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Challenges for Black Workers After 2020: Antiracism in the Gig
Economy?

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Challenges for Black Workers After 2020: Antiracism in the Gig Economy?

Michael C. Duff*

I. Introduction: The Loss of “Employment”

Of critical importance to Black workers in the coming decades is the fate of employee status under various labor and employment laws. The Gig economy, conceived as a network of platforms in which large entities facilitate work, while claiming not to employ their own workers, is exploding,¹ and with it the potential destruction of employment law as we know it. Over the decades explicit American federal “antiracism law”² has been transmitted over the decades through the medium of “employment law.”³ The Black work force, and the broader society, should be concerned about this disruption. Commentators have noted with respect to the existing employment law regime: “While legislation alone cannot prevent bias, the persistent underfunding of enforcement agencies and exemptions for small companies result in limited accountability for employers that abuse and exploit their workers based on race.”⁴ This is obviously even more the case if Black workers are deemed not to be employees and therefore are not able to advance legal claims under federal antiracism law.⁵

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¹ Recent tax studies suggest that much of the Gig work may be supplemental to poorly paying or inadequate “regular” work, but there is tremendous disagreement on the question of the scope of the Gig economy, *see infra* n.21; *see also* 78 GROUPS URGE CONGRESS TO EXTEND LABOR PROTECTIONS TO MILLIONS OF APP-BASED WORKERS, NATIONAL EMPLOYMENT LAW PROJECT, Jan. 25, 2021, <https://www.nelp.org/news-releases/77-groups-urge-congress-extend-labor-protections-millions-app-based-workers/>. Though numbers are disputed, there is little doubt that “app-based” work is has experienced “explosive growth.” BRETT COLLINS, ANDREW GARIN, EMILIE JACKSON, DMITRI KOUSTAS, MARK PAYNEK, IS GIG WORK REPLACING TRADITIONAL EMPLOYMENT? EVIDENCE FROM TWO DECADES OF TAX RETURNS, INTERNAL REVENUE SERVICE PUBLICATION 4, Mar. 25, 2019, <https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf>.

² “Being antiracist is fighting against racism.” TALKING ABOUT RACE, NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE/SMITHSONIAN *available at* <https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist>. This discussion assumes that antidiscrimination law is antiracist. Of course, it cannot be seriously contended that the policy objectives of the law have been adequately pursued let alone achieved.

³ While it is certainly true that federal antiracism law exists in the domains of the Fair Housing Act, the Voting Rights Act of 1965, and education and public accommodations under U.S. Code Title 42, Chapter 21, a good case can be made that antiracism protections related to employment are among the most profound of the antiracism legal protections.

⁴ DANYELLE SOLOMON, CONNOR MAXWELL, AND ABRIL CASTRO, SYSTEMATIC INEQUALITY AND ECONOMIC OPPORTUNITY, CENTER FOR AMERICAN PROGRESS, August 7, 2019 *available at* <https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/>.

⁵ *See infra* section IV. One recognizes, of course, that most employment protections may also be conceived as antiracist insofar as they improve the fortunes of workers in the lower rungs of the socioeconomic ladder, where Black workers, and other workers of color, are disproportionately likely to be.

One can argue all day and night about just how big the Gig economy has gotten in recent years,⁶ but given the catastrophic impact of the pandemic on Black small businesses,⁷ nearly half of which had closed by April 2020,⁸ it seems a reasonable surmise that many displaced small Black business owners may be destined for participation in the Gig economy as “workers.”⁹ Thus, in upcoming years the Gig economy is likely to have an outsized impact on the fortunes of Black workers. Proponents appearing to champion the novelty and disruption of the Gig economy, such as those writing in recent years for the Brookings Institution’s Hamilton Project,¹⁰ nevertheless concede that without employee status¹¹ Black workers lose the benefit of federal antiracism law, which applies only to “employees.”¹² Dramatic efforts undertaken over decades to enact a broad, federal, antiracist employment statute¹³ are accordingly seriously threatened by the Gig economy. Through Title VII of the Civil Rights Act of 1964,¹⁴ “one of the most important pieces of legislation in the last century,”¹⁵ bedrock antiracist policy was unequivocally injected into

⁶ See Josh Eidelson, *The Gig Economy Is Coming for Millions of American Jobs*, BLOOMBERG NEWS, Feb. 17, 2021. (arguing that California’s Proposition 22, *see infra* at Section III, is a harbinger of an even faster growing Gig economy).

⁷ There can be little continuing doubt about the overall disproportionate impact of the pandemic on communities of color, with Blacks being hit hardest. *See* COVID TRACKING PROJECT AT THE ATLANTIC, THE COVID RACIAL DATA TRACKER, COVID-19 IS AFFECTING BLACK, INDIGENOUS, LATINX, AND OTHER PEOPLE OF COLOR THE MOST *available at* <https://covidtracking.com/race>.

⁸ CLAIRE KRAMER MILLS AND JESSICA BATTISTO, DOUBLE JEOPARDY: COVID-19’S CONCENTRATED HEALTH AND WEALTH EFFECTS IN BLACK COMMUNITIES, FEDERAL RESERVE BANK OF NEW YORK *available at* https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses.

⁹ Studies as far back as 2017 showed that “[f]rom 2002 to 2014, while total employment increased 7.5 percent, gig economy workers increased by between 9.4 percent and 15.0 percent, depending on the definition of gig economy workers. Between 2010 and 2014, growth in independent contractors alone accounted for 29.2 percent of all jobs added during that time period.” BEN GITIS, DOUGLAS HOLTZ-EAKIN, WILL RINEHART, THE GIG ECONOMY: RESEARCH AND POLICY IMPLICATIONS OF REGIONAL, ECONOMIC, AND DEMOGRAPHIC TRENDS, THE ASPEN INSTITUTE, January 10, 2017 *available at* <https://www.aspeninstitute.org/publications/the-gig-economy-research-and-policy-implications/>. The gig economy had, in other words, been growing up until the pandemic faster than the traditional economy, so if the trend continues post-pandemic, if one loses one’s business and needs a job the work is increasingly likely to be found in the Gig economy unprotected by antiracism law.

¹⁰ SETH D. HARRIS AND ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER,” THE HAMILTON PROJECT 1(2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf. Of course, dispossessing workers of the employee definition essentially deregulates their working conditions under a vast array of employment statutes. By focusing on the seriousness of the potential deregulation of racist conduct this discussion does not mean to underestimate serious impact on other protected groups.

¹¹ The literature surrounding legal developments in defining employee status is vast but a good starting point in the context of contingent employment and the gig economy is DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014). It is also very clear that the problem is not new. *See* Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 172 (2003) (explaining that the problem of contingent work was high on the agenda of the famous Dunlop Commission on the Future of Worker-Management Relations commissioned in 1992).

¹² *See supra*. n.10 at 17-18. *See also infra*. Section IV.

¹³ Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

¹⁴ Pub. L. 88-352, as amended, 42 U.S.C. § 2000e et seq.

¹⁵ Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L. J. 170, 173 (2006).

American society through the instrumentality of employment law.¹⁶ Title VII was antiracist, at least at its inception, because it explicitly forbade racial discrimination in hiring and with respect to other terms and conditions of employment. The law thereby enhanced prospects for increased and sustained Black employment.¹⁷ Even if only on a symbolic level,¹⁸ the statute brought directly into American workplaces, for the first time, the prospect (at least) of expanded legal liability for racist conduct.¹⁹ Thus, regardless of the full range of claims²⁰ advanced by the burgeoning²¹ Gig economy, all foes of racism can quickly agree with Gig economy proponents contending that Gig workers should somehow be brought “within the protections of the federal employment discrimination laws.”²² In fact, one can go farther to assert that all independent contractors—disputed or traditional—should have access to federal antiracism legal protections. The question is how best to accomplish this objective.

II. Section 1981 Considerations

One approach to the loss of antiracism law occasioned by the potential destruction of the employment relation under the Gig economy might be to skip “employment” altogether by simply

¹⁶ Nevertheless, it is a fair criticism to note that precisely because Title VII was so important it created the false impression in many that the work of antiracism was finished. Ibram X. Kendi, *The Civil Rights Act Was a Victory Against Racism. But Racists Also Won*, Washington Post, (July 2, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/the-civil-rights-act-was-a-victory-against-racism-but-racists-also-won/>.

¹⁷ Erik Loomis, Title VII’s Legacy, LABORONLINE, <https://www.lawcha.org/2014/10/15/title-viis-legacy/>

¹⁸ Chuck Henson, *The Purposes Of Title VII*, 33 NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY 221 (2019) (arguing that while Title VII was a powerful symbol in the it also served the aims of the white power structure when it was enacted) .

¹⁹ *Id.* at 222-223 (“The symbolism derives in part from finally achieving a federal law that breached that part of federalism that accommodated legalized inequality. Accomplishing the passage of the Civil Rights Act of 1964 was a big deal.”).

²⁰ Common justifications center on the desirability of corporate and worker flexibility, of recognizing changes in technology, and of the substantial financial benefits flowing to companies utilizing “alternative labor arrangements.” See generally Befort, *Revisiting the Black Hole of Workplace Regulation*, *supra.* n.11, at 160-163. Of course, the talismanic invocation of technology does not explain its relevance nor would anyone dispute that compliance with law usually increases the costs of business operation.

²¹ Although the Bureau of Labor Statistics figures show only modest growth in the “contingent” labor force in recent years, the complexity of the survey questions posed to respondents about their job status provides fertile ground for skepticism about the results, see e.g., See KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67 (2004). The creation of Pandemic Unemployment Assistance as part of the CARES Act providing benefits to “individuals not qualified for regular unemployment compensation, extended benefits under state or Federal law, or pandemic emergency unemployment compensation,” see CARES Act, Section 2102, suggests a growing Gig economy. In 2015, the Government Accounting Office estimated the contingent workforce at a much higher figure of 35.3 percent of employed workers in 2006 and 40.4 percent in 2010. See Government Accounting Office letter to Hon. Patty Murray and Hon. Kirsten Gillibrand, Contingent Workforce: Size, Characteristics, Earnings, and Benefits,” p. 4, April 20, 2015, available at <https://www.gao.gov/assets/670/669899.pdf>. As the letter explains, estimates can differ significantly depending on baseline definitions and assumptions.

²² See HARRIS & KRUEGER, *supra.* n.1, PROPOSAL FOR MODERNIZING. The approach is somewhat puzzling: one pulls workers out of the employment regime only to place them back in again to regain a policy originally implemented through employment. Perhaps all well and good; but coverage is only step one. The real test of the adequacy of such a model is the bottom-line compensation of victims that will serve both as make-whole relief and also as deterrence of future racist conduct.

covering black “contractors” with broad, universal antiracism law such as that represented by the Reconstruction-era statute, Section 1981 of the Civil Rights Act of 1866.²³ One benefit to this approach is that it would be applicable to any future claimed transformation of work. Call employment what you will, a broader antiracism statute would cover it.

Section 1981 has well-known limitations, however. “At present, § 1981 provides protection roughly equivalent to that of Title VII to a subset of the independent contractors whom Title VII excludes: those who suffer race-based disparate treatment discrimination.”²⁴ However, “[b]ecause § 1981 leaves untouched a range of discriminatory conduct, including nonracial discrimination and disparate impact discrimination, and because it has a number of procedural limitations, § 1981 remains an imperfect remedy.”²⁵ Additionally problematic, in light of the U.S. Supreme Court’s recent opinion in *Comcast Corp. v. National Ass’n of African American-Owned Media*,²⁶ “[t]he but-for causation requirement, combined with the heightened requirements for pleading that the Court established in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, may render § 1981 effective only against the most blatant examples of race discrimination.”²⁷

Everything mentioned in the preceding paragraph could be fixed (and more besides). Strong arguments exist for doing so. Section 1981, emerging as it did in the aftermath of the Civil War, has, or should have, unique antiracist symbolic power. The Civil Rights Act of 1866 was deemed so important to Congress that the 14th Amendment was advanced, in substantial part, to ensure that the Act was constitutionally valid.²⁸ The Civil Rights Act, including Section 1981, seems easily among the most important of American “super-statutes.”²⁹ On two prior occasions Congress considered embedding Section 1981 within Title VII: First, when Congress enacted the Equal Opportunity Act of 1972, the Senate considered an amendment to make the Equal Pay Act and Title VII the exclusive federal remedies for employment discrimination;³⁰ second, when

²³ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a) (2020)).

²⁴ Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent*, *supra*. n.15, at 174.

²⁵ *Id.*

²⁶ 140 S. Ct. 1009 (2020).

²⁷ Note, *Comcast Corp. v. National Ass’n Of African American-Owned Media*, 134 HARV. L. REV. 580, 587-88 (2020)

²⁸ MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 86 (1986).

²⁹ William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215, 1216 (2001):

A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem, but a lengthy struggle does not assure a law super-statute status. The law must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture.

³⁰ Tarantolo, *From Employment to Contract supra*. n.15, 209, n.223. Senator Williams on that occasion stated: “The law against employment discrimination did not begin with [T]itle VII and the EEOC, nor is it intended to end with it.... [This amendment would] repeal the first major piece of civil rights legislation in this Nation’s history. We cannot do that.” 118 CONG. REC. S. 3371 (daily ed. Feb. 9, 1972).

Congress debated the Civil Rights Act of 1991.³¹ The overtures were rejected then as they should be now. The argument is powerful and preferable that Section 1981 should “drive” antiracist employment law, rather than the reverse. Federal antiracism law through the medium of Section 1981 should be strengthened.³²

III. State Law Carveouts

In the absence of an expanded and strengthened federal Section 1981 (or in the meantime), it might be possible to simply cover contractors, or other Gig workers, with laws guaranteeing working standards under federal law, regardless of who is doing the work.³³ One looming legal battle on the horizon may be a test of whether there is anything constitutionally sacrosanct about projecting social standards for working conditions (antiracist or otherwise) exclusively through the medium of formal employment.³⁴ The larger the Gig economy becomes, the more society may feel compelled to debate whether polices embedded in employment statutes must be irretrievably lost as employee status is destroyed. Given the likely intensity of such a debate at the national level, it is perhaps not surprising that its first glimmers have been observable at the state level.³⁵ One such experiment was recently undertaken in the racial discrimination context when California voters approved by referendum Proposition 22, which mandates that “app-based transportation (rideshare) and delivery drivers” are independent contractors.³⁶ In many instances these workers would have been deemed employees under common law factor tests;³⁷ and they almost certainly would have been deemed employees under California’s “ABC test,” which shifts the burden to companies to prove the non-employee status of their workers, under a substantive test favorable to determinations of employee status.³⁸ The 181.4 million dollar Proposition 22 initiative to classify

³¹ Tarantolo, *From Employment to Contract supra*. n.15, 209, n.223. S. REP. No. 101-315, at 12 (calling § 1981 “a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts” on the way to rejecting a proposed amendment).

³² See U.W. Clemon et al., *The Nation’s First Civil-Rights Law Needs to Be Fixed*, THE ATLANTIC, August 7, 2020 available at <https://www.theatlantic.com/ideas/archive/2020/08/nations-first-civil-rights-law-needs-be-fixed/614926/>

³³ See David C. Yamada & Lewis L. Maltby, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239 (1997) (arguing generally against a uniform employee definition but concluding that independent contractors should be covered under the major federal discrimination laws—Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Section 1981 of the Civil Rights Act).

³⁴ It seems particularly clear that such regulation may be available to states in light of the U.S. Supreme Court’s opinion in *Parker v. Brown*, 317 U. S. 341, 350-52 (1943) (“nothing in the language of the Sherman Act or in its history suggests that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints as an act of government).

³⁵ See e.g. *The war heats up over Seattle’s attempts to regulate Uber and Lyft drivers’ pay*, SEATTLE CITY COUNCIL INSIGHT, July 21, 2020 (recounting Seattle’s repetitive attempts to regulate Uber).

³⁶ Now codified at Cal. Bus. & Prof. Code § 7448 et seq.

³⁷ See generally Restatement 2d of Agency, Section 220 (2) (utilizing ten-factor test to assess primarily the employer’s control of working conditions and make determination as to whether a worker is an employee or an independent contractor). The test substantially disregards an employer’s characterization of the legal status of its workers.

³⁸ That test places the burden on the putative employer, rather than the putative employee, to show that it lacks control of the details of the employee’s work. The test (not applicable to workers’ compensation cases) states:

[A] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that . . .

the designated workers as non-employees as a matter of law, the costliest referendum in U.S. history,³⁹ is hard to conceive as beneficial for these workers. As a January 2021 letter to Congress authored by an umbrella group of over seventy labor and activist organizations put it:

The “gig economy” is the deliberate destruction of our most basic labor standards—for now, targeting the delivery, transportation, and home care sectors—and it disproportionately impacts workers of color and immigrants. Combined, Black and Latino workers make up less than 29 percent of the nation’s total workforce, but they comprise almost 42 percent of workers for app-based companies. They are underpaid, put in harm’s way on the job, and left to fend for themselves. Facing racist exclusions from stable work, app-based workers of color must endure punishing working conditions locked-in through forced arbitration agreements that forbid collective action—all under a pretense of individual enterprise.⁴⁰

Proposition 22, as now codified discriminates even if not facially, against “workers of color and immigrants.” Somewhat schizophrenically, however, the law formally retains *employment* law antidiscrimination protections. Thus, the law appears to extend employment protections to state-defined independent contractors.⁴¹ Under Section 7456 of the California Business and Professions Code,

(a) It is an unlawful practice, unless based upon a bona fide occupational qualification or public or app-based driver safety need, for a network company to refuse to contract with, terminate the contract of, or deactivate from the network company’s online-enabled application or platform any app-based driver or prospective app-based driver based upon race, color, ancestry, national origin, religion, creed, age, physical or mental disability, sex, gender, sexual orientation, gender identity or expression, medical condition, genetic information, marital status, or military or veteran status.

(b) Claims brought pursuant to this section shall be brought solely under the procedures established by the Unruh Civil Rights Act (Section 51 of the Civil Code) and will be governed by its requirements and remedies.

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work

(B) The person performs work that is outside the usual course of the hiring entity’s business.

(C) The person is customarily engaged in an independently established trade, occupation, or business

. . .
³⁹ Michael Hiltzik, *Uber and Lyft just made their campaign to keep exploiting workers the costliest in history*, L.A. TIMES, Sept. 8, 2020 available at <https://www.latimes.com/business/story/2020-09-08/uber-lyft-most-expensive-initiative>.

⁴⁰ Letter to Congress on Labor Protections for App-Based Workers, January 25, 2021 available at <https://www.nelp.org/publication/letter-congress-labor-protections-app-based-workers/>

⁴¹ Cal. Bus. & Prof. Code § 7451.

The carveout suggests that the proponents of the referendum perceived that its early critics were making inroads in opposing earlier drafts by underscoring the absence of enforceable discrimination remedies.⁴² Accordingly, despite the most expensive referendum in history, Proposition 22 proponents did not quite dare to completely wrest antiracism protections from California workers.⁴³

Remedies for racial discrimination under Section 7456 are inferior to those of Title VII,⁴⁴ and great care should be taken to ensure that state carveouts allowing for application of antiracism law to non-employees not be regressive. Nevertheless the Proposition 22 experience demonstrated that there appear to be limits to the public's tolerance of employment antiracism law destruction and that states may be early laboratories for covering independent contractors with antiracist (and perhaps other) employment laws.⁴⁵ None of the foregoing discussion is meant to diminish the reality that Proposition 22 stripped Black app-based rideshare and delivery workers, and other workers, of a host of important labor and employment protections.⁴⁶ Title VII's policy of ensuring greater participation by Black workers in the economy is obviously of diminished utility if the protective floor of that economy is falling for all workers.⁴⁷

IV. *From Reid Factors to ABC Test*

The impetus of this short article has been that the Gig economy demands that workers be deemed independent contractors *ex ante* as a matter of law—including Black workers seeking protection of antiracist employment law. Rather than attempting to cover putative independent contractors with generalized antiracist law, as explored in preceding sections, employment law could simply be broadened to disregard the Gig economy's *ex ante* demands. Further, in addition to not following a legal presumption that Gig workers are independent contractors, Congress could undermine the Gig economy's seemingly endless machinations to leverage multifactor tests under existing law to prove that workers are independent contractors. Decades ago the U.S. Supreme

⁴² See REY FUENTES, REBECCA SMITH, AND BRIAN CHEN, RIGGING THE GIG, PARTNERSHIP FOR WORKING FAMILIES & NATIONAL EMPLOYMENT LAW PROJECT 17, July 2020 (noting that the version of Proposition 22 under discussion at that time contained no explicit connection to the California Civil Code) available at https://s27147.pcdn.co/wp-content/uploads/Rigging-the-Gig_Final-07.07.2020.pdf.

⁴³ Of course, the same could be said for all benefits afforded workers under the referendum. The legal authority to provide independent contractors with employment benefits is untested. The fact that proponents braved, for example, potential ERISA and antitrust legal issues speaks volumes to the political fragility of the initiative to strip the workers of employment rights.

⁴⁴ The Unruh Act does not allow punitive damages for racial discrimination, Cal.Civ.Code § 52(a), while Title VII does. See 42 U.S.C. § 1981a.

⁴⁵ The level of benefits is clearly inadequate, see RIGGING THE GIG, *supra*. n.42, but that is not the point. The point is that bad benefits one conceded as lawful under a structure can be improved. Passing the threshold of lawfulness is no small feat.

⁴⁶ See RIGGING THE GIG, *supra*. n.42 at 17.

⁴⁷ PROP 22 HARMS PEOPLE OF COLOR FIRST AND WORST, FACT SHEET, PARTNERSHIP FOR WORKING FAMILIES & NATIONAL EMPLOYMENT LAW PROJECT available at https://www.nelp.org/publication/prop-22-harms-people-color-first-worst/#_ednref8. As this essay was being completed, the Supreme Court of the United Kingdom decided that Uber drivers were not independent contractors under UK law. This may have international impact on the Gig economy. See Mary-Ann Russon, *Uber drivers are workers not self-employed, Supreme Court rules*, BBC NEWS, FEB. 19, 2021 available at <https://www.bbc.com/news/business-56123668>.

Court recognized in *Hearst Publications*⁴⁸ that, as a matter of common sense, workers who are dependent on a company cannot be “independent.”⁴⁹ The Court recognized that the large remedial purposes of employment laws could not be effectuated if large sections of the workplace were left uncovered.⁵⁰ Congress overruled application of this common sense “economic realities” test to the National Labor Relations Act the year after *Hearst Publications* was decided, explicitly excluding independent contractors from coverage under the NLRA.⁵¹ For present purposes, the important aspect of *Hearst Publications* is that it made clear Congress possessed the authority to disregard common law employment statuses *should it wish to do so*.⁵² In the decades since *Hearst Publications*, the Supreme Court has routinely required application of the common law employee definition where Congress has not been clear about, or has been silent on, the employee definition under a statute.⁵³ Under Title VII, for example, the U.S. Supreme Court applied a common law multifactor analytical framework in *Community For Creative Non-Violence v. Reid*.⁵⁴

Because the Supreme Court has never required Congress to define “employee” in a particular manner, there is nothing doctrinally problematic in defining employees under a statute in a manner calculated to lead to increased statutory coverage. In this context, members of the House of Representatives Committee on Education and Labor circulated a discussion draft of a labor law reform bill in the fall of 2020, the “PRO Act,” aiming to, among other things, significantly amend the National Labor Relations Act’s employee-status rules.⁵⁵ Under the amendment, the “ABC test”⁵⁶ would supplant common law employee-status principles utilized by the courts and the National Labor Relations Board in an obvious effort to broaden the NLRA’s coverage. This activity follows the Trump NLRB’s efforts to make it easier for employers to classify Gig workers as independent contractors under the National Labor Relations Act,⁵⁷ a policy choice that would reduce coverage of workers under the NLRA.⁵⁸ At this writing, the PRO Act is

⁴⁸ NLRB v. Hearst Publications, 322 U.S. 111 (1944).

⁴⁹ *Id.* 127-128 (“In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.”).

⁵⁰ *Id.*

⁵¹ The exclusion is currently codified at 29 U.S.C. § 152(3) (2019).

⁵² NLRB v. Hearst Publications, 322 U.S. at 127-128. The exclusion does not, of course, determine whether any particular person is an independent contractor. That determination must be analyzed by the NLRB under the common law. NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968). The important point is that the analysis need not be carried out at all unless Congress says it must.

⁵³ *Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 322 (1992) (quoting prior case law that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . In the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”)

⁵⁴ 490 U.S. 730 (1989).

⁵⁵ See text at <https://edlabor.house.gov/imo/media/doc/PRO%20Act%20Bill%20Text.pdf>

⁵⁶ *Id.* at Section 101(b). The language tracks the customary definition of the ABC test. See *supra*. n.37 for definition.

⁵⁷ See Uber Technologies, Inc., Office of the General Counsel Advice Memorandum, Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483, April 16, 2019 available at <https://src.bna.com/lbt> (finding, as internal agency matter, certain UberX and UberBLACK drivers to be independent contractors).

⁵⁸ Lawrence Mishel and Celine McNicholas, Uber drivers are not Entrepreneurs, Economic Policy Institute, September 20, 2019 (“The [NLRB]’s determination effectively robs Uber drivers of the rights under the NLRA to engage in collective action—such as organizing a union or collectively bargaining—to improve their working conditions.

moving forward towards a vote in Congress.⁵⁹ Non-employees—including black workers—have no right to organize unions under the National Labor Relations Act. The Congressional NLRA activity underscores a very straightforward approach to preventing evisceration of antiracism law under Title VII: incorporate the ABC test for defining employees under Title VII. The downside to the approach (even if consistently leading to more favorable outcomes) is that employee status would continue to involve a time-consuming—and therefore expensive—factor analysis that can be harassed over time by evasive regulatory arbitrage. It seems far better for Congress to pursue an aggressive, global, federal antiracism law designed to nip in the bud all quirks concocted in malicious executive suites.

V. Conclusion

The Gig economy may be a complement to or cannibal of the traditional economy.⁶⁰ Regardless, it is hard to find a defender of a racist Gig economy. Yet, unless legal structures are modified Black workers after 2020 could face a world of work affording neither rights nor remedies against racist workplace conduct. The simplest and best way to prevent this outcome is to reconfigure Section 1981 of the Civil Rights Act of 1866, a statute possessing Civil War, antiracist symbolic power, to cover all forms of workplace racist conduct. The law should not only substantively reach racist conduct, it should also be structured in a way that does not erect practically insurmountable procedural barriers to bringing a cause of action.

States should also decide to cover all independent contractors with the functional equivalent of antiracist employment law. No legal barriers to moving in this directions appear to exist, and California provides a recent example underscoring that the general public may not tolerate an “employee-less” world that simultaneously ushers in an era in which workers are subject, without remedy, to racist workplace practices. Proposition 22 is—ironically—a harbinger of this welcome intolerance. Further, even if legal obstacles to covering independent contractors with the functional equivalent of antiracist employment law emerged, states should stay the course. Those are legal battles worth fighting. The same can be said of overtures to apply federal employment law to independent contractors.⁶¹

Hopefully, an epoch of regulatory arbitrage, which has slowly drained the lifeblood of employment law for decades, is on the verge of a comeuppance through broader application of the “ABC” test.⁶² Though this solution to preventing exclusion of Black workers from the protections of employment law is not preferable to expanding Section 1981 or covering independent contractors with antiracist employment law, it would be a step in the right direction.

Although the memo specifically covers Uber and UberX drivers, it serves as guidance for the Board’s treatment of similarly situated workers and employers.”) *available at* <https://www.epi.org/publication/uber-drivers-are-not-entrepreneurs-nlrb-general-counsel-ignores-the-realities-of-driving-for-uber/>

⁵⁹ TOP DEMOCRATS INTRODUCE BILL TO PROTECT WORKERS’ RIGHT TO ORGANIZE AND MAKE OUR ECONOMY WORK FOR EVERYONE, HOUSE EDUCATION AND LABOR COMMITTEE, <https://edlabor.house.gov/media/press-releases/top-democrats-introduce-bill-to-protect-workers-right-to-organize-and-make-our-economy-work-for-everyone>

⁶⁰ *See generally* MARK MURO, THE GIG ECONOMY: COMPLEMENT OR CANNIBAL?, Brookings, November 17, 2016.

⁶¹ *See generally* Yamada & Maly, *Beyond Economic Realities*, *supra*. n.33

⁶² *See supra*. n.37.