**AB5 to Democracy:**

**Economic Security & the Regulation of Gig work in California[[1]](#footnote-1)**

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 Poverty is not a suspect classification under the U.S. Constitution, but it is an affront to life and dignity and to democracy more broadly. With the evisceration of the U.S. welfare state and judiciary’s deference to political outcomes in the area of “economics and social welfare” (Loffredo 1993, 1278-90), employment is the primary legal and political means to address economic inequality (Dubal 2017a, 67). In turn, employment is—for better or for worse—key to democratic outcomes in the U.S. It provides access to the tools for basic sustenance in modern America: the minimum wage, health insurance, safety net protections, and even the right to organize and collectively bargain. Our capacity to participate in life and partake in politics, depends, in no small part, on our status as employees. In the words of political theorist Judith Shklar, “We are citizens only if we ‘earn.’” (Shklar 1995, 416). Yet, since at least the 1970s, the capacity of U.S. workers to earn a sustainable income through work has been curtailed by the proliferation of contract labor—work conducted outside the regulatory framework of employment (Collier et al. 2017, 3-5). In recent years, this kind of contract work has grown through both on-demand and crowdsourcing labor platforms (Id.), both of which rely on putative independent contractors.

 The potential for labor platforms relying on non-employee labor to exacerbate poverty looms large in debates about the future of work and of workers in the U.S. While the number of app-based workers remains comparatively small (Bernhardt et al. 2017, 7-10), the potential for this sector to grow and for industries to reproduce this model across the service economy looms large. Since most work across the service economy could conceivably be deregulated through app-based labor, discussions of labor in this sector have focused on how to provide protections to the growing number of workers who get jobs through digital platforms. Some scholars have argued for a “third category” of worker—a worker who gets some limited protections, but, most centrally, is not paid an hourly wage, does not have workers compensation, and does not benefit from the safety net afforded through unemployment insurance (Harris et al. 2015). In the U.S. legal academy, however, there is general consensus that because of the algorithmic control administered by labor platform companies, their control over wages, their power over the dissemination of work, and their ability to terminate workers, labor platforms like Uber misclassify their workers and regulators should approach them as they approach traditional employees (Greenhouse 2015; Secunda 2017).

 AB5—a bill which was signed into law in California in September 2019 and goes retroactively into effect on January 1, 2020—is the first new state law in the United States to address labor regulation of platform “gig” workers by re-imaging the legal test for state employment law protections. AB5 pulls these workers back under the “employee” umbrella by codifying the presumption of employee status under state law and putting forth an exacting, conjunctive test that hiring entities must meet if they wish to engage workers as non-employees. Unlike traditional versions of the control test and nascent forms of the test of entrepreneurial potential (as articulated in *FedEx v. NLRB*, 563 F. 3d 492 (2009) and extended in *Supershuttle DFW, Inc.*, 367 NLRB No. 75 (2019)), California’s ABC test presumes that all workers are employees and puts the burden on the hiring entity to prove otherwise. Because labor platforms have posed risks to employment regimes and the security of workers the world over, the bill has been internationally lauded[[2]](#footnote-2) and states across the U.S. seek to replicate it.[[3]](#footnote-3)

How did California manage to pass this law, and what implications might AB5 hold for the relationship between work, poverty, and democracy more broadly? In the following sections, I discuss the emergence of platform labor, the early failures to regulate this work, and the role of gig worker groups in pushing for AB5 and for secure work more broadly.

1. Sharing or Taking? The Emergence of Precarious Platform Labor

 To understand the significance of AB5 in the broader political and economic context, we must understand how the precarious labor trends it addresses initially proliferated. Labor platform companies Uber and Lyft first appeared on the streets of San Francisco in the shadows of the Great Recession. They operated under the guise of sharing and trust-building and launched to a captive audience. In a period of heightened unemployment and distrust in government (on both the left and the right), the companies capitalized on the public appetite for easily accessible jobs and economic re-making to introduce “disruptive” business models built on unregulated, independent contractor labor. Uber and Lyft (which paved the ideological way for numerous gig companies that followed in their suit) provided traditional taxi services outside of traditional regulatory frameworks (Dubal 2017a, 119-134) at rock-bottom, subsidized prices (Dean 2019). They argued that their technology platforms produced not work—but community. And their public relations message was that they did not employ people; *they empowered them*.

 Belying this seductive narrative are anticompetitive business practices and insecure work. The labor platforms set fares, control worker behavior through algorithms (Scheiber 2017), and unilaterally (and sometimes inexplicably) terminate workers. The companies, meanwhile, claim to facilitate micro-entrepreneurship. In reality, individual workers bear all the traditional risks of business (Dubal 2017a, 119-134). In the Uber and Lyft context, for example, gig workers provide their own car, phone, hybrid car insurance, and gas—but have very little to no control over the business itself. Unlike small businesspeople, most gig workers cannot negotiate prices, the terms of their work, or even develop their own clientele. Although the companies tout flexibility, the time schedules of workers are highly incentivized by price structures. In order to make money, drivers must work during particular, high-demand hours. Fulltime drivers frequently work more than sixty hours a week, and even in busy metropolitan areas, after accounting for expenses, their hourly incomes fall well below the minimum wage of the cities in which they work.

1. From Failures to Regulate to Dynamite *Dynamex*

 Despite growing complaints from workers and organized driver protests, regulators in U.S. states failed to enforce existing employment laws against labor platform companies, and in some states, they have affirmatively legalized their independent contractor business models (Collier et al. 2018, 7-8). This culture of political acquiescence began at ground zero in San Francisco. When Lyft hit the streets of San Francisco in 2012, the California Public Utilities Commission (CPUC, a state regulatory agency) issued a cease and desist order, arguing that the company was operating illegally (Id., 14). With this state order in effect, then-San Francisco Mayor Ed Lee took a different municipal approach, commending the emergence of Lyft and Uber, launching a Sharing Economy Working Group, and pronouncing June 13, 2013 “Lyft Day.”

 The CPUC eventually changed course and began a rule-making process to legalize the companies, noting that the agency sought to “foster innovation” (Ha 2013). By regulating this industry state-wide, the agency effectively pre-empted California cities from enacting local regulations (Smith et al. 2018). This meant that workers and regulators would be more disconnected and that the policy-making process would be more opaque. Hoping that the courts would address the misclassification concern, the CPUC wrote laissez faire rules that were silent on labor issues.[[4]](#footnote-4)

 Around the same time, a number of class action lawsuits were filed alleging the misclassification of workers by Uber and Lyft. But ultimately, the class actions’ effectiveness as enforcement mechanisms were stymied by arbitration clauses and the U.S. Supreme Court’s decision in *Epic Systems v. Lewis*. (138 S.Ct. 1612 (2018)). *Epic Systems* made it clear that under U.S. law, arbitration agreements in labor contracts that contained prohibitions on class actions were legal and not a violation of the National Labor Relations Act as some lower courts had held. Thus, class actions against gig companies in which classes of workers had been certified by courts were subsequently de-certified.

 One month before *Epic Systems* was decided, however, the California Supreme Court decided *Dynamex* *v. Superior Court* *of Los Angeles* (4 Cal.5th 903 (2018)). *Dynamex* changed California law and the conversation around employee rights in the gig economy in the U.S. In *Dynamex*, which addressed the classification of drivers for an offline delivery company, the Court wrote that the purpose of California wage laws was to “raise living standards” for California workers and their families. The decision noted how easy it was for companies to manipulate their business models to avoid responsibility to workers under the existing legal test for employment. To better address this growing issue, the Court revised the state’s analysis of employee status under wage orders.

 The Court in *Dynamex* decided that all California workers are employees for wage orders as a matter of law. The decision also stated that if a hiring entity wants to use independent contractor labor, the entity had to prove the workers are contractors by fulfilling the terms of a conjunctive, tri-partite test—the ABC test. As articulated by the California Supreme Court, the ABC test is as follows:

(A) that the worker is free from the control and direction of the hiring entity 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 the work performed.

 This test differs from the one outlined in *S.G. Borello & Sons, Inc.* *v. Department of Industrial Relations* (48 Cal. 3d 342 (1989)),which for three decades had been used to determine employee status under most California laws. Like most tests to determine employee status in the U.S., the *Borello* test was rooted in a several-factor analysis of control: how much control did the hiring entity wield over the means and manner of the worker’s performance. The more control that the hiring entity had, the more likely the worker was an employee. While *Borello* was generally considered “worker friendly,” it was riddled with problems. For one, the test left too much room for subjective analysis, such that different judges could come to different decisions on the same set of facts (Dubal 2017b, 70). Additionally, over the years, companies had found ways to use the test as a roadmap to avoid liability (see Dubal 2017c). Rather than looking to an analysis of control in the workplace as a mark of employee status, the ABC test is enforcement-oriented.

 While *Epic Systems* undermines the possibility of class action and thereby hinders the private enforcement of *Dynamex*, the implications of *Dynamex* decision were immediately apparent to the labor platform companies and to gig workers. Under the ABC test, analysts agree, there is little wiggle room; labor platform workers are very likely employees for California state laws. Gig companies thus scrambled to leverage their significant structural and instrumental power to create a legal carveout for themselves through legislation. As a result, after the *Dynamex* decision, lawmakers spoke frequently about the importance of a “compromise” between business and labor on the issue. In response to this general sentiment, some unions began closed-door conversations with the gig companies. Given California’s tech-friendly political environment, however, few thought the bill could pass without an exemption for labor platform companies.

 Rather than wait for the companies to regulate themselves out of employment obligations, California Assemblywoman Lorena Gonzalez introduced a bill in the 2019 legislative session now known as AB5. The bill extends the legal precedent in *Dynamex* beyond wage orders to all California employment laws—including those in the Labor Code (which governs wage orders, meal and rest breaks, and workers’ compensation) and the Unemployment Insurance Code. The bill also gives city attorneys the power to enforce the law through the issuance of an injunction, which means that if the companies do not comply, they can be held in civil contempt of court.

1. Drivers take the Lead: Unprecedented Organizing in the Gig Economy

 During the earlier failure to regulate by courts and legislatures, I interviewed a number of labor platform drivers who lived in their cars or who couch-surfed. They didn’t make enough to afford rent. Some of them had—at Uber’s urging—purchased vehicles to work and were trapped in predatory auto loans. Other drivers I met—migrant workers—came up from Southern California and the Central Valley to drive where fares were higher. They were *all* tired of laboring under uncertain conditions. While not everyone wanted the control that they feared came with employee status, everyone wanted basic benefits like a wage floor and workers’ compensation (Dubal 2020).

 Tired of relying on state actors and unions to fight on their behalf, a number of frustrated drivers started to organize. Drivers in Los Angeles, for example, founded the Ride-share Drivers United (RDU) in 2018. Doing what some trade unionists thought was impossible as atomized and dispersed workers, RDU members built relationships through one-on-one conversations and weekly meetings. They orchestrated actions to pressure state actors and even planned an unprecedented global strike against Uber and Lyft on May 8, 2019. In a remarkably short period of time and without funding, the RDU grew their membership to over 5000 workers and inspired affiliate grassroots groups in San Diego and San Francisco.

 RDU and other drivers’ groups—including those sponsored by unions and worker centers—readily endorsed AB5 and fought passionately to get it passed. The workers felt strongly that Uber and Lyft’s proposed compromise legislation was unsatisfactory. While the company’s legislation included a wage floor, this floor did not account for driver waiting time. Thus, it still fell below the state minimum wage guarantee. The companies’ proposal also did not account for overtime, unemployment insurance, or provide adequate workers’ compensation. RDU members told me that they were appalled and alarmed that the companies’ proposal required them to exchange basic employee rights for a company-funded “worker association” and portable benefits. In the U.S. such a company-influenced worker association would be illegal under the National Labor Relations Act, if the drivers were found to be employees.

1. Using Employment to Organize for a Democratic Workplace

 Against powerful odds and powerful actors, the California legislature passed AB5 without a carveout for the labor platform companies. The California Governor, Gavin Newsom, signed the bill, indicating at the same time that he wanted to see a pathway to unionization for gig workers. Due to a recent federal 9th circuit decision, *Chamber of Commerce v. City of Seattle* (890 F. 3d 769 (2018)) stemming from a challenged city collective bargaining law, a state law facilitating collective bargaining may be possible in the United States. In order to avoid issues of federal preemption, however, such a law would only be possible if the National Labor Relations Board finds gig workers to be independent contractors. Under the Trump administration, the NLRB’s general counsel has taken the position that Uber drivers are independent contractors, but this position has no precedential value.

 Uber claims both that it is exempt from the law *and* that they will fight the law with a referendum. In arguing that the law does not apply to them, Uber maintains—as it has in litigation across the globe—that it is a platform company and not a transportation company. Thus, the argument goes, the drivers are doing work outside “the usual scope” of Uber’s business. Recognizing that this is a dubious claim, Uber, Lyft, DoorDash, Postmates, and Instacart have pooled 110 million dollars to back a California proposition, a law which bypasses the legislature by going directly to the California electorate for a direct decision (Canon 2019).

The gig companies’ proposition would create an exemption from AB5 for gig workers, and in exchange, offers a wage floor in exchange. However, the proposed wage floor only covers engaged time and does not count waiting time as remunerable work time. It also leaves the costs associated with driving—including vehicle depreciation, gas, insurance—unreimbursed. Economists have calculated that as a result, the hourly minimum wage for gig workers under this proposition would be $5.64 or roughly one third of the minimum wage of the city of San Francisco (Jacobs and Reich 2019). By contrast, under AB5, gig workers would be entitled to the minimum wage for each hour, or fraction thereof, that they work, even if they spend most of that time awaiting a fare. Early polling suggests that a majority of California voters would vote against the gig companies’ proposition (Emerson Polling 2019).

While California gig workers anticipate the electorate’s decision on the gig company proposition, they are pushing to have AB5 enforced. Under an employment regime, the organizing potential of gig workers will grow exponentially. Workers who earn a living wage and benefits have time and energy to build power together. But AB5 itself does not give workers the legal authority to engage in protected concerted activity, and it certainly doesn’t force the companies to collectively bargain with them. So, what’s next? What might the road to a union and workplace democracy look like for California’s labor platform workers?

One promising path may be for drivers’ groups like RDU to continue to build collective power and to eventually file for union recognition under federal labor law. While Trump’s NLRB General Counsel has issued a non-binding advisory opinion calling Uber drivers independent contractors, carved out of the NLRA (Scheiber 2019), federal analysis on the issue might change with business model changes brought on by AB5 and would certainly change under a different administration.

Yet another path may be for drivers’ groups to fight for a radically bold state labor law for all excluded workers. Such a law would not erode—*but grow*—the hard-won rights under AB5 and allow anyone excluded from federal law to organize to improve their conditions. The NLRA—since Taft-Hartley—has been decried as being in need of reform, especially for the new economy. As the most progressive state with the highest poverty rate, California could build on the momentum of AB5 and create a state pathway to union recognition that resolves the many hurdles posed by federal law. A new California collective bargaining law, for example, could make it easier for workers to secure union recognition and better protect their rights to picket, strike, and engage in concerted activity.

 In an ironic twist, the so-called “gig economy” may be a political catalyst for both worker-led organizing and the revitalization of labor law. Under the employment regime authorized by AB5, California’s precarious platform workers will have the power to effectively fight poverty while building a just and vibrant democracy—in the workplace and beyond.

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1. A shortened version of this paper first appeared in the Expert Forum of the American Constitutional Society. [↑](#footnote-ref-1)
2. See, e.g., the press release of the International Transport Workers’ Federation which calls for AB5 to be the inspiration for global rules to govern the gig economy (ITWF 2019). [↑](#footnote-ref-2)
3. New York, for example, is writing its own version of AB5 (McDonough 2019). [↑](#footnote-ref-3)
4. Notably, they were also silent on supply (the number of Uber and Lyft vehicles operating at any given time) and on prices, two issues that had been regulated in the taxi industry for over a century (see, generally, Dubal 2017a). [↑](#footnote-ref-4)