup>175</sup> However, despite this NLRA protection, a 5-4 majority of the Court

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168. *Ca. Trucking Ass’n v. Su*, 903 F.3d 953 (9th Cir. 2018).

169. *Id.* at 959.

170. *Id.* at 967 n.4.

171. *See, e.g., Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998). The *Dynamex* preemption issue appears to be directly presented by *Western States Trucking Ass’n v. Andre Schoorl*, No. 2:18-cv-01989, 2018 WL 5920148 (E.D. Cal. Nov. 13, 2018).

172. 138 S. Ct. 1612 (2018).

173. *Id.*

174. *Id.* at 1620.

175. *See id.* at 1628 (citing *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962)).

held that the FAA<sup>176</sup> forbade the employees from pursuing such litigation because they had entered into an agreement, required as a condition of employment, with the employer that provided for “individual” arbitration to resolve all employment disputes and prohibited class actions in court or arbitration.<sup>177</sup>

Justice Neil M. Gorsuch, writing for the majority, held that (1) the NLRA protection of concerted activity did not cover protests involving class actions and (2) the FAA was instructive to federal courts regarding the enforcement of such arbitration agreements.<sup>178</sup> In so holding, Justice Gorsuch reasoned that, notwithstanding the fact that the NLRA provides employees the “rights to organize unions and bargain collectively, . . . [the NLRA] says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.”<sup>179</sup> The Court held that the focus of the NLRA was upon the right to organize unions and to bargain collectively.<sup>180</sup> The Court also noted that “[u]nion organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures” are found elsewhere.<sup>181</sup> But collective protest over working conditions is the bread and butter of the NLRA as well. The practical significance of this protest is to protect employees against discipline and discharge when they work together and speak out over conditions, such as the rate of wages or other conditions of employment, that they deem to be unfair or inequitable.

The Court emphasized its precedent regarding the FAA that allowed these individualized proceedings to prevail over NLRA protections.<sup>182</sup> The Court in *Epic Systems* remained deliberately deaf to the realities of workplace litigation.<sup>183</sup>

Justice Ginsburg dissented persuasively on behalf of three other members of the Court: Justice Stephen G. Breyer, Justice Sonia M. Sotomayor, and Justice Elena Kagan.<sup>184</sup> Her dissent constituted a vigorous, frontal attack on the class action waiver that gave rise to the litigation. Justice Ginsburg noted that the “claims [involving minimum wage and maximum hour alleged violations

176. 9 U.S.C. §§ 1–14 (2018).

177. *Epic Sys. Corp.*, 138 S. Ct. at 1619.

178. *Id.*

179. *Id.*

180. *Id.* at 1630.

181. *Id.* at 1627.

182. *See id.* at 1621–22 (citing *Am. Express Co. v. It. Colors Rest.*, 570 U.S. 228, 233 (2013) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also* William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg’s Term*, 36 U. HAW. L. REV. 371, 391–96 (2014).

183. This was notwithstanding the argument made that individual claims could not be pursued on an individual basis because of cost ineffectiveness as it would cost more to litigate than could be obtained from the relief itself. *See Epic Sys. Corp.*, 138 S. Ct. at 1622–23.

184. *See id.* at 1633–49 (Ginsburg, J., dissenting).

of the FLSA] . . . [we]re small, scarcely of a size warranting the expense of seeking redress alone.”<sup>185</sup> Justice Ginsburg said, “For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer.”<sup>186</sup>

Her dissent explained the basis for the rise of labor legislation in the 1930s, which was designed to end inequality between the worker and the employer.<sup>187</sup> It highlighted the fact that the FAA used by the majority required plaintiffs to proceed one by one.<sup>188</sup> The FAA was used by the majority, over the objections of the dissent, to allow for a take-it-or-leave-it arbitration, including the collective litigation abstinence demanded therein.<sup>189</sup> Justice Ginsburg emphasized that employees could only effectively tackle working conditions that labor law regards as inequitable and unacceptable by banding together to protest through litigation and other means.<sup>190</sup> It was wrong, said the dissent, for the majority to subordinate the NLRA and its relevant right to engage in “concerted activities”;<sup>191</sup> however, this was a point the majority in *Epic Systems* virtually ignored.

The dissent also addressed the point that arbitration provisions of this kind are unrelated to employment contracts and opined that “in relatively recent years, the Court’s Arbitration Act decisions have taken many wrong turns.”<sup>192</sup> Justice Ginsburg maintained that the dynamics of the arbitration provision imbalance create a scenario wherein employers can risk violations of employment law statutes while knowing that workers in most instances are not in a position to protest because they could not do so collectively.<sup>193</sup> Beyond what was explicitly stated in the dissent, class actions are also important because they provide for enforcement of employment law through the “private attorney general” when government enforcement is ineffectual due to inadequate funding, inertia, or hostility.<sup>194</sup>

And the ramifications of this power imbalance are even deeper than what Justice Ginsburg set forth. For example, when the Anita Hill-Clarence Thomas hearings took place in the spring of 1991, Justice Clarence Thomas was being

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185. *Id.* at 1633.

186. *Id.*

187. *Id.* at 1634–35.

188. *Id.* at 1645–48; see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

189. *Epic Sys. Corp.*, 138 S. Ct. at 1623 (majority opinion); *id.* at 1642–43 (Ginsburg, J., dissenting).

190. *Id.* at 1633 (Ginsburg, J., dissenting).

191. *Id.*

192. *Id.* at 1645.

193. *Id.* at 1646–48.

194. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968) (discussing bringing a suit under Title II of the Civil Rights Act of 1964 the plaintiff acts “not [only] for himself alone but also as a ‘private attorney general’ vindicating a policy that Congress considered of the highest priority”).

confirmed as a member of the United States Supreme Court.<sup>195</sup> Ms. Hill was repeatedly interrogated about sexual harassment allegations that she made against Justice Thomas and was also asked why she had not filed an unlawful employment practice charge with the Equal Employment Opportunity Commission.<sup>196</sup> In my judgment, the reason Ms. Hill did not file such a charge is likely because a remedy could not be obtained for a violation beyond a mere cease-and-desist requirement unless a demotion, re-assignment, or dismissal was involved.

This reality helped build momentum for the civil rights movement in 1991 and culminated in an amendment to Title VII of the Civil Rights Act of 1991,<sup>197</sup> which provided greater damage recovery that went above and beyond the traditional back pay employment remedy for sex discrimination and sexual harassment claims, such as compensatory damages, punitive damages, and attorneys' fees.<sup>198</sup> The availability of such relief, alongside the common law wrongful discharge actions that had emerged in many states during the 1980s, created significant liability for employers and increased their desire to be immunized from such exposure.<sup>199</sup>

The answer for employers wanting to limit their liability was the employer's adoption of arbitration clauses – or, in the words of Justice Ginsburg, “unbargained-for” contracts.<sup>200</sup> Employers promulgated unlawful discharge procedures to shield themselves from juries – a forum that employers deem inhospitable.<sup>201</sup> The reality of the workplace relationship and the significance of the Court's holding in *Epic Systems* for employer-employee disputes is well-chronicled in Justice Ginsburg's dissenting opinion.<sup>202</sup> But the need to fill in the gap, as illustrated by Ms. Hill's testimony, was not explicitly referenced in the 1991 amendment.<sup>203</sup>

At least two other issues of importance are raised by the *Epic Systems* decision. The first is that it is unclear whether *Epic Systems* endorses the view that arbitration agreements are categorically enforceable as a matter of public policy. For example, the plaintiffs in *O'Connor v. Uber*<sup>204</sup> maintained that

195. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 383 (5th ed. 2013).

196. See Ann C. Juliano, Note, *Did She Ask for It?: The “Unwelcome” Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1559 n.8 (1992).

197. Marcia D. Greenberger, *What Anita Hill Did for America*, CNN (Oct. 22, 2010), <http://www.cnn.com/2010/OPINION/10/21/greenberger.anita.hill/index.html>; see Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat 1071 (codified as amended by 42 U.S.C. § 2000e-2 (2018)).

198. *Id.* § 1981a.

199. See GOULD, *supra* note 195, at 420–28.

200. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1648–49 (2018) (Ginsburg, J., dissenting).

201. See *id.* at 1647 n.15.

202. See *id.* at 1646–49.

203. See *supra* notes 197–99 and accompanying text.

204. 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

class certification of drivers who have opted out of arbitration or ended their work prior to the implementation of an arbitration clause may be appropriate prior to the determination of the enforceability of the clause with regards to those who had accepted it.<sup>205</sup> Uber maintained that *Dynamex* has no applicability to that litigation because the *O'Connor* case did not involve a wage order but rather another provision of the California Labor Code – an issue which will come back to the Supreme Court of California in the future.<sup>206</sup> Class action determinations could still sweep in those who have not signed an arbitration agreement with those who have, thus enhancing the leverage of both groups.

The second is that the FAA at issue in *Epic Systems* does not apply to transportation employees.<sup>207</sup> But this is limited in scope. In the first place, the narrower pre-New Deal reliance upon commerce excludes a narrow band of transportation workers from the clutches of *Epic Systems*.<sup>208</sup> The worker, rather than products or goods handled, must himself or herself be in interstate commerce.<sup>209</sup> Are independent contractors and employees covered by the transportation exemption? The United States Supreme Court, in *New Prime, Inc. v. Oliveira*,<sup>210</sup> has held that both groups are covered by the exemption. The Court stated:

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205. Plaintiffs' Motion for Class Certification at 2 n.4, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. CV 13-3826-EMC), 2015 WL 12777254. A number of courts have adopted this approach. *See id.* (listing eight court decisions).

206. Defendant Uber Techs., Inc.'s Opposition to Plaintiffs' Motion for Class Certification at 11–12 n.3, *O'Connor*, 82 F. Supp. 3d 1133 (No. CV 13-3826-EMC).

207. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1644 (2018). The U.S. Court of Appeals for the Ninth Circuit has held that *Epic Systems* eliminates plaintiffs' claims in *O'Connor*. "Following the Supreme Court's decision in *Epic Systems*, we obtained supplemental briefings from the parties. Plaintiffs acknowledged that the Court's decision extinguished their argument that the arbitration agreements were not enforceable under the NLRA." *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 n.3 (9th Cir. 2018).

208. Section 1 of the FAA states that "nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2018). Therefore, transportation is part of the FAA §1 exemption.

209. In *Circuit City Stores, Inc. v. Adams*, the United States Supreme Court stated,

When the FAA was enacted in 1925 . . . the phrase "engaged in commerce" was not a term of art indicating a limited assertion of congressional jurisdiction; to the contrary, it is said, the formulation came close to expressing the outer limits of Congress' power as then understood . . . . Were this mode of interpretation to prevail, we would take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the statute means now.

532 U.S. 105, 116 (2001) (citations omitted).

210. 139 S. Ct. 532 (2019).

[In 1925] . . . most people then would have understood §1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work.

. . . This Court’s early 20th-century cases used the phrase ‘contract of employment’ to describe work agreements involving independent contractors . . . .

. . . [T]he evidence before us remains that, as dominantly understood in 1925, a contract of *employment* did not necessarily imply the existence of an employer-employee or master-servant relationship.<sup>211</sup>

Accordingly, such truckers, so frequently characterized as independent contractors in the deregulation era, now have the right to sue for employment contract violations in federal courts of general jurisdiction, notwithstanding the *Epic Systems* holding.<sup>212</sup> *Oliveira* makes it clear that some transportation workers, including independent contractors, are not swept up by the *Epic Systems* pronouncements.

This ruling will have a major impact upon the gig economy, given the large number of transportation employees who are located within it. It could touch upon both the FAA coverage of transportation and its workers who are admittedly independent contractors or characterized as such.

In addition to *Oliveira*, another possible *Epic Systems* escape route has been adumbrated in California challenges to the Uber-independent contractor classification under the California Unfair Competition Law (“UCL”), which protects a competitor who has been injured by unlawful or unfair conduct. Here, plaintiffs have taken the position that their employment of drivers as employees performing the same tasks as Uber’s independent contractors at inferior wages has placed plaintiffs at a competitive disadvantage.<sup>213</sup> This gets at the same problem from which workers sought relief in *Epic Systems* – but in the form of a competitor’s action based upon unfair competition.<sup>214</sup>

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211. *Id.* at 539–40, 542 (alteration in original).

212. The Court in *Oliveira* did not address state arbitration laws, though it is possible that they may be preempted. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

213. Class Action Complaint for Violation of the California Unfair Competition Law and the California Unfair Practices Act, *Diva Limousine Ltd. v. Uber Techs., Inc.* (N.D. Cal. Sept. 19, 2018) (No. 3:18-cv-05546-EMC).

214. The Complaint emphasizes the fact that Uber has hemorrhaged money mounting into considerable losses but that this has not dissuaded investors who expect returns when the TNC competitors are eliminated by virtue of the above referenced practices. *Id.*



### 3. *Chamber of Commerce v. City of Seattle*

The third area, which involves an entirely different approach undertaken by local government, has accepted the assertion by employers that drivers in the ridesharing and taxicab industries are independent contractors and therefore states and local governments have jurisdiction to enact collective bargaining legislation. *Chamber of Commerce v. City of Seattle*<sup>215</sup> involved comprehensive legislation enacted in the form of an ordinance by the City of Seattle that provided a collective bargaining process for for-hire vehicles and taxis, some of which operate through platforms like Uber and Lyft.<sup>216</sup> Seattle is the first city to have enacted this kind of legislation.<sup>217</sup> The ordinance

cover[ed] any company that sells a ride, whether it be through an app[lication (“app”)], a dispatch, curb calling, hailing on the street, or a flat rate. It was enacted on December 14, 2015, by the Seattle City Council. [Because the City of Seattle realized that] the unilateral imposition of contracts upon drivers as well as unilateral changes in their wages and working conditions could ‘adversely impact the ability of a for-hire driver to provide transportation services in a safe, reliable, stable, cost-effective and economically viable manner,’ Seattle . . . provided these drivers with an opportunity for union representation and collective bargaining . . . .<sup>218</sup>

. . . The ordinance also provide[d] that, in the seeking of representation, the union is entitled to obtain from the “driver coordinators” the names, contact information, and license numbers of drivers so that the union can solicit their interest and obtain, if possible, majority support for the purpose of bargaining . . . . [The ordinance further provided that, i]n the event that the parties are unsuccessful at negotiating a collective bargaining agreement, either side may initiate arbitration of their differences, which has a binding effect, so long as local government approval of the award is obtained.<sup>219</sup>

The Chamber of Commerce challenged the lawfulness of the ordinance on both federal antitrust and labor law grounds.<sup>220</sup> The Chamber argued that the ordinance violated § 1 of the Sherman Antitrust Act (“Sherman Act”) because it sanctioned “price-fixing of ride-referral service fees by private cartels of independent-contractor drivers.”<sup>221</sup> The Chamber further argued that the

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215. 890 F.3d 769 (9th Cir. 2018).

216. *Id.* at 775.

217. *Id.*

218. Gould, *supra* note 66, at 123 (footnotes omitted).

219. *Id.* at 123–24 (footnotes omitted).

220. *Chamber of Commerce*, 890 F.3d at 775.

221. *Id.*

ordinance was preempted by both the Sherman Act and the NLRA.<sup>222</sup> The district court found that neither the Sherman Act – by reason of the state-action immunity doctrine – nor the NLRA preempted the ordinance, and the Chamber appealed.<sup>223</sup>

The U.S. Court of Appeals for the Ninth Circuit, proceeding upon the assumption that the ordinance would authorize a per se antitrust violation, reversed the district court’s dismissal of the antitrust claim under the state-action immunity doctrine first announced by the United States Supreme Court in *Parker v. Brown*.<sup>224</sup> In *Parker*, as the Ninth Circuit noted, the Court held that Congress did not intend to restrict the sovereign capacity of states to regulate their economies and further held that the Sherman Act “should not be read to bar [s]tates from imposing market restraints ‘as an act of government.’”<sup>225</sup> The Ninth Circuit echoed what it characterized as the United States Supreme Court’s disfavor of such immunity by stating, “State-action immunity is the exception rather than the rule.”<sup>226</sup>

The Ninth Circuit noted that the United States Supreme Court “uses a two-part test” to determine whether exemption from antitrust liability can be established: “[F]irst, the challenged restraint [must] be one clearly articulated and affirmatively expressed as state policy, and second, ‘the policy [must] be actively supervised by the [s]tate.’”<sup>227</sup>

With respect to the first prong of the test, the Ninth Circuit stated that “[t]he state’s authorization must be plain and clear . . . .”<sup>228</sup> The displacement of competition through a regulatory structure is the policy that a state must clearly articulate.<sup>229</sup> The Ninth Circuit, by a unanimous three-judge panel, held that the first prong – the clear articulation requirement – had not been satisfied in *Chamber of Commerce* because, given that the ridesharing industry was not

222. *Id.* at 779 (citing *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976) and *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)). See generally William B. Gould, *The Garmon Case: Decline and Threshold of “Litigating Elucidation”*, 39 U. DETROIT L.J. 539 (1962).

223. *Chamber of Commerce*, 890 F.3d at 776.

224. *Id.* at 781 (citing 317 U.S. 341 (1943)).

225. *Id.* (quoting *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013)). “Following *Parker*, the [United States] Supreme Court has, ‘under certain circumstances,’ extended immunity from federal antitrust laws to ‘nonstate actors carrying out the State’s regulatory program.’” *Id.* (quoting *Phoebe Putney Health Sys., Inc.*, 568 U.S. at 224–25).

226. *Id.*

227. *Id.* at 782 (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). This “two-part test [is] sometimes referred to as the *Midcal* test.” *Id.*

228. *Id.*

229. *Id.* at 782–83 (citing *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985)).

yet in existence, it could not be said that the Washington legislature contemplated the for-hire drivers to “price fix” their compensation.<sup>230</sup> In reaching this conclusion, the Ninth Circuit found that the legislature, in focusing upon privately operated transportation services, was not concerned with “the contractual payment arrangements between for-hire drivers and driver coordinators for use of the latter’s smartphone apps or ride-referral services.”<sup>231</sup> This reasoning that emphasizes statutory construction has persuaded no other tribunal in the United States or in Europe confronted with a similar issue.<sup>232</sup> The court, in arriving at its conclusion that the clear articulation requirement had not been satisfied, stated,

Although driver coordinators like Uber and Lyft contract with providers of transportation services, they do not fulfill the requests for transportation services – the drivers do. Nothing in the statute evinces a clearly articulated state policy to displace competition in the market for ride-referral service fees charged by companies like Uber, Lyft, and Eastside. In other words, although the statute addresses the provision of transportation services, it is silent on the issue of compensation contracts between for-hire drivers and driver coordinators.

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. . . [A]lthough the State of Washington authorized municipalities to regulate the for-hire transportation services industry at large, the statutes do not indicate that the state adopted a policy authorizing for-hire drivers to fix the rates Uber and Lyft charge for use of their ride-referral apps.<sup>233</sup>

This theme pervades the Ninth Circuit’s opinion on the clearly articulated prong of the *Parker* state sovereignty test. Simply, the Ninth Circuit noted that Uber and Lyft were not in existence when the Washington statute was enacted.<sup>234</sup> But the court noted that “the fact that technology has advanced leaps and bounds beyond the contemplation of the state legislature is not, on its own, the dispositive factor in our holding today.”<sup>235</sup> Modern technological advances may not have been a dispositive factor in the court’s defense of its own opinion; yet, when one looks at the totality of the Ninth Circuit’s opinion, it appears

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230. *Id.* at 783.

231. *Id.* at 784.

232. *See, e.g.*, Case C-320/16, *Uber France SAS v. Bensalem* (Apr. 10, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=192325&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1610202>; *The British Council v. Jeffrey* [2018] EWCA (Civ) 2253 (Eng.).

233. *Chamber of Commerce*, 890 F.3d at 784–86.

234. *Id.* at 787.

235. *Id.*

that, to paraphrase Shakespeare, “[t]he lady doth protest too much, methinks.”<sup>236</sup>

The court held that the second prong – the active supervision requirement – was also not satisfied in *Chamber of Commerce* because active supervision had to exist at the state level rather than the municipal level.<sup>237</sup> Therefore, because the Seattle ordinance only possessed active supervision at the municipal level, the court held the active supervision requirement was not met.<sup>238</sup> The Ninth Circuit stated, “Sovereign capacity matters.”<sup>239</sup> Moreover, in the court’s view, because private parties had “substantial discretion” in setting the terms of municipal regulation, the act of state supervision must be shown in the circumstances, notwithstanding the fact that no agreement could be entered into – let alone certified – without the City of Seattle’s approval.<sup>240</sup>

The soundest portion of the Ninth Circuit’s opinion lies in its handling of the preemption issue. The district court held that the congressional decision to exclude independent contractors did not “implicitly” preempt state or local labor regulation of independent contractors.<sup>241</sup> The Ninth Circuit, like the district court, relied on the cases holding that the exclusion of farm workers<sup>242</sup> and domestic employees<sup>243</sup> from federal law allowed for state regulation and noted that the preemption of state legislation relating to supervisors was predicated upon the peculiar NLRA language relating to them.<sup>244</sup> Accordingly, the court rejected the Chamber’s contention that the ordinance was preempted under *Machinists* preemption<sup>245</sup> because, given the explicit instruction to exclude inde-

236. WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 2.

237. *Id.* at 789–90.

238. *Id.*

239. *Id.* at 789.

240. *Id.* at 790.

241. *Id.* at 791, 793.

242. *Id.* at 793; *see also* *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 921 (7th Cir. 1990); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977) (“[T]here is no legislative history to indicate that the NLRA’s exclusion of agricultural laborers from its coverage was intended to leave the area totally free from regulation and because that exclusion standing alone is to be understood to mean that federal policy is indifferent, . . . the court has concluded that state regulation has not been preempted . . .”). *See generally* William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L. REV. 1243, 1271–72 (2017) (discussing the coverage of agricultural laborers). “[S]tates remain free to legislate as they see fit.” *Chamber of Commerce*, 890 F.3d at 793 (quoting *United Farm Workers of Am. v. Ariz. Agric. Emp’t Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982)).

243. *Id.*; *see also* *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015).

244. *Chamber of Commerce*, 890 F.3d at 793–94.

245. *Id.* at 790–94; *see also* *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976). “Machinists preemption forbids both the . . . [NLRB] and [s]tates to regulate conduct that Congress intended to be unregulated because left to be controlled by the free play of economic forces.” *Chamber of Commerce*, 890 F.3d at 790 (citations omitted).

pendent contractors, “the [o]rdinance regulates economic activity that Congress intended to remain unregulated and left to the forces of the free market.”<sup>246</sup>

The Ninth Circuit also considered whether the ordinance was preempted under *Garmon* preemption but ultimately held that it was not.<sup>247</sup> In *Garmon*, the United States Supreme Court held that if a subject matter is deemed “‘arguably’ protected or prohibited,” it is preempted.<sup>248</sup> The Ninth Circuit held that *Garmon* preemption could be found if the NLRB *could* address the issue of whether the drivers were employees in the future and rejected the Chamber’s argument that the ordinance should be deemed preempted under *Garmon* until the NLRB decides the issue.<sup>249</sup>

The Ninth Circuit noted that the Chamber, “without citing any authority,” claimed that there was no need for it to take a position on the status of drivers or to provide any evidence because the proceedings before the NLRB on employee status were “ongoing” to make out preemption.<sup>250</sup> The Ninth Circuit noted that one of the most instructive cases regarding the issue of preemption is *ILA v. Davis*,<sup>251</sup> wherein the United States Supreme Court held that preemption was not established as a “conclusory assertion.”<sup>252</sup> Accordingly, the Ninth Circuit held that, as in *Davis*, preemption could not be found simply because an issue before the NLRB had not been decided by it.<sup>253</sup> However, the question in *Davis* of whether an individual was properly excluded as a supervisor was one exclusively of fact, whereas the independent contractor issue involving drivers involves both a conclusion of law as well as fact.<sup>254</sup> The Ninth Circuit rendered this difference between the two cases relatively meaningless, however. It stated,

Practically speaking, the question of whether drivers who contract with Uber and Lyft are employees or independent contractors may well be a “live issue” in other judicial and administrative proceedings involving different parties, claims, and law. But that does not absolve the Chamber from complying with our case law regarding *Garmon* preemption.<sup>255</sup>

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246. *Chamber of Commerce*, 890 F.3d at 791.

247. *Id.* at 794–95; see *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

248. *Chamber of Commerce*, 890 F.3d at 794 (quoting *Int’l Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 394 (1986)).

249. *Id.* at 795.

250. *Id.*

251. 476 U.S. 380.

252. *Chamber of Commerce*, 890 F.3d at 794 (quoting *Davis*, 476 U.S. at 394).

253. *Id.* at 795.

254. Gould, *supra* note 66, at 138–39.

255. *Chamber of Commerce*, 890 F.3d at 795.

One difficulty with the employers' position under *Garmon*, while arguing for preemption at the local level, was that in asserting its position before the NLRB, the employers were arguing two positions inconsistent with one another, depending upon the forum. The last thing that employers wished to do in *Chamber of Commerce* was put forward evidence showing that the drivers were arguably employees, as a conclusion by the NLRB that the drivers were employees would not have been desirable from the employers' perspective.

The most important practical upshot of this aspect of *Chamber of Commerce* is that states willing to enact legislation providing for collective bargaining for independent contractors now have a roadmap to do so. Even though some of the Ninth Circuit's antitrust analysis rests on a wobbly edifice, supervision can be designated to the municipal level, though the politics of obtaining statewide legislation would be more considerable given that the voices of antiregulation are louder outside the cities. Preemption, if it had been found by the Ninth Circuit, could have put any state and local legislation out of business. As a direct result of the *Chamber of Commerce* decision, states like California, for instance, have a roadmap for how to proceed and may assert jurisdiction in light of the preemption analysis provided in *Chamber of Commerce*.

#### IV. CONCLUSION

*Dynamex* is a landmark decision of considerable importance. The business community, however, may have underestimated its ace in the hole – that is, individualized and, in Justice Ginsburg's words, “unbargained-for” contracts that make it impossible for employees to benefit from decisions like *Dynamex*. True, the Court has thus far left unresolved the issue of exemption for transportation employees in the gig economy. Are transportation employees exempt from the Court's unwavering promotion of employer-promulgated arbitration? Does the exemption extend to both independent contractors as well as employees? This Article shows that two decades of FAA jurisprudence clearly provide for the exemption. The practical significance of the exemption would allow holdings like *Dynamex* to flourish – as they should – and would provide dignity and protection for workers in the gig economy.

Finally, although *Chamber of Commerce* has less immediate impact than either *Dynamex* or *Epic Systems*, the *Chamber of Commerce* decision sketches an outline for any state to enact relatively comprehensive collective bargaining legislation for the benefit of drivers whom companies claim to be independent contractors,<sup>256</sup> particularly if the NLRB under President Trump's Administra-

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256. Some have argued that the legislative answer lies in the creation of a new or third classification for “independent workers” in the gig economy. See SETH D. HARRIS & ALAN B. KRUEGER, HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 5 (2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf). But the better view is that articulated by Professors Miriam Cherry and Antonio Alosi who have persuasively

tion adopts the employer position and characterizes such drivers as independent contractors.<sup>257</sup> Perhaps an intermediate compromise would allow, as in Denmark, for the workers to choose their status at a particular time.<sup>258</sup> The ultimate irony could be that the *Chamber of Commerce* decision adds to the cause of reformers who seek to bring the rights of labor to state government – rights that are so often excluded by the doctrine of preemption.

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argued that a third category should not be created given the inevitable litigation about these boundaries and given the fact that doing so would “result in downgrading employees to intermediate status, [which] would do nothing to eliminate the problem of bogus contractor status.” Miriam A. Cherry and Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 678 (2017).

257. Cf. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1526 (2015) (“The amount and extent of political interference has increased substantially since the 1990s and promises to do so again given the composition of Congress in 2015 and beyond. Congress, now encouraged and prompted by the Congressional Review Act, seems now to be almost obsessed with the view that it is the expert, not the [NLRB], and that its role is to instruct the [NLRB] about what to do.” (footnote omitted)).

258. Sarah O’Connor, *Uber and Lyft’s Valuations Expose the Gig Economy to Scrutiny*, FINANCIAL TIMES (Jan. 1, 2019), <https://www.ft.com/content/49650d32-0c48-11e9-acdc-4d9976f1533b> (“There is a way out. Last year, a Danish gig economy company called Hilfr, which sends cleaners to private homes, signed an innovative collective agreement with the 3F union. After 100 hours of work on the app, Hilfr workers become covered automatically by the agreement, which gives them a minimum wage, sick pay and pension contributions. If they prefer, workers can opt out and continue to work as freelancers. This solution might not be directly transferrable to other [labor] markets. But it is a reminder that the benefits delivered by gig companies – speed, flexibility, transparency – are not incompatible with giving workers employment protections.”).