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#### Recommended Citation

Shu-Yi Oei. "The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights." *Law and Contemporary Problems* 81, no.3 (2018): 107-136.

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# THE TROUBLE WITH GIG TALK: CHOICE OF NARRATIVE AND THE WORKER CLASSIFICATION FIGHTS

SHU-YI OEI\*

## I INTRODUCTION

It is by now widely accepted that businesses such as Uber, Airbnb, Lyft, TaskRabbit, Rover, and DogVacay represent a new sector and way of providing goods and services. This group of firms has variously been referred to as the sharing economy, gig economy, platform economy, 1099 economy, and peer-to-peer economy. The term “sharing economy” has arguably been the dominant term used to describe the new firms.<sup>1</sup> However, as time has gone on, terms like “gig economy,” “peer-to-peer economy,” and “platform economy” have also gained traction and prominence, among academics as well as the press.<sup>2</sup> While

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This article is also available online at <http://lcp.law.duke.edu/>.

\* Professor of Law, Boston College Law School. I would like to thank Kim Krawiec, Julia Mahoney, Sally Satel, and the other participants of the Altruism, Community, and Markets Symposium organized by the American Enterprise Institute, Duke University School of Law, and the University of Virginia School of Law for their helpful comments and suggestions on this essay. My thanks also to Diane Ring for feedback on drafts.

1. For example, a quick search of the *New York Times* archives since January 1, 2006 yields 245 references to the term “sharing economy,” 115 references to the term “gig economy,” three results for the term “1099 economy” and five results for the term “platform economy.” Terminology searches, N.Y. TIMES, [https://query.nytimes.com/search/sitesearch/ \[https://perma.cc/PDL5-EGHZ\]](https://query.nytimes.com/search/sitesearch/?https://perma.cc/PDL5-EGHZ) (Follow hyperlink; then set date range from 01/01/2006 to 10/02/2017 (date author conducted searches) and search “sharing economy,” “gig economy,” “1099 economy,” and “platform economy,” separately). A search in the *Wall Street Journal* online archives for the last four years yielded 620 hits for “sharing economy” as opposed to 159 hits for “gig economy,” three hits for “1099 economy,” and nine hits for “platform economy.” Terminology searches, WALL ST. J., <http://www.wsj.com/public/page/archive.html> (Follow hyperlink; set date range accordingly and search “sharing economy,” “gig economy,” “1099 economy,” and “platform economy” separately). Searches conducted on October 9, 2017 of the SSRN platform yielded 287 references to “sharing economy” since 2009. In contrast, there were 61 references to “gig economy” with the oldest relevant reference occurring in August 2015, 39 references to “platform economy” with the oldest relevant reference occurring in August 2015, and 6 references to “1099 economy” with the oldest occurring in February 2015. Terminology searches, SSRN, [https://www.ssrn.com/en/ \[https://perma.cc/PK74-N8WQ\]](https://www.ssrn.com/en/) (Follow hyperlink; set date range accordingly and search “sharing economy,” “gig economy,” “1099 economy,” and “platform economy” separately). See also Aaron Smith, *Shared, Collaborative and On Demand: The New Digital Economy*, PEW RES. CTR. (May 19, 2016), [http://www.pewinternet.org/2016/05/19/the-new-digital-economy/ \[https://perma.cc/67NT-8XSZ\]](http://www.pewinternet.org/2016/05/19/the-new-digital-economy/) (finding based on Pew survey of 4,787 American adults that 27% of those surveyed have heard of the term “sharing economy” while 73% have not, and 11% have heard of the term “gig economy” while 89% have not).

2. For academic uses, see, e.g., Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016); Kathleen D. Thomas, *Taxing the Gig Economy*, 166 U. PA. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2894394 \[https://perma.cc/AB2F-F8AW\]](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2894394); Aqib

references to the sharing economy persist, the gig economy terminology has risen in popularity at the same time that the sharing economy terminology has been increasingly critiqued.<sup>3</sup> This shift partially derives from an emerging sense that “sharing economy” is an inaccurate name for a sector that is so obviously commercial in nature and not about sharing, generosity, or altruism.<sup>4</sup>

Yet, it is not just the term “sharing economy” that is loaded with meaning. The other alternatives hold meaning too. For example, “gig economy” signifies individuals landing a one-off project and carries a freelance connotation. “Platform economy” suggests that large firms like Uber are merely a facilitating intermediary for transactions between individuals. Likewise, “peer-to-peer economy” de-emphasizes the role played by the startups in bringing together workers or service providers and clients. In some situations, these latter terminologies have been used purposefully to convey these meanings.<sup>5</sup>

The fact that several of the terminologies used to describe these new arrangements are meaningful and purposeful should not be totally surprising. Academics are familiar with the power of language in shaping public opinions about regulatory outcomes, including outcomes in the new economy.<sup>6</sup> Moreover,

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Aslam & Alpa Shah, *Taxation and the Peer-to-Peer Economy* (IMF, Working Paper No. 17/187, 2017); Ruth B. Collier, V.B. Dubal & Christopher Carter, *Labor Platforms and Gig Work: The Failure to Regulate* (IRLE, Working Paper No. 106-17, 2017). For popular press and policy uses, see, e.g., Zeninor Enwemekar, *What the Booming Gig Economy Means for the Future of Work*, WBUR (Nov. 2, 2017), <http://www.wbur.org/bostonmix/2017/11/02/gig-economy> [<https://perma.cc/R5SV-FJUX>]; James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy*, MCKINSEY GLOBAL INST. (Oct. 2016), <https://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> [<https://perma.cc/Y37F-P54X>]; Alana Semeuls, *Could a Tax Fix the Gig Economy?*, THE ATLANTIC (Nov. 6, 2017), <https://www.theatlantic.com/business/archive/2017/11/gig-economy/544895/> [<https://perma.cc/M23S-EZ7H>].

3. For examples of critiques of the “sharing economy” terminology, see TOM SLEE, WHAT’S YOURS IS MINE: AGAINST THE SHARING ECONOMY (2015); Dean Baker, *Don’t Buy the “Sharing Economy” Hype: Airbnb and Uber are Facilitating Rip-Offs*, THE GUARDIAN (May 27, 2014), <https://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation> [<https://perma.cc/K47J-FYFP>]; Adam Chandler, *What Should the ‘Sharing Economy’ Really Be Called?*, THE ATLANTIC (May 27, 2016), <https://www.theatlantic.com/business/archive/2016/05/sharing-economy-airbnb-uber-yada/484505/> [<https://perma.cc/M4QS-M4AF>]; Alex Hern, *Why the Term “Sharing Economy” Needs to Die*, THE GUARDIAN (Oct. 5, 2015), <https://www.theguardian.com/technology/2015/oct/05/why-the-term-sharing-economy-needs-to-die> [<https://perma.cc/9578-77HE>]; Christopher Mims, *How Everyone Gets the ‘Sharing’ Economy Wrong*, WALL ST. J. (May 24, 2015), <https://www.wsj.com/articles/how-everyone-gets-the-sharing-economy-wrong-1432495921>; Sarah O’Connor, *The Gig Economy is Neither “Sharing” Nor “Collaborative,”* FIN. TIMES (June 14, 2016), <https://www.ft.com/content/8273edfe-2c9f-11e6-a18d-a96ab29e3c95> [<https://perma.cc/NPX4-BZNN>].

4. See *supra* note 3.

5. See *infra* Part III.B.

6. See, e.g., JEREMIAS PRASSL, HUMANS AS A SERVICE (2018) (discussing competing narratives in the sharing economy); Kieran Healy & Kimberly D. Krawiec, *Organ Entrepreneurs*, in THE CAMBRIDGE HANDBOOK OF LAW AND ENTREPRENEURSHIP (D. Gordon Smith & Christine Hurt eds., forthcoming) (noting how “[t]he rhetoric of the so-called ‘Sharing Economy’ presents the entrepreneurial firm as a facilitator of co-operative exchange between both peers and strangers.”); Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL’Y REV. 309, 311 (2016) (developing a counternarrative to dominant narratives in the platform economy); Abbey Stemler, *The Myth of the Sharing Economy and its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 197, 209 (2017) (discussing the relationship between narrative and regulation; examining the choice of the term “sharing

scholars have noted how the new businesses have purposefully attempted to direct and change regulatory outcomes in advancing their business model.<sup>7</sup> Yet, it seems that terms like “gig economy” and “platform economy” have slipped into popular discourse without much interrogation. Rather than accepting their existence unquestioningly (or, worse, feeling a sense of relief that they are at least more accurate than “sharing”), it is worth probing in detail how these terms have come into common usage and how they have shaped perceptions of the new sector and helped push laws and regulations in desired directions.

This essay argues that many of the newer terms for describing the sharing economy—such as the “gig economy,” “1099 economy” or “platform economy”—are at least as problematic as, and possibly even more so than, the sharing economy misnomer. Such “gig talk”<sup>8</sup> advances a specific story regarding the relationship between the worker or service provider and the business.<sup>9</sup> That story is one of relative independence between the actions of those providing goods and services and the businesses that make the underlying transactions possible. This claimed independence has implications for legal areas as varied as worker classification, taxation, public accommodation laws, product liability laws, and other types of regulation.<sup>10</sup> Moreover, and more importantly, this essay also argues that terms like “gig economy” or “platform economy” are potentially more effective than “sharing economy” in exploiting extant legal rules and ambiguities to generate the legal and regulatory outcomes that these new businesses desire. By contrast, the term “sharing economy” is so obviously a departure from the commercial reality of the transactions that its power in affecting policy at the margins is more limited.

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economy;” identifying five frames used by firms operating in the new sector).

7. See *supra* note 6; see also Jordan Barry & Elizabeth Pollman, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 383 (2017) (characterizing the new businesses as regulatory entrepreneurs and documenting how the new businesses have used various tactics to attempt to change the law in their favor); Shu-Yi Oei & Diane Ring, *Can Sharing be Taxed?*, 93 WASH. U. L. REV. 989, 1028–29, (2016) (describing firm uses of first mover advantage to opportunistically take advantages of gaps and ambiguities in the law).

8. This essay uses the terms “gig talk” or “gig and platform talk” as a shorthand way to refer to this collective of new terms for the new economy.

9. This essay uses the generic terms “firm” and “business” to denote what others have called the “platform” that enables these services to be provided. It also uses the term “the new sector” in place of terms like “gig economy” or “sharing economy.” These descriptions are chosen in the interest of neutrality.

10. See generally David Berke, *Products Liability in the Sharing Economy*, 33 YALE J. ON REG. 603 (2016) (products liability); Nestor M. Davidson & John Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215 (2016) (examining municipal regulation of the new sector); Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017) (law of public accommodations); Oei & Ring, *supra* note 7 (tax law implications); Daniel Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901 (2016); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479 (2016) (labor law consequences); see also Stemler, *supra* note 6, at 113–26 (describing some of the desired legal and regulatory outcomes that sharing economy firms hope to achieve through use of framing).

The reason why gig talk has been more effective lies not in the objective accuracy of the chosen description itself but in how the chosen description interacts with existing legal rules and ambiguities: Existing laws and legal ambiguities can help constrain chosen descriptive narratives about the new economy, acting as a roadblock that limits the potency of the chosen description.<sup>11</sup> But laws and ambiguities can also be employed to reinforce the use of the chosen narrative.<sup>12</sup> This observation suggests that if a narrative can find support in existing laws or legal ambiguities, it is likely to prove sticky and legally potent, even if it is fundamentally contestable. By contrast, if existing laws or legal structures serve to undermine and overwhelm a given narrative, then that narrative may turn out to be more benign, even if it is outlandish or inaccurate on its own terms.<sup>13</sup> Thus, in evaluating narrative language, we should not focus merely on the veracity of the description itself, but also on the interplay between the description, the legal treatment being sought, and the capacity of existing laws to encourage or resist the chosen description and the legal outcome it suggests. In particular, we need to pay attention to the extent to which current laws or legal ambiguities can be harnessed in support of the narrative and corresponding legal treatment that is being advanced. Under this analytical approach, terms like “sharing economy” may turn out to be hyperbolic, yet harmless, while terms like “gig economy” may have a much more significant legal impact.

This essay argues that as the new businesses gained an economic foothold and legitimacy, the “community of sharers” narrative lost potency, due in part to the fact that many laws, including tax laws, have served to discredit or block that narrative. Simultaneously, the benefits of advancing a gig or platform narrative became clearer to the firms operating in the new sector. As a result, replacement terms such as “platform” or “1099” or “gig” economy have risen in prominence as alternatives.<sup>14</sup> These latter terminologies have been increasingly used by academics and the press (partially due to dissatisfaction with the “sharing

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11. For example, the necessity of taxing market transactions from an early stage effectively limited the effectiveness of the sharing narrative. See SHARING ECONOMY TAX CENTER, <https://www.irs.gov/businesses/small-businesses-self-employed/sharing-economy-tax-center> [https://perma.cc/8X9N-KFS4] (last visited Jan. 25, 2018); see also Oei & Ring, *supra* note 7, at 1008–27 (showing how existing tax law applies to sharing economy transactions).

12. For example, in the early days of the new sector, the arguably sluggish pace of action to regulate the ride- or home-sharing sectors helped reinforce the “sharing” narrative by supporting the idea that these services were non-commercial and distinct from the taxicab and hotel industries. See, e.g., Jack Newsham, *Uber, Lyft Save Big by Avoiding Regulations*, BOS. GLOBE (Dec. 25, 2014), <https://www.bostonglobe.com/business/2014/12/25/uber-lyft-save-big-avoiding-regulations/pQAMk1KMOavlyZhWi4XIaJ/story.html> [https://perma.cc/P9WQ-RR27]; David Streitfeld, *Companies Built on Sharing Balk When It Comes to Regulators*, N.Y. TIMES (Apr. 21, 2014), <https://www.nytimes.com/2014/04/22/business/companies-built-on-sharing-balk-when-it-comes-to-regulators.html> [https://perma.cc/GGN7-6PYW].

13. It is of course possible that the values such narrative expresses are so repugnant that the narrative is problematic for other reasons.

14. See *supra* note 2; see also Max Gulker, *Let's Stop Calling it the “Sharing Economy”*, AM. INST. ECON. RES. (Sept. 8, 2017), <https://www.aier.org/blog/let%E2%80%99s-stop-calling-it-%E2%80%9Csharing-economy%E2%80%9D> [https://perma.cc/U2UY-WFAH].

economy” terminology), as well as by the businesses themselves.<sup>15</sup> But these terms are not neutral. Instead, they tilt towards a certain set of legal and regulatory outcomes (such as independent contractor classification for workers). And because gig characterization is actually plausible under current law, these terminologies may have actually been more effective than the sharing economy terminology in shaping desired regulatory outcomes, due in part to the greater propensity of existing laws and legal ambiguities to support the claimed gig characterization. This essay therefore argues that scholars and policymakers should be vigilant about the ways in which “gig talk” has been used to promote and shape legal outcomes. The move away from “sharing economy” language may on its face appear to be a win for accuracy, but the important regulatory and deregulatory work being done by the “gig economy” set of terms should not be discounted.

This essay proceeds as follows: Part II describes the “sharing” or “collaborative consumption” narrative and how that narrative was initially wielded to try and win regulatory wars, with some initial success that slowly became more limited. This was due in part to the discrediting effects of various laws and regulations, such as tax and insurance law and local regulations, which acted as a plausibility constraint on the “sharing” description. Part III describes the rise of gig talk, such as “1099 economy,” “gig economy,” “peer-to-peer economy,” and “platform economy.” This essay argues that these competing terms have significance for important legal and regulatory battles (for example, fights over worker classification), and have often been deliberately wielded to win such battles. It details how businesses have employed existing laws and legal ambiguities to buttress the gig story and support their desired regulatory treatment and the ways in which they have exploited their first mover advantage in order to do so. As a result of the effective harnessing of laws and legal ambiguities in support of gig characterization, gig talk has turned out to be an effective framing device for advancing desired regulatory outcomes, both in the worker classification area and elsewhere. Finally, Part IV surveys the road ahead, analyzing potential challenges to gig and platform talk. Recent regulatory and public relations challenges to Uber and other businesses in this sector, as well as improving economic conditions and technological advances, may be wildcards that could support the rise of competing narratives (including those regarding work and worker protection) or could lead to the decline of gig talk’s significance.

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15. See, e.g., Kirsty Major, *Uber had this Coming – It was Never Just a “Tech Platform”*, INDEPENDENT (Sept. 22, 2017), <http://www.independent.co.uk/voices/uber-ban-london-ride-hailing-app-company-employees-taxi-drivers-customer-safety-women-protect-a7961231.html> [<https://perma.cc/V98C-6ETL>] (“For a long time, Uber had attempted to sell itself as a neutral technology platform that offered the software to link up the owner of a rusting car on the driveway with a person in need of a ride.”); Sam Shead, *Uber’s Main Argument for Why it Doesn’t Need to Give Driver’s Worker Benefits is Flawed, Lawyer Claims*, BUS. INSIDER (Sept. 28, 2017), <http://www.businessinsider.com/lawyer-fighting-for-uber-drivers-uber-cant-call-itself-an-agent-2017-9> [<https://perma.cc/HT9T-2N4W>] (“The Californian transport company has always maintained that drivers who use its platform are independent contractors. It frames itself as a technology platform, connecting riders and drivers and taking a fee in the process.”); see also sources cited, *supra* note 2.

This essay does not claim that construction of these narratives about the nature of the sector and the transactions occurring in it is the only way in which the new businesses have achieved success or gained footholds and social acceptability.<sup>16</sup> Obviously the way in which the new businesses talk about their legal model interacts with the actual legal and business moves they make to ensure that their preferred characterization of the sector sticks. Moreover, this essay also does not claim that gig characterization is necessarily the normatively wrong one. It is quite possible that courts and observers could reasonably conclude that those working in this sector are accurately classified as independent contractors based on assessment of all the facts. Instead, the essay has more modest goals: First, to emphasize how, in marketing a sector of first impression involving transactions that arguably fall into a regulatory gray area,<sup>17</sup> descriptive framings have been purposefully employed by some (and accidentally supported by others) to advance legal and regulatory ends. Second, to show that in a gray space in which legal rules and norms are still developing, it is not just the most obviously wrong framings, but also the *less* obviously flawed ones, that we ought to be concerned about. In some instances, the former may be more easily resisted by current laws while the latter may be more purposefully deployed to advance hidden regulatory and economic goals.

## II

### THE “SHARING” NARRATIVE

One of the origin narratives advanced about the new businesses was a story of sharing or collaborative consumption.<sup>18</sup> In its early stages, the new sector was marketed by the businesses and their proponents as a trust and collaboration-based method of providing services between ordinary people who “shared” their stuff on an “excess capacity” basis.<sup>19</sup>

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16. For example, it is clear that the new businesses have engaged in not insignificant degrees of lobbying in order to obtain their desired regulatory treatment. *See, e.g.*, Catherine Ho, *Airbnb Bulks Up Lobbying Presence as Lawmakers Increase Scrutiny of “Sharing Economy,”* WASH. POST (Oct. 11, 2016), [https://www.washingtonpost.com/news/powerpost/wp/2016/10/11/airbnb-bulks-up-lobbying-presence-as-lawmakers-increase-scrutiny-of-sharing-economy/?utm\\_term=.35c9b6f65888](https://www.washingtonpost.com/news/powerpost/wp/2016/10/11/airbnb-bulks-up-lobbying-presence-as-lawmakers-increase-scrutiny-of-sharing-economy/?utm_term=.35c9b6f65888) [<https://perma.cc/7MVE-N8XZ>]; Gerald B. Silverman, *Uber, Airbnb, Tech Companies Spend Big Bucks Lobbying in N.Y.*, BLOOMBERG BNA (May 28, 2017), <https://www.bna.com/uber-airbnb-tech-n73014451621/> [<https://perma.cc/4ZLC-7HC4>].

17. *See generally* Oei & Ring, *supra* note 7 (discussing how new businesses have harnessed legal and regulatory ambiguities).

18. *See supra* note 1; Stemler, *supra* note 6, at 109–12 (discussing choice to use the term “sharing economy”).

19. Anya Kamenetz, *Is Peers the Sharing Economy’s Future or Just a Great Silicon Valley PR Stunt*, FAST CO. (Dec. 9, 2013), <https://www.fastcompany.com/3022974/is-peers-the-sharing-economys-future-or-just-a-great-silicon-valley-pr-stunt> [<https://perma.cc/M3QZ-FGLF>] (discussing the creation and marketing of Peers.org by the new businesses as an organization “uniting the values of collaboration, community, and entrepreneurship” and “building a bottom-up economy”; recounting how Airbnb sought help of a for-profit consultancy that launches “social movements” and paid it to start Peers.org).

### A. The Sharing Story and its Early Gains

As others have noted, the sharing narrative highlighted the more gratuitous aspects of transactions facilitated by online platforms and was advanced to purposefully shape the regulatory treatment of the sector.<sup>20</sup> It carried the implication that these transactions belonged in the more personal, peer-to-peer realm, and ought not to be regulated, governed, or taxed in the same manner as similar transactions in a more commercial vein. For example, this narrative conveys the idea that someone generously “sharing” their home by renting it out on the odd day should not be subject to the same stringent health and safety regulations as commercial businesses operating as hotels or should not be subject to the same state and local taxes and fees imposed on hotels.<sup>21</sup> Similarly, the sharing narrative implied that someone helping out a neighbor with a home improvement task in their spare time should not be subject to the same licensing and insurance requirements as a general contractor in the construction business.<sup>22</sup> Ridesharing services have embraced similar characterizations in arguing that their drivers should not be subject to taxicab regulation.<sup>23</sup>

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20. See Healy & Krawiec, *supra* note 6 (noting that “a striking feature of many of the most prominent and allegedly disruptive services is their embrace of the imagery and logic of gift exchange and reciprocity”); Stemler, *supra* note 6, at 205 (noting that “the term [sharing economy] invokes notions of ‘helping others’ and ‘community’”); Donna Tam, *Airbnb, Lyft Partner with New Share-Economy Advocacy Group*, CNET (July 31, 2013), <https://www.cnet.com/news/airbnb-lyft-partner-with-new-share-economy-advocacy-group/> [<https://perma.cc/4DRT-W9R9>] (noting how Airbnb, Lyft and TaskRabbit have partnered with Peers.org, a nonprofit whose goal is “to promote and protect the businesses and groups that allow people to share goods and services” for example by “holding events to bring together advocates and users for ‘community-building’ and providing a place for them to share stories and talk about related topics”).

21. Emily Badger, *Airbnb is About to Start Collecting Hotel Taxes in More Major Cities, Including Washington*, WASH. POST (Jan. 29, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/?utm\\_term=.4fe48e854573](https://www.washingtonpost.com/news/wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/?utm_term=.4fe48e854573) [<https://perma.cc/D9SR-J99W>] (“In its younger — much younger — days, Airbnb argued that hotel laws and taxes didn’t apply to a company that doesn’t run hotels.”); Rebecca Jarvis, *Hotel Industry Fighting Back against Airbnb*, ABC NEWS (Apr. 22, 2014), <http://abcnews.go.com/blogs/business/2014/04/hotel-industry-fighting-back-against-sites-like-airbnb/> [<https://perma.cc/F38L-2P3T>] (countering New York Attorney General’s claim that many NYC Airbnb rentals are illegal hotels and stating that Airbnb is “proud to stand up for our hosts who share their homes and against this over-broad, government sponsored fishing expedition”); Donna Tam, *NY Official: Airbnb Stay Illegal; Host Fined \$2,400*, CNET (May 20, 2013), <https://www.cnet.com/news/ny-official-airbnb-stay-illegal-host-fined-2400/> [<https://perma.cc/4WPW-UGZL>] (Airbnb statement to CNET that “Eighty-seven percent of Airbnb hosts in New York list just a home they live in — they are average New Yorkers trying to make ends meet, not illegal hotels that should be subject to the 2010 [short-term rental] law.”).

22. Colleen Taylor, *TaskRabbit Raises \$5M for Nationwide Expansion*, GIGAOM (May 4, 2011), <https://gigaom.com/2011/05/04/taskrabbit-raises-5m-for-nationwide-expansion/> [<https://perma.cc/7BVP-XMMU>] (quoting founder Leah Busque as saying “We’re really empowering people to sell their free time and their special skills and services.”).

23. Sidecar, for example, a ridesharing service that eventually shut down, initially adopted suggested donations for rides, rather than formal charges. Katie Fehrenbacher, *Introducing SideCar, the Uber for Personal Cars*, GIGAOM (Jun. 26, 2012), <https://gigaom.com/2012/06/26/sidecar-launches-with-real-time-ride-sharing/> [<https://perma.cc/B7K5-X95A>]; Ariel Schwartz, *The Potential for Pitfalls and Success in the Sharing Economy*, FAST CO. (June 26, 2012), <https://www.fastcompany.com/1680087/the-potential-for-pitfalls-and-success-in-the-sharing-economy> [<https://perma.cc/3T6E-DYGJ>] (describing Sidecar’s “Community Drivers” model). See also *Uber Needs Partners Like You*, UBER, <https://get.uber>.

The “community of sharers” narrative has also partially been able to gain traction due to the existence of smaller and less formal platforms, as well as the offering of various socially beneficial services as well as idiosyncratic services that have gained popular traction. For example, platforms emerged offering sharing of bathroom facilities<sup>24</sup> and offering safe rides home to the LGBTIQQ community and sex workers.<sup>25</sup> Uber, a giant of the new economy, emphasized the cuddly and communal nature of sharing by intermittently offering delivery of kittens, Mardi Gras King Cakes, and ice cream.<sup>26</sup> There has also been talk of how to extend the sharing economy to facilitate social enterprise and non-profit activities.<sup>27</sup> Purposefully or not, these smaller-scale examples of how sharing among peers could operate and be harnessed for sociable or charitable ends have helped buttress the sharing characterization.

The “community of sharers” narrative has been successful to some extent. This success was due, in part, to the regulatory strategies employed by some firms. Scholars have noted that several of the firms in this sector simply began operations, acting under the assumption that they were not subject to various regulatory regimes or simply choosing their preferred tax treatment.<sup>28</sup> For example, when Airbnb first began operating, it disregarded local rules restricting short-term rentals and left collection of local hotel taxes to the individual hosts.<sup>29</sup>

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com/p/legacy-cl-base/ (last visited, Oct. 8, 2017) (“Get paid weekly just for helping our community of riders get rides around town.”).

24. Suzy Strutner, *Airbnb is the Best Way to Find Toilets in a Hurry*, HUFFINGTON POST (Jan 25, 2015), [http://www.huffingtonpost.com/2015/01/25/toilet-finder-app\\_n\\_6518116.html](http://www.huffingtonpost.com/2015/01/25/toilet-finder-app_n_6518116.html) [https://perma.cc/5GPU-9CBQ].

25. See, e.g., Vanessa L. Pinto, *Homobiles: Possibly the Best S.F. Ride Service Ever*, SF WKLY. (June 21, 2012), <https://archives.sfweekly.com/exhibitionist/2012/06/21/homobiles-possibly-the-best-sf-ride-service-ever> [https://perma.cc/534C-EJ6E] (describing Homobiles as service “to provide safe rides home to people vulnerable to harassment, such as sex workers or transgender folks”); HOMOBILES, <http://www.homobiles.org/> (last visited Feb. 4, 2018) (California nonprofit organization “Committed to providing secure and reliable transit to the SF Bay Area LGBTIQQ community and its allies.”).

26. *King Cakes on Demand*, UBER BLOG (Jan. 4, 2016), <https://www.uber.com/blog/new-orleans/request-a-king-cake-on-demand-on-jan-6/>; *Meet the Purr-sidential Candidates*, UBER BLOG (Oct. 26, 2016), <https://www.uber.com/blog/colorado/uber-kittens/>; *Uber Ice Cream is Here!*, UBER NEWSROOM (Aug. 20, 2017), <https://www.uber.com/newsroom/uber-ice-cream2017/>.

27. See, e.g., Erin Morgan Gore, *Nonprofits Should Lead the Sharing Economy*, STAN. SOC. INNOVATION REV. (Mar. 3, 2014), [https://ssir.org/articles/entry/nonprofits\\_should\\_lead\\_the\\_sharing\\_economy](https://ssir.org/articles/entry/nonprofits_should_lead_the_sharing_economy) [https://perma.cc/KN2T-DNH4] (discussing “nonprofit success stories” in the sharing economy and discussing how nonprofits can “tap into the full potential of the sharing economy”).

28. Barry & Pollman, *supra* note 7, at 398–400; Oei & Ring, *supra* note 7, at 994; Diane M. Ring, *Silos and First Movers in the Sharing Economy Debates*, LAW & ETHICS HUM. RTS. (forthcoming 2018) (discussing first-mover advantage and its effects on regulation).

29. See, e.g., Elizabeth Harris, *The Airbnb Economy in New York: Lucrative but Often Illegal*, N.Y. TIMES (Nov. 4, 2013), <http://www.nytimes.com/2013/11/05/nyregion/the-airbnb-economy-in-new-york-lucrative-but-often-unlawful.html> [https://perma.cc/U99C-JDEW] (describing how various Airbnb hosts disregard short-term rental prohibitions in New York City); Owen Thomas, *Airbnb Home Rentals Aren't Even Legal in Its Hometown of San Francisco*, BUS. INSIDER (June 11, 2012), <http://www.businessinsider.com/airbnb-illegal-san-francisco-2012-6> [https://perma.cc/CA62-YRLA] (discussing how short-term rentals violate San Francisco Admin. Code § 41A.5 prohibition of short term rentals); Brad Tuttle, *The Other Complication for Airbnb and the Sharing Economy: Taxes*, TIME (June 15, 2013), <http://business.time.com/2013/06/15/the-other-complication-for-airbnb-and-the-sharing-economy-taxes/> [https://perma.

Uber began operations in San Francisco and elsewhere with scant regard to local taxicab regulations.<sup>30</sup> These legal treatments may not have lasted, but the businesses' first-mover advantage served to delay the onset of potentially more onerous legal and regulatory systems. Even after some states and localities were able to force the platform into collecting local hotel taxes, these agreements between Airbnb and localities did not always require collection of back taxes owed for previous periods.<sup>31</sup> With respect to ride hailing companies, it is significant that these companies have not generally been required to compensate taxicab medallion owners for declines in value of their medallions.<sup>32</sup>

## B. Law and the Construction of a Commercial Counter-Narrative

Yet, the “community of sharers” narrative has ultimately not been powerful enough to stave off regulation altogether. The commercial nature of the new businesses quickly became apparent to regulators and legislators, as well as to consumers and workers in the new economy. As the new firms grew in size, transaction volume, and geographic reach, and as they sought to recruit more participants, it became more and more difficult, if not outright counterproductive, to characterize the transactions as gratuitous and not for profit. Jurisdiction after jurisdiction has forced Airbnb and similar firms to enter into agreements to collect and pay hotel taxes from guests.<sup>33</sup> Jurisdictions have started to impose restrictions on landlords' ability to rent properties on Airbnb (including local fees, direct regulations, and limits on number of days rented), as the impact on local communities has become more apparent.<sup>34</sup> Similarly, cities

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cc/7DYQ-GTP9] (noting that “[a]ccording to Airbnb, it’s entirely up to the host to include the proper taxes in their rental listing rates, and then it’s up to the host to pay them. ‘You are responsible for managing your tax and other regulatory obligations,’ Airbnb’s Taxes FAQ section says. ‘Please contact a tax professional or city compliance department for advice about your tax status and compliance.’”).

30. Brian X. Chen, *A Feisty Start-Up is Met with Regulatory Snarl*, N.Y. TIMES (Dec. 2, 2012), <http://www.nytimes.com/2012/12/03/technology/app-maker-uber-hits-regulatory-snarl.html> [https://perma.cc/3T69-2WJE] (quoting Uber CEO Travis Kalanick as saying “[I]f you put yourself in the position to ask for something that is already legal, you’ll find you’ll never be able to roll out . . . . The corruption of the taxi industries will make it so you will never get to market.”); Adrienne Jeffries, *Uber the Outlaw: A Rogue Startup Fights the Taxi Power*, VERGE (Sept. 7, 2012), <https://www.theverge.com/2012/9/7/3300244/uber-taxi-new-york-travis-kalanick-rogue> [https://perma.cc/6K7F-EU2Q] (citing former Uber general manager as saying “Their strategy has been ‘try and stop us, and if you try and stop us, then we’ll cross that bridge when we come to it.’”).

31. Oei & Ring, *supra* note 7, at 1045–46 (discussing occupancy tax issues).

32. Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 NYU J. LEGIS. & PUB. POL’Y 1, 81–82 n.247–48 (2017) (discussing court cases where medallion owners have made taking claims and noting general lack of success).

33. *In What Areas is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available?topic=264> [https://perma.cc/3MVX-4PWG] (last visited Jan. 25, 2018) (listing jurisdictions where Airbnb collects and remits local occupancy taxes); Oei & Ring, *supra* note 7, at 1023–27 (discussing growing number of jurisdictions where Airbnb collects and remits occupancy taxes).

34. See, e.g., Heather Kelly, *Why Everyone is Cracking Down on Airbnb*, CNN (June 23, 2016), <http://money.cnn.com/2016/06/22/technology/airbnb-regulations/index.html> [https://perma.cc/YMS9-2YAB] (discussing various local regulatory developments to crack down on Airbnb rentals); see also *What Regulations Apply to My City?*, AIRBNB, <https://www.airbnb.com/help/article/961/what>

and states have begun to impose fees on Uber rides and to enact ridesharing legislation governing various aspects of ridesharing transactions.<sup>35</sup> There has been increasing pressure on platforms to curb discrimination (including race-based discrimination) occurring on their platforms.<sup>36</sup>

These developments were facilitated in part by lobbying efforts by competitors and opponents of the new firms (for example, by the hotel and taxicab industries), as well as by the press and academics drawing attention to issues and problems raised by the new businesses.<sup>37</sup> Under these influences, legislators and regulators have become increasingly concerned about the regulatory issues raised by the new businesses and the need to figure out how to subject them to regulation consistent with their commercial nature.

More fundamentally, however, the sharing characterization was just not plausible given the commercial underlying nature of the transactions, and such implausibility became obvious once the new transactions came into contact with existing law. The example of tax law is instructive. Despite the attempted characterization of the businesses as “sharing,” the obligation for those individuals operating in the new sector to file and pay taxes on income earned from work quickly became obvious. In the very early days of the new economy, some participants may have been unaware of their obligation to pay taxes.<sup>38</sup> However, the notion that such income was not taxable was swiftly put to rest in a number of ways: First, news articles began to discuss tax filing and payment obligations.<sup>39</sup> Second, the businesses themselves began including more comprehensive information about tax obligations for sector participants on their

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regulations-apply-to-my-city [<https://perma.cc/CGX6-5YNN>] (last visited Jan. 25, 2018) (listing the types of local regulations that might apply in various localities).

35. See, e.g., An Act Regulating Transportation Network Companies, ch. 187, 2016 Mass. Acts (2016) (imposing new fee and various other regulatory requirements).

36. See, e.g., Tracy Jan, *Faced with Complaints of Discrimination, Airbnb Partners with NCAAP to Recruit Black Hosts*, WASH. POST (July 26, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/07/26/faced-with-complaints-of-discrimination-airbnb-partners-with-naacp-to-recruit-black-hosts/?utm\\_term=.ca2ec2a6c837](https://www.washingtonpost.com/news/wonk/wp/2017/07/26/faced-with-complaints-of-discrimination-airbnb-partners-with-naacp-to-recruit-black-hosts/?utm_term=.ca2ec2a6c837) [<https://perma.cc/THW5-QKHV>]; Sam Levin, *Airbnb Gives in to Regulators' Demand to Test for Racial Discrimination by Hosts*, THE GUARDIAN (Apr. 27, 2017), <https://www.theguardian.com/technology/2017/apr/27/airbnb-government-housing-test-black-discrimination> [<https://perma.cc/QQ4R-2QYG>].

37. See, e.g., Leong & Belzer, *supra* note 10; Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment* (Harv. Bus. Sch. Working Paper 16-069, 2016), [http://www.hbs.edu/faculty/Publication%20Files/16-069\\_5c3b2b36-d9f8-4b38-9639-2175aaf9ebc9.pdf](http://www.hbs.edu/faculty/Publication%20Files/16-069_5c3b2b36-d9f8-4b38-9639-2175aaf9ebc9.pdf) [<https://perma.cc/DM3W-S69F>]; Mason Ameri et al., *No Room at the Inn? Disability Access in the New Sharing Economy* (May 2017) (unpublished study), [https://smlr.rutgers.edu/sites/default/files/documents/PressReleases/disability\\_access\\_in\\_sharing\\_economy.pdf](https://smlr.rutgers.edu/sites/default/files/documents/PressReleases/disability_access_in_sharing_economy.pdf) [<https://perma.cc/63WH-KCQQ>].

38. See Oei & Ring, *supra* note 7, at 993; Shu-Yi Oei & Diane Ring, *The Tax Lives of Uber Drivers: Evidence from Internet Discussion Forums*, 8 COLUM. J. TAX L. 56, 60 (2017) (noting, based on review of postings by rideshare drivers on internet discussion forums, that forum participants' understandings of expenses and deductions “were less accurate and more varied in sophistication” than their understandings of basic tax filing and income inclusion obligations); Tuttle, *supra* note 29.

39. See, e.g., Kathleen Pender, *If You Make Money in the Sharing Economy, the IRS Will Know*, SFGATE (Feb. 22, 2014), <https://www.sfgate.com/business/network/article/If-you-make-money-in-the-sharing-economy-the-IRS-5258941.php>; Tuttle, *supra* note 29.

websites.<sup>40</sup> Third, online forums, platforms, and services emerged that counseled sector participants on the key issues at stake in preparing their taxes.<sup>41</sup> Finally, while some of the new businesses initially took advantage of legal ambiguity in the tax law and did not report worker earnings at or below a certain threshold—quite high at 200 transactions/\$20,000 earned—to the IRS, others did eventually begin to more comprehensively report income earned by workers to the IRS, perhaps due to fear of penalties for information reporting failures.<sup>42</sup>

At this point, virtually all businesses in the sector are complying with tax information reporting requirements, albeit by embracing the most plausibly advantageous tax position.<sup>43</sup> Thus, almost from the outset, multiple voices reinforced to sector participants that tax filing and payment were not optional. This message undermined the notion that participation in the sector was gratuitous and non-commercial. While there may be some gray areas in terms of *where* to report the income on the tax return and *which* expenses are deductible,<sup>44</sup> the fact that income earned through platform work is taxable is quite well understood at this point.<sup>45</sup> In short, despite claims and characterizations about “sharing,” it became difficult to assert that the new transactions were less commercial than the old when income earned from work in this sector was clearly taxable in a manner comparable to other commercial or work transactions.

Similarly, the gratuitous, sharing characterization was undercut by quickly emerging insurance and other considerations. Many early participants may not have fully thought through considerations of insurance coverage, including whether their existing home, car, or personal liability insurance covered their

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40. See, e.g., *How Do Taxes Work for Hosts?*, AIRBNB, <https://www.airbnb.com/help/article/481/how-do-taxes-work-for-hosts> [<https://perma.cc/3RG6-TL3Z>] (last visited Oct. 7, 2017) (linking to various related FAQ articles explaining tax obligations for hosts); *Taxes 101 for Etsy Sellers*, ETSY, <https://www.etsy.com/seller-handbook/article/taxes-101-for-etsy-sellers/22721885775> [<https://perma.cc/WC3X-C23U>] (last visited Jan. 25, 2018); *The Uber Partner’s Tax Guide: Everything You Need to Know*, UBER, <https://www.uber.com/drive/resources/tax-tips-for-drivers/> (last visited Oct. 7, 2017).

41. Oei & Ring, *supra* note 7, at 1055–56 (describing some of these services); Oei & Ring, *supra* note 38, at 103–05 (same).

42. I.R.C. § 6050W(e) (requiring reporting by third-party settlement organizations only if amounts are over \$20,000 and there are more than 200 transactions) (2012); 26 C.F.R. § 1.6050W-1 (2012); Oei & Ring, *supra* note 7, at 1034–35; Oei & Ring, *supra* note 38, at 65; see also CAROLINE BRUCKNER, KOGOD TAX POLICY CENTER, *SHORTCHANGED: THE TAX COMPLIANCE CHALLENGES OF SMALL BUSINESS OPERATORS DRIVING THE ON-DEMAND PLATFORM ECONOMY* (2016), <https://www.american.edu/kogod/research/upload/shortchanged.pdf> [<https://perma.cc/35KH-6G52>]; Thomas, *supra* note 2. For example, Lyft issues Forms 1099-K to drivers who receive at least \$600 in gross ride receipts. See *Tax Information for U.S. Drivers*, LYFT, <https://help.lyft.com/hc/en-us/articles/115012926967-Taxinformation-for-US-drivers> [<https://perma.cc/UC2D-5YCW>] (last visited Apr. 23, 2018). In early 2015, Uber announced it would issue Form 1099-K to all drivers regardless of thresholds, but later changed its position and now only issues Form 1099-K to drivers who meet the \$20,000/200 ride threshold. See *Your Tax Questions, Answered*, UBER, <https://www.uber.com/drive/tax-information/> (last visited Apr. 23, 2018).

43. See *supra* note 40.

44. Oei & Ring, *supra* note 7 at 993, 1009–10, 1014–15; Oei & Ring, *supra* note 38 at 60, 78.

45. See I.R.C. § 61 (2012) (broadly defining “gross income” as “all income from whatever source derived”); see also Oei & Ring, *supra* note 38 at 77–78.

activities in the emerging sector.<sup>46</sup> However, early horror stories of drivers getting into car accidents or insurance companies denying coverage for ride-hailing activities or home-sharing activities, or of regulators and landlords imposing fines or sanctions, quickly brought into focus the commercial nature of the transactions, and undercut claims that they were merely personal or gratuitous.<sup>47</sup> Additionally, some new sector participants soon learned that they had run afoul of local zoning or occupancy laws or landlord-tenant leases.<sup>48</sup> These early encounters helped counteract claims that the activities in which they were engaged were merely “sharing.”

This essay does not claim that there were zero benefits to the new sector of embracing an excess capacity or sharing characterization at the initial stage. These narratives clearly give the sector a first-mover advantage and may have helped them get off the ground in the face of regulatory constraints. For example, the sharing or excess capacity story may have served as a baseline negotiation point, which prevented far more draconian regulation of the sector (for example, classification of workers as employees, or requiring taxicab medallions).

The point, rather, is this: It is the very fact that “sharing” is such an extreme characterization that compromises its longevity, and ultimately its vitality, as a plausibly accurate description of the sector. Meanwhile, as argued below in Part III, seemingly more accurate or balanced characterizations such as “platform” or “gig” economy have quietly exerted a deep and significant influence on law and regulatory outcomes. Because they are less obviously inaccurate and may capture some aspects of work in this sector, these latter terms may have drawn fewer challenges.

### III

#### THE EMERGENCE OF GIG AND PLATFORM TALK

As the new sector has matured, the “sharing” terminology has been increasingly critiqued.<sup>49</sup> At the same time, a different set of descriptors has risen to accompany and sometimes replace the sharing narrative. This cluster of entrepreneurship-focused terms includes the terms “gig economy,” “1099 economy,” “peer-to-peer economy,” and “platform economy.”<sup>50</sup> It is not entirely

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46. See, e.g., Ron Lieber, *Share a Car, Risk Your Insurance*, N.Y. TIMES (Mar. 16, 2012), <http://www.nytimes.com/2012/03/17/your-money/auto-insurance/enthusiastic-about-car-sharing-your-insurer-isnt.html> [<https://perma.cc/Y4CT-2WXL>].

47. *Id.*; see also Complaint for Damages and Demand for Trial by Jury at 4–5, *Liu v. Uber Technologies, Inc.*, (Cal. Super. Ct. 2014) (wrongful death complaint for pedestrian killed by Uber driver); see also Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html?mcubz=1/> [<https://perma.cc/8EJ9-JDBM>].

48. See, e.g., Lieber, *supra* note 47.

49. See *supra* note 3.

50. See, e.g., Om Malik, *Are You Ready for the New Peer-to-Peer Economy*, GIGAOM (Mar. 11, 2011), <https://gigaom.com/2011/03/11/are-you-ready-for-the-new-peer-to-peer-economy/> [<https://perma.cc/BUZ9-AZBM>]; David Streitfeld, *Rough Patch for Uber Service's Challenge to Taxis*, N.Y. TIMES (Jan. 26, 2014), <https://www.nytimes.com/2014/01/27/technology/rough-patch-for-uber-services->

clear what led to the emergence of this latter cluster of terms. As noted, the shift to these terms stems partially from an emerging sense that the term “sharing economy” is not accurate given the sector’s commercial nature.<sup>51</sup> As a result, commentators and journalists began to suggest the latter terms as replacements that more clearly reflect the commercial nature of the sector.<sup>52</sup> Academic articles also began to emerge that eschewed “sharing” characterization in favor of references to “gigs” and “platforms.”<sup>53</sup>

Meanwhile, firms in the sector—which were coming under increasing regulatory pressure and scrutiny—also began to appreciate the legal advantages of characterizing themselves as platforms and the work done by the workers as “gigs.” The firms therefore began describing themselves using that terminology as well.<sup>54</sup> As described below, characterization of the work or services done in this sector as a “gig” and the relationship between worker and firm as one using a “platform,” lines up squarely with some of the important legal positions firms in this sector wish to take. Many of these terms focus on the individualistic, entrepreneurial character of work and services offered on the platforms and serve to deemphasize the substantive role of the businesses themselves in making the sector function. They enable the businesses to be conceptualized as mere technology platforms that allow individual micro-entrepreneurs to connect with other individuals and engage in commerce. All this, of course, undercuts the sharing narrative of altruism and non-commercialism. However, the appeal of the gig narrative is that it buttresses the substantive and high-stakes positions that businesses like Uber and Lyft have taken with respect to worker classification and other laws and regulations.

In the remainder of this Part, this essay largely focuses on worker classification questions, first describing the essence of the worker classification debate and then explaining how gig talk advances the positions taken by the businesses in winning the debate. But it should be noted that the worker classification question is inextricably linked to the broader business model claimed by the new firms. Thus, this essay’s insights are also applicable to other regulatory areas, such as tort liability, local regulations, and public accommodation laws.<sup>55</sup>

#### A. The Worker Classification Debate and the Claimed Business Model

As the sharing economy businesses have matured, a persistent question that

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challenge-to-taxis.html?ref=dauidstreitfeld [https://perma.cc/S4NQ-MQXN]; David Streitfeld, *Some Setbacks for the Sharing Economy*, N.Y. TIMES (Apr. 23, 2014), <https://bits.blogs.nytimes.com/2014/04/23/some-setbacks-for-the-sharing-economy/> [https://perma.cc/E26X-CKP4] (Airbnb spokesperson characterizing Airbnb as a “platform” in distancing itself from “predatory landlords”); see also sources cited, *supra* note 15.

51. See *supra* note 3.

52. *Id.*

53. See *supra* note 2.

54. See *infra* Part III.B.

55. See *supra* note 10 and *infra* notes 89 and 91.

has emerged has been how those offering services or accommodations via the new firms should be classified in terms of labor, tax, and other laws.<sup>56</sup> Specifically, the issue is whether such workers are more appropriately classified as independent contractors or as employees.<sup>57</sup> The appropriate classification of workers is one of the key contested questions in the ongoing tussle over what is the correct description of the new firms' business model. Are these firms app providers that provide a platform to connect micro-entrepreneurs with a customer base and whose own direct customers are these micro-entrepreneur/service providers? Or are the firms basically taxicab and food delivery companies operating under another label, which hire workers to do the work and whose customers are the ultimate service recipients? The answer has important legal and regulatory implications.

### 1. The Worker Classification Question

The worker classification question is important for a number of areas of law. Perhaps most importantly, for labor law purposes, classification as an employee carries the right to bargain collectively under the National Labor Relations Act (NLRA), while independent contractors are not afforded NLRA protections.<sup>58</sup> Employee classification also provides a worker with protections and advantages under a variety of federal and state laws, such as overtime pay, minimum wage laws, child labor laws, family and medical leave, and health and safety regulations.<sup>59</sup> Employees also enjoy more robust anti-discrimination protections and old age retirement, disability, and medical benefits than independent contractors.<sup>60</sup>

Direct protections and regulations aside, the classification of a worker also matters for tax purposes.<sup>61</sup> While employers must issue Forms W-2 and perform wage withholding on compensation paid to employees, independent contractors instead receive Forms 1099-MISC or 1099-K from payors, who do not withhold

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56. For examples of academic literature addressing the worker classification issue, see Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1763 (2016); V.B. Dubal, *Wage Slave or Entrepreneur, Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 101 (2017); Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511 (2016); Rogers, *supra* note 10.

57. See *supra* note 56.

58. See 29 U.S.C. § 152(3) (2012) (defining "employee"; excluding "independent contractors").

59. See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012); Family and Medical Leave Act, 29 U.S.C. § 2611(3) (2012) (defining "employee" by cross-reference to 29 U.S.C. § 203 (2012)); Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (2012); CAL. LAB. CODE § 351 (2017) (prohibiting employers taking tips from employees); CAL. LAB. CODE § 226 (2017) (employer obligation to provide itemized statements to employees); CAL. LAB. CODE § 2802 (2017) (obligation to reimburse employee mileage costs).

60. See, e.g., 29 U.S.C. § 630(f) (2012) (defining "employee" under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634); Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e–2000e-17 (2012) (42 U.S.C. § 2000e-2 prohibiting discrimination against employees on the basis of sex, race, color, national origin, and religion; 42 U.S.C. § 2000e(b),(f) defining "employer" and "employee"); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

61. See Federal Insurance Contribution Act of 1935, 26 U.S.C. §§ 3101–3128 (2012); Federal Unemployment Tax Act, 26 U.S.C. §§ 3301–3311 (2012).

taxes from payments but instead simply report payment amounts to the IRS.<sup>62</sup> Such Form 1099 recipients are in effect regarded as small business owners for tax purposes. As small business owners, they are eligible for more generous expense deductions provisions than employees; they may deduct business expenses “above the line” like other businesses owners, which means that such expenses may be deducted in computing adjusted gross income and are not capped.<sup>63</sup> Workers classified as independent contractors for tax purposes are nominally responsible for paying the entire liability for social security taxes.<sup>64</sup> In contrast, employee social security taxes (Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes) are divided between employer and employee.<sup>65</sup> Independent contractors may also have to pay estimated taxes on a quarterly basis, and may face penalties if they fail to do so.<sup>66</sup> In short, for tax purposes there are some benefits to being classified as an independent contractor (more generous deductions) but there are also risks (such as risks of estimated tax penalties).

Each legal area makes its own determination of appropriate classification and may apply slightly different legal tests in doing so. For example, the common law of agency test—derived from common law respondeat superior claims but now contained in the Restatement (Third) of Agency—focuses on employer control over the employee. This test has been applied for purposes of determining collective bargaining protections under the NLRA.<sup>67</sup> Another related test looks at the economic realities surrounding the employment relationship—whether the work done is an integral part of the employer’s business, whether worker’s managerial skill affects her opportunity for profit, the relative investments of worker and manager, the nature and degree of the employer’s control, and other factors.<sup>68</sup> This “economic realities test” has been applied by the Department of

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62. See I.R.C. §§ 3401, 3402, 3501, 6041, 6050W; see also IRS, PUBLICATION 15, at 20–24 (2016), <https://www.irs.gov/pub/irs-pdf/p15.pdf> [<https://perma.cc/W7PM-Z9FV>] (describing employer withholding obligations on employee wages).

63. Expenses are treated as expenses of a business and can therefore be deducted “above the line.” See I.R.C. § 162 (2012); I.R.C. § 62(a)(1) (2012) (deductions attributable to trade or business other than performance of services as employee are above the line deductions). By contrast, unreimbursed employee expenses are below the line deductions and may only be deducted to the extent that they exceed 2% of adjusted gross income. See I.R.C. § 67 (2012). Moreover, such unreimbursed employee expense deductions have been suspended for taxable years 2018 through 2025 as a result of new tax legislation passed at the end of 2017. I.R.C. § 67(g) (2018).

64. See *supra* note 61.

65. See *supra* note 61.

66. I.R.C. § 6654 (2012).

67. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006); see also *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) (applying common law “right to control” test to ERISA claims); *Alexander v. Fedex*, 765 F.3d 981 (9th Cir. 2014) (class action by Fedex drivers for unpaid wages and expenses under California Labor Code; court applied California control test; found that control and other factors supported finding that drivers were employees); cf. *Fedex v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (applying “significant entrepreneurial opportunity” analysis).

68. See, e.g., U.S. DEPT OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE? EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2014), <https://www.dol.gov/whd/regs/compliance/whdfs13.pdf> [<https://perma.cc/AW53-YF7P>].

Labor in applying the provisions of the Fair Labor Standards Act.<sup>69</sup> Yet another test is the so-called “ABC Test,” which looks at freedom from control or direction, whether the work done is outside the course of the company’s business and off the business premises, and whether the worker is customarily engaged in an independent trade, occupation, profession, or business. The ABC test is applied by a majority of states in state unemployment insurance law analysis.<sup>70</sup> Finally, the IRS applies a twenty-factor test in determining whether a worker is an independent contractor or employee for tax purposes.<sup>71</sup> The twenty factors focus on behavioral controls, financial aspects of the job, and the nature of the relationship between worker and hirer.

The determination of worker classification is done separately for each area of law. However, there is overlap in the substantive considerations that each field takes into account, although there may be differences at the margin.<sup>72</sup> Moreover, if a worker is classified as an independent contractor for one purpose (for example, collective bargaining), such classification has the potential to influence determinations in other areas of law by creating a presumption of correctness or by harnessing a preference for consistency across legal areas. To be sure, different fields employ different worker classification tests, but at least to some degree the tests all examine the nature of the relationship between the business and the worker, and they all pay attention to the control exercised by the business over the worker.

There is currently a good deal of disagreement regarding not only the correct classification of workers but also the normatively desirable one. In particular, while workers classified as employees receive more robust direct protections as a matter of labor and other laws, there may be some advantages to independent contractor classification from a tax point of view, such as the ability to take more generous business deductions.<sup>73</sup> Furthermore, some argue that classifying sector participants as employees will cause opportunities and profitability in the sector to decrease.<sup>74</sup> It is therefore far from obvious that all those who offer services in the Uber economy prefer one classification over the other.<sup>75</sup> Anecdotal evidence

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69. *Id.*; see also *United States v. Silk*, 331 U.S. 704 (1947) (concerning employee status under Social Security Act; Court sets forth five factors constituting economic realities test).

70. See, e.g., *Hargrove v. Sleepy’s, LLC*, 106 A.3d 449 (N.J. 2015) (holding that ABC test applies for determining employee vs. independent contractor statute for New Jersey wage-payment and wage-and-hour claims purposes).

71. Rev. Rul. 87-41, 1987-1 C.B. 296; *Independent Contractor (Self-Employed) or Employee?*, IRS <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> [<https://perma.cc/KHB7-QTL2>] (last visited Jan. 27, 2018).

72. For example, the ABC test’s emphasis on whether the worker is operating an independent business differs from the common law of agency “control” analysis.

73. See *supra* note 63 and accompanying text.

74. Stephen Gandel, *Uber-nomics: Here’s What It Would Cost Uber to Pay its Drivers as Employees*, FORTUNE (Sept. 17, 2015), <http://fortune.com/2015/09/17/ubernomics/> [<https://perma.cc/XQ4X-YTQM>] (noting possibility of pay cuts and even “extinction” if Uber drivers were reclassified as employees); see also Oei & Ring, *supra* note 38 at 93–94.

75. 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; Oei & Ring, *supra* note 38 at 87–88,

from news interviews and internet discussions among Uber drivers, for example, reveals heterogeneity in preferences as between classifications.<sup>76</sup>

## 2. Relationship between Worker Classification and the Claimed Business Model

Still, there is no question that stakeholders on both sides believe that classification matters substantively. Several high-profile cases contesting the classification of workers as independent contractors have been litigated against Uber and other firms on behalf of drivers and other sector participants, and the firms have vigorously defended themselves against such lawsuits.<sup>77</sup> From the point of view of the businesses, classification matters because the costs to the businesses of employee classification are likely to outstrip the costs of having independent contractors and may upend the business model.<sup>78</sup> Classification of workers as independent contractors may also be beneficial to the firms for behavioral reasons— independent contractors who are not subject to tax withholding receive larger payment amounts upfront, while employees receive wage payments that have already been subject to tax withholding and are hence less than gross.<sup>79</sup> This may generate an incentive effect: workers may be more willing to provide services on the new platforms if the taxes owed on their earnings are less salient at the time they make the labor supply decision.<sup>80</sup>

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93–94.

76. *Id.*

77. *See, e.g.*, *Cotter v. Lyft, Inc.*, 176 F. Supp. 930, 932–933 (N.D. Cal. 2016); *Mohamed v. Uber Technologies, Inc.*, 109 F. Supp.3d 1185, 1189 (N.D. Cal. 2015), *aff'd in part, rev'd in part*, 836 F.3d 1102 (9th Cir. 2016), *superseded by* 848 F.3d 1201 (9th Cir. 2016); *Yucesoy v. Uber Technologies, Inc.*, 109 F. Supp. 3d 1259, 1261 (N.D. Cal. 2015); *O'Connor v. Uber Technologies, Inc.*, No. C-13-3826 EMC, 2013 WL 6354534, at \*2 (N.D. Cal. Dec. 5, 2013); *Lavitman v. Uber Technologies, Inc.*, No. SUCV201204490, 2015 WL 728187 at \*6 (Mass. Super. Ct. Jan. 26, 2015).

78. *See, e.g.*, J.B. Wogan, *Employee of Independent Contractor? It's the Uber-Important Question of Today's Economy, Government Technology*, GOV'T TECH. (June 3, 2016), <http://www.govtech.com/policy/Employee-or-Independent-Contractor-Its-the-Uber-Important-Question-of-Todays-Economy.html> [<https://perma.cc/7PUS-87CC>] (noting that “[i]f all those [Uber] drivers had to be treated as employees, the aggregate costs might threaten its very business model.”); *see also* Jack Denton, *Two Federal Lawsuits Could Spell Big Trouble for Uber*, PAC. STANDARD (Apr. 10, 2017), <https://psmag.com/news/two-federal-lawsuits-could-spell-big-trouble-for-uber> [<https://perma.cc/7C79-P8MN>]. Independent contractor classification allows more flexibility in hiring and firing, less obligation to permit workers to collectively bargain for higher compensation, less obligation to provide retirement and other benefits, and less direct liability for paying over social security taxes or performing tax withholding on employee wages. *Id.*

79. *See supra* note 62.

80. *See* Gamage & Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 57 (2011) (discussing how, if the imposition of the tax is separate from the time of the market (e.g., labor supply) decision, taxpayers may underestimate the tax burden); Gamage et al., *Experimental Evidence of Tax Salience and the Labor-Leisure Decision: Anchoring, Tax Aversion, or Complexity?*, 41 PUB. FIN. REV. 203, 214 (2012) (finding that “[s]ubjects are most willing to work when their net wage is transparent. Any additional complexity in the wage description . . . decreases work participation”); Jacob Nussim, *To Confuse and Protect: Taxes and Consumer Protection*, 1 COLUM. J. TAX L. 218, 253 (2010) (noting that workers may be misled by gross salaries and may oversupply labor).

More broadly, independent contractor classification also matters because it is consistent with the overarching business model claimed by the new firms for legal and regulatory purposes. The broader claim is that these firms are apps that connect micro-entrepreneurial service providers with a customer base. Under this conceptual vision, the customers of firms like Uber are the drivers, taskers, or other service providers operating using the apps or websites, rather than the end-user customers who enjoy the services. This claimed business model is important for avoiding a broad range of regulations, not just employee classification. For example, it allows the new firms to take the position that they are simply technology companies—rather than taxi companies or hotels—and are hence not subject to laws and regulations that have traditionally governed these sectors.

Another example comes from securities laws and financial accounting: Uber recently claimed that the Securities and Exchange Commission has assented to Uber's reporting of only net rather than gross revenues in its financial reporting, without needing to report the amount being paid to drivers.<sup>81</sup> Uber's claimed financial reporting position results from its adoption of new accounting "revenue recognition" rules issued by the Financial Accounting Standards Board (FASB) that distinguish principals from agents for revenue reporting purposes.<sup>82</sup> As reported in the press, Uber views itself as an "agent" connecting the "merchant" (driver) and the "customer" for financial accounting purposes that thus is entitled to report only net revenues, even though some experts think gross revenues would more accurately inform investors.<sup>83</sup> The claim for financial accounting purposes that Uber is an agent is purposefully consistent with the broader business model advanced by the new firms that envisions the firms merely as technology app providers rather than principal providers of services. However, if courts and other tribunals call into question the firms' (including Uber's) classification of their workers, then this financial reporting position may be called

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81. Francine McKenna et al., *Uber Believes it Has SEC Nod for Earnings Approach that Mirrors Business Model*, MARKETWATCH (Oct. 30, 2017), <https://www.marketwatch.com/story/uber-an-early-adopter-of-new-revenue-recognition-rules-believes-it-has-secs-blessing-of-its-business-model-2017-10-25> [<https://perma.cc/D2S8-9CTA>].

82. FINANCIAL ACCOUNTING STANDARDS BOARD, FASB ACCOUNTING STANDARDS UPDATE NO. 2016-08 (MAR. 2016), REVENUE FROM CONTRACTS WITH CUSTOMERS (TOPIC 606), PRINCIPAL VERSUS AGENT CONSIDERATIONS, [http://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage?cid=1176167987739&acceptedDisclaimer=true](http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176167987739&acceptedDisclaimer=true) [<https://perma.cc/K2VJ-HWU2>]; see also Leslie Hook & Richard Waters, *Uber, Amazon and Microsoft Braced for Accounting Shake-Up*, FIN. TIMES (July 19, 2017), <https://www.ft.com/content/74447ca2-6b0b-11e7-bfeb-33fe0c5b7eaa> [<https://perma.cc/X5GU-X8M8>]; McKenna et al., *supra* note 81.

83. McKenna et al., *supra* note 81 (describing Uber's position; also noting that "[t]he determination that Uber is the agent in its ride-sharing transactions is consistent with the company's messaging regarding its business model, which rests heavily on the premise that Uber drivers are correctly classified as independent contractors, not employees" and that "a legal ruling that forced the company to reclassify drivers as employees would significantly disrupt the company's business model . . . [and] [i]ts revenue and cost-of-sales accounting likely would have to change as well, since drivers' portion of the revenue and their salaries would be on Uber's books").

into question as well.<sup>84</sup>

Thus, to a non-trivial extent, the desired worker classification being pursued is inextricably related to the broader question of how the relationships between service providers and customers and between firms and service providers are characterized. To the extent the firms are simply regarded as a convenient app with no substantive control over the service providers, the service providers may be regarded as business entrepreneurs operating independently from the firms. But if service providers are construed as under the control of the firms, this may point towards more legal liability and accountability of the firms for worker classification and other purposes.

## B. How Gig Talk Pushes Legal Outcomes and How Law Abets Gig Talk

Against this factual backdrop, it becomes clear why gig talk has been advanced as a competing narrative to “sharing” and why it has been effective.

### 1. The Use of Gig and Platform Talk to Frame the Debates

Gig and platform talk is useful in framing the activities of operators in the new economy as peer-based and disassociated from the control and responsibility of the firms themselves. These and related narratives highlight the peer-to-peer nature of these transactions, put the service providers and customers at the center of the transactions, and make the corporate firms appear less culpable, relevant, or involved. If the work is “just a gig” and the firm “just a platform,” this suggests a casual and possibly intermittent relationship between the service provider and the firm.

In recent years, new firms have adjusted and managed the ways in which they publicly describe work done via their web platforms to reflect the independent-contractor, peer-to-peer nature of the work. For example, Uber’s advertising for new drivers trumpets the merits of flexibility and “being your own boss.”<sup>85</sup> Others like Lyft and TaskRabbit employ similar characterizations.<sup>86</sup> These types of statements are expressions of how these firms regard themselves, and how they

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84. See Francine McKenna, *U.K. Ruling on Uber Drivers May Lead SEC to Reexamine Company’s Revenue Approach*, MARKETWATCH (Nov. 22, 2017), <https://www.marketwatch.com/story/uk-ruling-on-uber-drivers-may-lead-sec-to-re-examine-companys-revenue-approach-2017-11-20> [<https://perma.cc/BDD7-MVBA>].

85. *Be Your Own Boss: Drive on the Uber Platform*, UBER NEWSROOM (Sept. 29, 2014), <https://newsroom.uber.com/us-louisiana/be-your-own-boss-drive-on-the-uber-platform/> (stating that “[p]artners who drive on the Uber platform love it because they make higher earnings than traditional cab drivers and have the flexibility to set their own hours”); *Uber Needs Partners Like You*, UBER, <https://get.uber.com/p/legacy-cl-base/> (last visited Oct. 8, 2017) (“As an independent contractor with Uber, you’ve got freedom and flexibility to drive whenever you have time.”).

86. *Drive More, Earn More*, LYFT, <https://www.lyft.com/drive-with-lyft> [<https://perma.cc/RNJ8-GGVF>] (last visited Oct. 8, 2017) (“Be your own boss”; “You choose when you drive”); *Why Should I be a Tasker?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411060-Why-should-I-be-a-Tasker-> [<https://perma.cc/4MMY-8KUE>] (last visited Oct. 8, 2017) (“TaskRabbit is a platform that enables individuals to make a meaningful income by building their own business. Taskers are independent contractors and manage their accounts according to their preferences . . . . The number one thing we offer Taskers is flexibility.”).

intend to describe themselves in litigation. But they also are to some extent used to convince service providers that they are “gig” workers by emphasizing the flexibility of gig work. In addition, by framing how the opportunity is advertised to workers upfront (such as by stating outright that the relationship is one of independent contractor), these advertising narratives make it harder for workers to argue on the back end that independent contractor classification is unfair or wrong.<sup>87</sup>

Gig talk thus cuts to the heart of the most important legal debates in the new economy, speaking directly to many of the current legal ambiguities confronting the new sector.<sup>88</sup> A central theme is this: How responsible or involved is the corporate business itself and how should its relationship to individual workers be characterized and treated as a matter of law? Gig talk tilts the debate by underplaying the role of the businesses. The gig narrative suggests that the new firms ought to be regulated as facilitators of individual enterprise rather than employers, as apps rather than public accommodations, and as channels of facilitation rather than objects of regulation.<sup>89</sup>

Gig talk does not stop at just talk. Gig talk in popular discourse helps support and give credence to positions the new firms have been taking in actual litigation. For instance, in court filings concerning litigation over worker classification, Uber has denied plaintiffs’ attempts to characterize it as a “car service that provides drivers who can be hailed and dispatched through a mobile phone application.”<sup>90</sup> Instead, it had described itself as “a software technology company that provides lead generation services for transportation companies and drivers.”<sup>91</sup> Lyft has similarly denied class action plaintiffs’ attempts to characterize it as a “car service,” admitting only that “Riders and Drivers are matched with each other using Lyft’s software, and that geographic vicinity is a

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87. See *supra* notes 85 and 86.

88. As noted, these include both the worker classification debates as well as other legal issues. See *supra* note 10 and *infra* notes 89 and 91.

89. See, e.g., Cyrus Farivar, *Lyft, Sidecar, and Uber All Slapped with \$20k Fines by CA Regulator*, ARSTECHNICA (Nov. 14, 2012), <https://arstechnica.com/tech-policy/2012/11/lyft-sidecar-and-uber-all-slapped-with-20k-fines-from-ca-regulator/> [<https://perma.cc/H8GK-RKUY>] (quoting Lyft co-founder as saying “We are not a charter-party carrier, we are a peer-to-peer carrier” and “I think it’s clear to everyone that the current framework doesn’t fit modern technology and possibilities.”; quoting Sidecar CEO as saying “We established SideCar to allow drivers and passengers to connect with one another under the safe harbor of the ridesharing provisions of the law.”).

90. Second Amended Class Action Complaint at 2, *O’Connor v. Uber Technologies, Inc.*, No. C-13-3826 EMC (N.D. Cal. 2014).

91. Answer to Plaintiff’s Second Amended Class Action Complaint at 2, *O’Connor v. Uber Technologies, Inc.*, No. C-13-3826 EMC (N.D. Cal. 2014). Uber made similar claims in responses to a wrongful death lawsuit against it. See Answer and Affirmative Defenses of Defendants Uber Technologies, Inc., Raiser LLC, and Raiser-CA LC to Plaintiff’s Complaint at 2–3, *Liu v. Uber Technologies, Inc.*, No. CGC-14-536979 (Cal. Super. Ct. 2014) (describing itself as a “technology company that developed a software application that enables users to request transportation services from independent, third-party transportation providers”; claiming that “the Uber App provides transportation providers with a tool to grow their businesses and increase their livelihood” and that drivers use the app as a “lead generation service”; stating that “Uber itself does not provide transportation services and is not a transportation carrier.”).

factor in such matching.”<sup>92</sup> Likewise, Grubhub, a company that provides restaurant food delivery to customers, has characterized itself in litigation responses as “a technology company that connects restaurants with independent delivery partners who specialize in delivering food orders from restaurants to customers at their homes and businesses,” denying plaintiff’s claim that it is a “food delivery service.”<sup>93</sup> All of these positions taken by the new firms are rooted in the idea that they are merely technology “platforms” that connect independently operating service providers (drivers) and customers. The underlying relationship, as described in these litigation responses, is a peer-to-peer one between gigging individuals. All of these litigation descriptions seek to downplay the relationship between the firm and the individuals doing the work. The ways in which the firms describe themselves outside of litigation—in press releases and interviews and even in securities filings and financial reporting—serve to strengthen the credibility of these litigation positions.<sup>94</sup>

## 2. How Law Abets Gig Talk

Gig and platform talk has been successful not just because it exists but because of how such talk relates to current legal ambiguities. The success and vitality of the gig narrative is in large part due to two features: First, the firms have had a “first-mover” advantage in taking mandatory legal positions with respect to their business model virtually from the outset.<sup>95</sup> Second, the gig narrative speaks to material and real ambiguities confronting the new sector. The new firms are not only able to move swiftly to advance their chosen characterizations but are also aided by the fact that these characterizations are credible under the law. Put simply, gig talk is not so outside the realm of legal possibility that it loses its effect.

*First-Mover Advantage.* Even as they were advancing “sharing” and community-based narratives about their activities, the new firms were

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92. Plaintiff’s Fourth Amended Complaint at 3, *Cotter v. Lyft, Inc.*, No. 3:13-cv-04065-VC (N.D. Cal. 2015); Answer by Defendant Lyft, Inc., to Plaintiff’s Fourth Amended Complaint at 3, *Cotter v. Lyft, Inc.*, No. 3:13-cv-04065-VC (N.D. Cal. 2015).

93. Defendant’s Answer to Plaintiff’s Second Amended Class Action and PAGA Complaint at 2, *Lawson v. Grubhub Holdings Inc.*, No. 3-15-cv-05128-JSC (N.D. Cal., July 27, 2016). In contrast, plaintiffs in the California lawsuit characterized Grubhub as “a food delivery service that provides delivery drivers who can be scheduled and dispatched through a mobile phone application or through its website and who will deliver food orders from restaurants to customers at their homes and businesses.” Second Amended Class Action and PAGA Complaint at 3, *Lawson v. Grubhub Holdings Inc.*, No. 3-15-cv-05128-JSC, (N.D. Cal. Apr. 12, 2016). On February 22, 2018, a federal district court judge ruled in favor of Grubhub in the lawsuit, holding that the plaintiff was properly classified as an independent contractor. *Lawson v. Grubhub Holdings, Inc.*, 2018 WL 776354 (N.D. Cal. 2018), *appeal docketed*, No. 18-15386 (9th Cir. Mar. 8, 2018).

94. See *supra* notes 81–84 (sources discussing Uber’s characterization of itself as an “agent” that connects drivers who are the “principal” ride providers and the financial reporting positions it has taken consistent with that characterization).

95. Oei & Ring, *supra* note 7, at 1028–38, 1035 n.222 (discussing how the new businesses have opportunistically harnessed first-mover advantage); Ring, *supra* note 28 (describing exercise of first-mover advantage and its effects on policy formulation).

simultaneously under pressure to take legal positions—for example, tax positions—with respect to their business transactions. Having to take these real legal positions has undercut the sharing narrative, but at the same time has helped firms advance beneficial alternative narratives of their choice. The firms effectively exercised this first-mover advantage in various ways, most notably in classifying sector participants as independent contractors for purposes of labor, tax, and other laws from the outset.<sup>96</sup> Uber and Lyft are the most high-profile examples of firms that embraced independent contractor classification for their workers. For example, they did not provide overtime, minimum wage, or other protections, did not acknowledge collective bargaining rights, hired and fired at will, issued Form 1099s for tax purposes, and did not withhold taxes on amounts paid to drivers.<sup>97</sup> These substantive legal positions were paired with expressive claims that Uber drivers were working for themselves under flexible (non-employee) arrangements.<sup>98</sup>

In being first-movers, these businesses gained the benefit of having a period of time to operate under the classification of their choice before workers and their representatives could organize and react. These substantive first-mover choices helped establish independent contractor classification as the default and endow it with a presumption of correctness. It allowed courts, sector participants, and observers to get used to and accept that classification. And it allowed the firms to grow to a point that causing the business model to collapse became an option unthinkable to many.

Thus, even though the mandatory nature of tax and other regulatory position-taking undermined the sharing narrative, that same mandatory-ness also allowed the firms to take positions consistent with the emerging gig and platform narratives. However, the firms have faced some pushback. Several lawsuits in California, Massachusetts, and other states have been filed against Uber and Lyft, alleging that these businesses misclassified drivers as independent contractors.<sup>99</sup> These lawsuits follow in the footsteps of earlier litigation involving the appropriate classification of FedEx drivers.<sup>100</sup> In addition, some administrative tribunals have held that ride-hailing drivers are properly classified as employees.<sup>101</sup> Despite these pushes in the opposite direction, however, the first-

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96. *Id.*

97. *Id.*

98. *See supra* notes 85 and 86.

99. *See supra* note 77 (various court cases alleging misclassification).

100. *See Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997 (9th Cir. 2014) (ruling that the FedEx drivers were employees under California state law, despite the company's claims that they were independent contractors); *In re Fedex Ground Package Sys., Inc., Employment Practices Litigation*, Case No. 3:05-MD-527 RLM, 283 F.R.D. 427 (N.D. Indiana 2008).

101. *See, e.g.*, ALJ's Decision and Order, [Redacted], Case No. 016-23858 (ALJ June 9, 2017) (ALJ decision holding that three Uber drivers are employees of Uber Technologies, Inc. and eligible for unemployment benefits); McGillis, No. 0026 2834 68-02 (Dep't Econ. Opportunity, Sept. 30, 2015) (after initially finding that driver was employee, Department of Economic Opportunity reversed itself and found driver was not employee), *aff'd McGillis v. Dep't of Econ. Opportunity*, 210 So.3d 220 (Fla. Dist. Ct. App. 2017) (affirming DEO decision that driver is not employee); Josefa Velasquez, *Administrative*

mover advantage enjoyed by the ride-hailing platforms seems to be persisting, as clearly reflected in the limited progress that has been made through these lawsuits.

*Sufficiently Ambiguous Law.* First-mover advantage by itself is not enough. Another important feature contributing to the staying power and success of the gig narrative is that gig characterization is actually reasonable under current law. Take, for example, taxation. As noted, tax returns and information reporting must be filed annually, and these annual filing and position-taking requirements undercut the sharing narrative by constructing a commercial counter-narrative. But that same necessity of taking a tax position—and in particular the necessity of the firm choosing and issuing the appropriate tax form and doing the appropriate tax withholding—led to firms choosing to issue 1099s and to perform information reporting, rather than doing W-2 wage withholding.<sup>102</sup> Importantly, this choice was not obviously wrong and hence became sticky due to entrenchment and costs of switching.<sup>103</sup> Once the firms had taken the initial tax position (independent contractor treatment), various websites, apps, and consultants sprang up to advise workers on how to file taxes as independent contractors.<sup>104</sup> The growth of these secondary industries contributed to the entrenchment of the gig story. In this manner, tax law facilitated the “independent contractor” narrative and enabled the legal position that workers were independent contractors.

This dynamic can be observed in other substantive legal and regulatory decisions as well: the fact that businesses are required to take a position for commercial, labor, securities, and other legal purposes endows them with a first-mover privilege in selecting what position to take.<sup>105</sup> If the positions they embrace are plausible interpretations of current law, such positions may stick, even if questionable. Ambiguous and aggressive positions that are still somewhat credible may provide businesses with the greatest regulatory gains.

### 3. Procedural and Legal Buttressing

An important factor contributing to the success of gig framing and related legal position taking stems from the fact that the businesses have been able to shore up these choices using procedural legal tools and strategies that make it hard for others to contest these positions going forward. Law and the legal process have been effectively harnessed to ensure that the competing

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*Law Judge Says Uber Drivers are Employees, Not Contractors*, N.Y. L.J. (June 14, 2017), <http://www.newyorklawjournal.com/id=1202789899357/Administrative-Law-Judge-Says-Uber-Drivers-Are-Employees-Not-Contractors?mcode=1202615704879&slreturn=20170909100329> [<https://perma.cc/E9YL-6N7D>].

102. Oei & Ring, *supra* note 7.

103. Once workers received Form 1099, they had to file Schedules C and E and compute expenses. See IRS, SCHEDULE C (FORM 1040) (2017); IRS, SCHEDULE E (FORM 1040) (2017).

104. Oei & Ring, *supra* note 7, at 6 & n.13 (discussing third-party tax assistance services); Oei & Ring, *supra* note 38, at 59 (analyzing tax-related discussions on three separate internet forums).

105. See, e.g., *supra* notes 81–84 (discussing Uber’s preferred financial reporting position for securities law purposes.)

characterizations and narratives do not take off.

One key example is the steps Uber has taken to gain an advantage in worker classification fights. Most materially, Uber has created a default by which drivers enter into arbitration agreements, waiving their rights to pursue class action challenges.<sup>106</sup> This has proven an effective strategy in stalling class action suits that claim that drivers have been improperly classified as independent contractors, forcing drivers to resort to piecemeal arbitrations, which are unlikely to fundamentally transform the worker classification landscape.

In particular, in the California class action lawsuit against Uber, the fact that most drivers had agreed to binding arbitration at the outset has acted as a bar to class-based litigations. On September 7, 2016, the Ninth Circuit struck a blow to the California class action, holding that the clauses delegating authority to arbitration tribunals were enforceable.<sup>107</sup> On November 21, 2016, the district court stayed five related litigations as a result of the Ninth Circuit's decision.<sup>108</sup> Thus, Uber's first-mover decision to classify drivers as independent contractors, buttressed by the arbitration clauses in the driver agreements, has served as an effective brake on attempts to contest that initial classification. While the California Lyft lawsuit settled for \$27 million in March 2017, that amount is not hugely significant and does not settle the worker classification question going forward.<sup>109</sup>

In the face of these obstacles to the class action approach, some states and localities have explored providing more piecemeal protections for TNC drivers that may be effective short of total reclassification. Most notably, Seattle issued an ordinance establishing a process for drivers to collectively negotiate with ride-hailing companies, with the goal of strengthening worker protections, conditions, and safety bargaining rights.<sup>110</sup> But firm-side interests have attempted to harness antitrust arguments to defeat such measures. For example, the United States Chamber of Commerce sued Seattle, alleging antitrust violations and preemption by the NLRA.<sup>111</sup> The argument was that collective negotiation among drivers constitutes anticompetitive collusion between businesses (that is, gig workers

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106. Elizabeth Chika Tippett & Bridget Schaaff, *Misclassification in the Sharing Economy: It's the Arbitration Agreements*, 70 RUTGERS L. REV. (forthcoming 2018) (analyzing use of class action waivers by sharing economy companies).

107. *Mohamed v. Uber Technologies, Inc.*, 836 F.3d 1102 (9th Cir. 2016), *superseded by* 848 F.3d 1201 (9th Cir. 2016); *see also* *Lamour v. Uber Technologies, Inc.*, 2017 WL 878712 at \*2 (S.D. Fla. Mar. 1, 2017) (recommending that case be stayed pending arbitrator's resolution of individual plaintiff's claim, and grant Uber's motion to strike plaintiff's collective action allegations).

108. *O'Connor v. Uber Technologies, Inc. and Related Cases*, No. 13-cv-038126-EMC, Order Re Stays (Nov. 21, 2016).

109. Order Granting Final Approval of Settlement Agreement, *Cotter v. Lyft*, No. 13-cv-04065-VC (N.D. Cal. Mar. 16, 2017). In April 2018, a district court judge ruled that drivers for Uber's limousine service (UberBLACK) are not Uber's employees. Memorandum and Order Granting Uber's Motion for Summary Judgment, *Razak v. Uber Technologies, Inc.*, No. 16-573 (E.D. Pa. Apr. 11, 2018). The plaintiffs in that case were drivers who had not agreed to binding arbitration. *Id.*

110. City of Seattle, Wash., Ordinance 124968 (Dec. 23, 2015).

111. Chamber of Commerce of the United States v. Seattle, No. 2:17-cv-00370-RSL, 2017 WL 5197158 (W.D. Wash. Sep. 6, 2017).

operating as “microbusinesses”).<sup>112</sup> The antitrust argument has met some resistance: On August 1, 2017, the Washington District Court dismissed the Chamber of Commerce’s antitrust argument, concluding that the Ordinance did not violate the Sherman Act or the state’s antitrust law.<sup>113</sup> But the Ninth Circuit subsequently enjoined the Seattle ordinance pending its own resolution of the case.<sup>114</sup> The deployment of antitrust and preemption arguments are an instance of throwing up legal roadblocks to buttress the underlying substantive claim.

The battle to shore up gig treatment has also been waged by proposals to change the law. Take tax law, for example: Legislation has been proposed in both the U.S. Senate and the House that purports to “clarify” the independent contractor status of gig workers for tax purposes.<sup>115</sup> Among other items, this legislation provides a safe harbor that, if met, will guarantee the treatment of gig workers as independent contractors. The safe harbor specifies three objective tests that must be satisfied in order to receive such treatment.<sup>116</sup> Generally, the three tests focus on (1) the relationship between the parties (including how the service provider incurs expenses, the specificity of the task agreed to be performed, and other factors such as exclusivity and extent of investment in assets or training), (2) the location of services or means by which the services are provided (generally, service providers must either provide their own equipment, perform services in their own place of business rather than service recipients’, or pay fair rental value for use of service recipient’s place of business), and (3) the existence of a written contract specifying the independent-contractor relationship, acknowledging responsibility for taxes, and agreeing to a tax reporting/withholding obligation.<sup>117</sup> The first two tests are not difficult to meet. The third is essentially met if there is a written contract in which the parties acknowledge and agree to independent contractor treatment.<sup>118</sup>

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112. The Washington District Court issued an injunction, putting the ordinance on hold until such legal issues have been resolved. *Chamber of Commerce of the United States v. Seattle*, No. 2:17-cv-00370-RSL, 2017 WL 1233181 (W.D. Wash., Apr. 4, 2017); Greg Bensinger, *Federal Judge Puts Hold on Seattle Ordinance Allowing Uber, Lyft Union Vote*, WALL ST. J. (Apr. 5, 2017), <https://www.wsj.com/articles/federal-judge-puts-hold-on-seattle-ordinance-allowing-uber-lyft-union-vote-1491336939>; Denton, *supra* note 78.

113. *Chamber of Commerce of the United States v. Seattle*, No. 2:17-cv-00370-RSL, 2017 WL 3267730 (W.D. Wash. Aug. 1, 2017).

114. *Chamber of Commerce of the United States v. Seattle*, No. 17-35640 (9th Cir. Sept. 8, 2017); Linda Chiem, *States, AFL-CIO Back Seattle’s Uber Union Law in 9th Circuit*, LAW 360 (Dec. 11, 2017), <https://www.law360.com/articles/993382> [<https://perma.cc/9PB7-C9DX>].

115. New Economy Works to Guarantee Independence and Growth Act of 2017, H.R. 4165, 115th Cong. (2017) (“NEW GIG Act of 2017”); S. 1549, 115th Cong. (2017) (same).

116. See *supra* note 115. For further discussion, see Shu-Yi Oei & Diane M. Ring, *The Senate Tax Bill and the Battles over Worker Classification*, TAXPROF BLOG (Nov. 11, 2017), [http://taxprof.typepad.com/taxprof\\_blog/2017/11/the-senate-tax-bill-and-worker-classification.html](http://taxprof.typepad.com/taxprof_blog/2017/11/the-senate-tax-bill-and-worker-classification.html) [<https://perma.cc/9SPY-L76Y>]; Shu-Yi Oei & Diane M. Ring, *Will Proposed Tax Legislation Tilt the Worker Classification Debate?*, ON LABOR BLOG (Nov. 16, 2017), <https://onlabor.org/will-proposed-tax-legislation-tilt-the-worker-classification-debate/> [<https://perma.cc/3MBA-RMC4>].

117. See *supra* note 115 and 116.

118. *Id.*

The legislation is justified by its sponsor as providing “clear rules” and “peace of mind” for workers.<sup>119</sup> However, that narrow justification is disingenuous because the proposed legislation, if passed, is likely to have an impact on the broader underlying debate regarding worker classification, with all of its labor law and other implications. By “clarifying” that independent contractor treatment is the right one for tax purposes, the legislation would entrench such treatment, and would therefore substantively tip the balance of the entire debate towards independent contractor status, thereby supporting the “gig” vision of this sector. Ten prominent firms operating on the so-called “platform” model—including Uber, Instacart, Postmates, and Grubhub—have indicated their support of this legislation in writing.<sup>120</sup>

This proposed legislation found its way into the initial November 9, 2017 Description of the Chairman’s Mark prepared by the Joint Committee on Taxation, which contained in substance the Senate version of the then-proposed 2017 tax reform legislation scheduled for legislative markup.<sup>121</sup> The independent contractor safe harbor was stricken from the revised Description of the Chairman’s Mark released on November 14, 2017 and did not become law as part of the 2017 tax changes; however, its inclusion in the November 9 Chairman’s Mark description provides some indication of the seriousness with which this legislation was pushed in recent tax reform initiatives.<sup>122</sup> In particular, various lobbyists and supporters of the new firms wrote opinion pieces online in support of this proposed legislation, and it is quite possible that such legislation might be re-introduced in the future.<sup>123</sup> This proposed tax legislation is an example of an attempt to actively lobby for laws that cement the classification of workers as independent contractors, thereby buttressing the preferred gig characterization and business model.

In addition to clear and direct attempts at “clarifying” independent contractor classification for tax purposes, there have also been more pervasive and

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119. See Press Release, Office of U.S. Senator John Thune, Thune Introduces Bill to Add Certainty to Worker Classification Rules (July 13, 2017), <https://www.thune.senate.gov/public/index.cfm/2017/7/thune-introduces-bill-to-add-certainty-to-worker-classification-rules> [<https://perma.cc/C45J-7ZUU>].

120. See Letter re: Support for S. 1549, The New Economy Work to Guarantee Independence and Growth Act of 2017 (“NEW GIG ACT of 2017”) (Aug. 21, 2017), [https://www.thune.senate.gov/public/\\_cache/files/188c3824-417e-48b5-9239-6af4b5dff1c6/78A9306A1CA70CFC597175E47D8189EF.thune-new-gig.pdf](https://www.thune.senate.gov/public/_cache/files/188c3824-417e-48b5-9239-6af4b5dff1c6/78A9306A1CA70CFC597175E47D8189EF.thune-new-gig.pdf) [<https://perma.cc/59CQ-2GWY>]; see also Press Release, Office of U.S. Senator John Thune, Ten Innovative Technology Companies Support Thune’s NEW GIG Act (Aug. 24, 2017), <https://www.thune.senate.gov/public/index.cfm/2017/8/ten-innovative-technology-companies-support-thune-s-new-gig-act> [<https://perma.cc/Z62J-YHQT>].

121. See J. COMM. ON TAX’N, JCX-51-17, 115TH CONG., DESCRIPTION OF THE CHAIRMAN’S MARK OF THE “TAX CUTS AND JOBS ACT” (Comm. Print Nov. 9, 2017).

122. STAFF OF S. COMM. ON TAXATION, 115TH CONGRESS, DESCRIPTION OF THE CHAIRMAN’S MODIFICATION OF THE CHAIRMAN’S MARK OF THE “TAX CUTS AND JOBS ACT” (Comm. Print 2017).

123. See, e.g., Althea Erickson, *Gig Economy Too Important to be Left Out of Tax Reform Plans*, HILL (Nov. 1, 2017), <http://thehill.com/opinion/finance/358091-critical-gig-economy-left-out-of-tax-reform-debate> [<https://perma.cc/9BQY-H69Q>]; Bradley Tusk, *Uber Drivers are “Independent Contractors.” Here’s How Tax Reform Can Settle the Issue*, CNBC (Nov. 10, 2017), <https://www.cnbc.com/2017/11/10/tax-reform-must-address-uber-lyft-and-gig-economy-commentary.html> [<https://perma.cc/VT9P-HJ9S>].

successful initiatives to alter economic incentives and to buttress independent contractor classification for tax purposes. The passthrough provisions of the recently passed tax legislation provide a new deduction for taxpayers who organize themselves as so-called passthrough entities (such as partnerships, S corporations, and solo proprietors).<sup>124</sup> Various commentators have noted that this favorable treatment of taxpayers operating as passthrough businesses creates an incentive for certain taxpayers to reorganize as passthroughs and classify themselves as independent contractors (or be less resistant to the decisions of firms to classify them as such) in order to obtain the tax benefits, thereby potentially foregoing direct employee protections.<sup>125</sup> The passthrough provisions of the new tax bill are not limited to workers in the sharing/gig sector, nor is it clear that reorganizing as a passthrough entity and embracing independent contractor classification will be a sensible calculus for those doing work on platforms, particularly those who earn low amounts. But the enactment of the new passthrough provisions in the tax bill suggest that the battle to move towards a “gig” or independent contractor-based economy is being waged broadly by a variety of interests, and these broader attempts to change the law will have an impact on those working in the platform sector.

Finally, legislative and academic proposals for the creation of a third category of workers between independent contractors and employees or for special regimes or benefits for gig workers, may similarly tip the scales in favor of gig characterization and its regulatory consequences.<sup>126</sup> The general principle is that

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124. H.R. 1, 115th Cong., § 11011 (2017) (enacting new I.R.C. § 199A, effective for tax years ending after December 31, 2017).

125. See, e.g., Patricia Cohen, *Tax Plans May Give Your Co-Worker a Better Deal Than You*, N.Y. TIMES (Dec. 9, 2017), [https://www.nytimes.com/2017/12/09/business/economy/tax-plans-may-give-your-co-worker-a-better-deal-than-you.html?\\_r=1](https://www.nytimes.com/2017/12/09/business/economy/tax-plans-may-give-your-co-worker-a-better-deal-than-you.html?_r=1) [<https://perma.cc/J7VC-LWXU>]; Shu-Yi Oei & Diane M. Ring, *Work-Related Distortions in the Tax Reform Bills: Understanding the New Proposed Provisions (Part 1 of 2)*, ON LABOR BLOG (Dec. 11, 2017), <https://onlabor.org/work-related-distortions-in-the-tax-reform-bills-understanding-the-new-proposed-provisions-part-1-of-2/> [<https://perma.cc/LU72-DEVZ>]; Shu-Yi Oei & Diane M. Ring, *Work-Related Distortions in the Tax Reform Bills: Understanding the New Proposed Provisions (PART 2 OF 2)*, ON LABOR BLOG (Dec. 11, 2017), <https://onlabor.org/work-related-distortions-in-the-proposed-tax-bills-understanding-the-policy-conversations-part-2-of-2/> [<https://perma.cc/EMH7-75NX>]; Reuven S. Avi-Yonah et al., *The Games They Will Play: An Update on the Conference Committee Tax Bill* (Dec. 18, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3089423](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089423) [<https://perma.cc/H57Z-RTX5>]; Shu-Yi Oei & Diane M. Ring, *Is New Code Section 199A Really Going to Turn Us All Into Independent Contractors?* (Jan. 12, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3101180](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101180) [<https://perma.cc/8JWZ-MLKJ>].

126. See, e.g., SETH D. HARRIS & ALAN B. KRUEGER, *A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER”* (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) [<https://perma.cc/UNX6-Q2MD>] (proposing a new category of “independent worker” that provides some of the protections employees receive, but not all); Marc Linder, *Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DETROIT L. REV. 555–599–601 (1989) (proposing a new category of employee modeled after third category used in other countries); Thomas, *supra* note 2 (proposing “non-employee withholding” and “standard business deduction” tax regimes for gig workers); see also Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*,

if the burdens faced by those who would otherwise be treated as independent contractors were to be alleviated, or if an intermediate classification were obtainable, this may tend to undercut arguments in favor of employee protections and reduce the risk of such classification being required of firms.<sup>127</sup>

#### IV

##### THE ROAD FORWARD: PROSPECTS FOR OTHER TYPES OF TALK?

It is impossible to prove that the deployment of gig characterization is the only reason certain legal treatments and outcomes, including independent contractor classification for workers, seem to be sticking, at least for the time being. But it is plausible that while gig and related characterizations appear innocuous and accurate relative to the sharing characterization, this set of descriptors may actually be doing more work than the sharing characterization in terms of advancing a desired regulatory outcome. The reasons they are able to do more work are that (1) gig characterization speaks to an important and material legal ambiguity; (2) gig characterization is plausibly accurate, even if deeply contested; and (3) the proponents of gig characterization have been able to use procedural and other tools to shore up gig characterization and defeat its competitors. These observations may be generalized beyond the gig context: While the temptation is to focus on narratives and characterizations that are clearly wrong, this essay suggests that we should also pay attention to more subtle narratives that are less clearly wrong, because these narratives may actually be doing more work by virtue of being “almost right.”

This essay does not argue that gig characterization is necessarily the wrong one, or even the less normatively desirable one at the end of the day. There may be good reasons why businesses and some workers may prefer independent contractor treatment to employee classification (for example, fears that the job opportunities will diminish as operating costs and protections rise). Rather, this essay’s goal is to highlight how the businesses have harnessed seemingly innocuous descriptions to reap large regulatory gains, and also to point out how journalists, academics, and other commentators may, in the pursuit of greater accuracy, have unwittingly helped the businesses bolster and disseminate gig- and platform-favorable narratives.

Is there any hope for counter narratives to gig talk? Gig characterization is sticky but not immutable. Despite the power of the gig narrative, it is conceivable that under some circumstances, it might lose its potency or prove less attractive. While predicting the full narrative trajectory of the new sector is beyond the scope of this essay, a couple of preliminary observations can be made. First, the continuing vitality of the gig narrative will depend on how competing narrative

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WALL ST. J. (Jan. 28, 2015), <https://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>.

127. See Miriam Cherry & Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 639, 655–67 (2017) (discussing risks of creating third category—such as risk of arbitrage between categories—based on experiences of other countries).

options perform. One potential counter narrative is an “employment” narrative that emphasizes more strongly the role played by firms. Such a narrative might, for example, highlight that those providing services in the sector generally do not capture the upside of their work and are under the direct or indirect control and direction of the firms. Another possible narrative may be one of “fragility” or “contingency”: Rather than highlight the entrepreneurial nature of the work, one might emphasize its contingent or insecure nature, which suggests the need for worker protections. A third possibility is that as more traditional businesses (such as taxicabs) also harness technology and become similar to the new firms, the line between the new firms and tech-savvy incumbents (and with it, the power of gig talk) may dissolve. On the flip side, it is also possible that such convergence between industries will allow gig characterization and its legal implications to permeate industries beyond what is currently understood as the gig sector. Up to this point, none of the competitor narratives have performed strongly enough to pose a real threat to gig talk. However, this may change in the future.

Second, whether gig talk will win out over competing narratives will depend on underlying economic and regulatory conditions. It is possible that adverse regulatory shocks may spur different ways of talking about the new sector. For example, immediately after the announcement that Uber was to lose its London license, several of the company’s defenders were quick to point out that this would lead to tens of thousands of workers losing their jobs.<sup>128</sup> This is an example of a regulatory shock suddenly making the “worker protection” and “employment” narrative more compelling from a business perspective. It is also possible that as economic conditions in a country improve and other types of employment opportunities arise drawing potential new economy workers away from the sector, it may prove advantageous to recast gig opportunities as comparable to more secure traditional employment opportunities or to change the structure of gig work to offer more robust benefits and protections. This is another type of shock that might create a shift away from gig characterization.

Third, the continuing prevalence and vitality of gig talk will depend on how technology continues to advance and develop. For example, if gig firms are able to eventually replace human labor with robots and self-driving cars, this may eliminate the need for gig talk as a regulatory strategy altogether. There is some suggestion that firms may be moving in the direction of replacing the human workforce. For example, Uber recently ordered 24,000 self-driving SUVs from Volvo.<sup>129</sup> More broadly, scholars and commentators are speculating over whether

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128. See, e.g., Robert Booth, *Uber Drivers in London Warn of Financial Ruin for Thousands of Families*, THE GUARDIAN (Sept. 22, 2017), <https://www.theguardian.com/technology/2017/sep/22/uber-drivers-london-warn-financial-ruin-thousands-families> [<https://perma.cc/TJ4G-WZZW>].

129. William Boston, *Volvo Promises Uber Fleet of Self-Driving Taxis by 2019*, WALL ST. J. (Nov. 20, 2017), <https://www.wsj.com/articles/volvo-promises-uber-fleet-of-self-driving-taxis-by-2019-1511184730>. However, in the aftermath of an accident in Arizona in March 2017 in which an Uber self-driving car killed a pedestrian, Uber’s self-driving car testing program was suspended in Arizona. Daisuke Wakabayashi, *Uber Ordered to Take Its Self-Driving Cars Off Arizona Roads*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/technology/arizona-uber-cars.html> [<https://perma.cc/5C58->

automation will lead to declining work opportunities for humans and arguing over how to address these threats to human labor.<sup>130</sup> If technology does replace human labor, the emphasis on gig characterization may decline, because traditional concerns about how humans are subject to tax and labor law might become less salient.

Whether or not gig talk persists or is displaced by competitor narratives, the insights offered in this essay remain relevant: From the point of view of legal and regulatory fights, it may not necessarily be the most obviously wrong descriptions that are doing the regulatory work but the ones most able to subtly corral law in support of underlying regulatory goals. Academic, journalists, and policymakers should take note.

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KKM4]. Uber also voluntarily suspended testing in all U.S. cities after the crash. Faiz Siddiqui, *Tech Firms, Government Officials Put the Brakes on Testing Self-Driving Vehicles After Fatal Uber Crash*, WASH. POST (Mar. 27, 2018), [https://www.washingtonpost.com/news/dr-gridlock/wp/2018/03/27/arizona-governor-suspends-testing-of-ubers-self-driving-cars-i-was-very-disturbed-by-video-of-fatal-crash/?noredirect=on&utm\\_term=.cbfbc66126f5](https://www.washingtonpost.com/news/dr-gridlock/wp/2018/03/27/arizona-governor-suspends-testing-of-ubers-self-driving-cars-i-was-very-disturbed-by-video-of-fatal-crash/?noredirect=on&utm_term=.cbfbc66126f5) [<https://perma.cc/4CFM-HKCU>]. These developments suggest that Uber's self-driving car program may have hit roadblocks.

130. See, e.g., Michael Jones, *Yes, The Robots Will Steal Our Jobs. And That's Fine*, WASH. POST (Feb. 17, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/02/17/yes-the-robots-will-steal-our-jobs-and-thats-fine/?utm\\_term=.13b33ece8770](https://www.washingtonpost.com/posteverything/wp/2016/02/17/yes-the-robots-will-steal-our-jobs-and-thats-fine/?utm_term=.13b33ece8770) [<https://perma.cc/82ZS-3MK9>]; Carl Benedikt Frey & Michael Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation* (Oxford Martin Sch., Working Paper 2013), [https://www.oxfordmartin.ox.ac.uk/downloads/academic/The\\_Future\\_of\\_Employment.pdf](https://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf) [<https://perma.cc/7FBC-5CYT>].