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# A THIRD CATEGORY FOR RIDESHARE DRIVERS: UNTYING EMPLOYMENT STATUTES FROM AGENCY LAW

*Nathaniel Reyes\**

## INTRODUCTION

Over the last several years, so-called “gig economies” have been gaining prevalence in the national economy, changing the ways many go about daily activities and creating new types of jobs.<sup>1</sup> The public transportation industry has been particularly impacted by rideshare companies. A study found that, from the moment when Uber or Lyft starts doing business in a given city, bus ridership decreases by an average of 1.7% per year.<sup>2</sup> Over one-third of Americans report having used a rideshare app at least once, and Uber and Lyft account for 6% of vehicle miles travelled in the United States.<sup>3</sup>

One issue that courts have increasingly had to confront is whether drivers for rideshare companies are “employees” under federal and state employment statutes. For the most part, federal employment statutes characterize all workers covered by the statute as “employees,”

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1 In 2021, about 9% of U.S. adults participated in gig work. Chris Kolmar, *23 Essential Gig Economy Statistics [2023]: Definitions, Facts, and Trends on Gig Work*, ZIPPIA (Sept. 22, 2022), <https://www.zippia.com/advice/gig-economy-statistics/> [<https://perma.cc/CA2A-V6QL>].

2 Graham Rapier, *Uber and Lyft Are Having a Terrible Effect on Public Transportation, New Research Shows*, BUS. INSIDER (Feb. 4, 2019, 12:57 PM), <https://www.businessinsider.com/uber-lyft-having-devastating-effect-on-public-transportation-study-2019-1> [<https://perma.cc/3JXW-527K>].

3 Jack Flynn, *23 Riveting Ridesharing Industry Statistics [2023]: Facts About Ridesharing in the U.S.*, ZIPPIA (Sept. 29, 2022), <https://www.zippia.com/advice/ridesharing-industry-statistics/> [<https://perma.cc/CN5A-FZ5B>].

and those not so covered as “independent contractors.”<sup>4</sup> Thus, much hinges on the question—if rideshare drivers are “employees,” they are entitled to a range of protections under various employment statutes, such as minimum wage and overtime provisions, protection from discrimination, and collective bargaining rights.<sup>5</sup> But if they are “independent contractors,” they lack these rights. For various reasons, rideshare companies explicitly state in their driver service agreements that the drivers are independent contractors.<sup>6</sup> This has led to several employee misclassification suits against companies such as Uber and Lyft, and various courts have resolved these suits in different and conflicting ways.<sup>7</sup>

Another place where the rideshare-driver classification question arises is in third-party tort liability cases. The common-law doctrine of respondeat superior permits injured plaintiffs to sue an employer for the torts of an employee. The doctrine is only operative if the tortfeasor was an employee of the defendant—an independent contractor relationship does not impute liability. Thus, the success of claims by injured rideshare passengers and bystanders against rideshare companies hinges in large part on the court’s holding that a certain rideshare driver was an employee, rather than an independent contractor. Thus, the same distinction between “employee” and “independent contractor” is used in two very different contexts: employment statutes and vicarious liability.

This Note does not take a stance on the issue of whether rideshare drivers should be classified as “employees” under either employment statutes or the doctrine of respondeat superior. It argues, rather, that if the protection of employment statutes is to be extended to rideshare drivers, this should be done by Congress’s creation of new worker categories in the statutes, rather than by squeezing rideshare drivers into the existing “employee” category. The use of the same binary distinction between employee and independent contractor in both employment statutes and respondeat-superior cases is a practice which should ultimately be abandoned, and recognizing a new statutory category is a commendable first step toward this aim. The creation of a third

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4 This is somewhat simplified. Other individuals, such as volunteers and student interns, are regularly excluded from employment statute coverage as well, even though they are not necessarily “independent contractors.” The binary divide which this Note refers to concerns only “workers,” understood as persons exchanging services for pay. Under most employment statutes, such individuals are either employees (covered) or independent contractors (not covered).

5 See Charles J. Muhl, *What Is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV., Jan. 2002, at 3, 4.

6 See *infra* text accompanying note 97.

7 See *infra* Section II.A.

category is not a new proposal. Others have argued in favor of this,<sup>8</sup> highlighting the difficulties courts face in applying outmoded multi-factor tests for “employee” status to novel types of work (such as driving for rideshare companies).<sup>9</sup> Concerned about the lack of protections currently available to economically vulnerable rideshare drivers, these scholars argue that the existing binary division between employees and independent contractors doesn’t account for the realities of the modern workforce—that it is a “vestige of the early law of ‘masters’ and ‘servants’ that is as archaic as the words suggest.”<sup>10</sup> Rideshare companies are able to take economic advantage of their drivers, and therefore the law should be amended to prevent this.

Avoiding the economic question, this Note identifies a different danger posed by use of the same binary distinction in both contexts. Because the terms used to define the coverage of employment statutes are the same as those used to delineate the applicability of respondeat superior, courts regularly view caselaw interpreting employment statutes as being directly on point in respondeat-superior cases, and vice versa. But this practice overlooks a theoretical difficulty: even if justice demands that rideshare drivers receive certain statutory protections, this does not necessarily mean that justice also demands that third parties injured by such drivers should have a right of recovery against the rideshare company. The word “employee” means very different things in the employment-statute and respondeat-superior contexts. In the former case, “employee” is the label ascribed to a category of workers who, for various policy reasons, are deemed to possess certain statutory rights. In the latter case, however, saying that a worker is an “employee” means that, in the interest of justice, the employer should be held liable to the injured third party, notwithstanding the fact that the employer did not directly cause the injury. Rather than defining the rights of the worker, this latter use of the term defines the rights of a third party. Thus, although distinct policy considerations are in play in each of the two contexts, the current practice of drawing from a single body of precedent for both types of cases obscures these policy differences.

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8 See, e.g., SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK 2 (2015); Yasaman Moazami, *UBER in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going Beyond the Dichotomous Workers’ Classification?*, 24 U. MIA. INT’L & COMPAR. L. REV. 609, 630–34 (2017).

9 See *infra* Section II.A.

10 HARRIS & KRUEGER, *supra* note 8, at 7; see also Moazami, *supra* note 8, at 632–33 (“The prevailing law falsely implies that employee and independent contractor statuses completely cover all work relationships. . . . [R]ules designed for the industrial age are [no longer] suitable.”).

The advent of the rideshare industry gives the law an opportunity to begin to separate questions of employment-statute coverage from those of vicarious liability. By creating a new category of worker which can encompass rideshare drivers, Congress would put the courts in a position where they would be able to begin to separate employment-statute caselaw from respondeat-superior caselaw—this would allow the respective policy considerations to be viewed in isolation. Part I traces the history of employment statutes in the common-law tradition, highlighting the fact that earlier employment statutes recognized a range of worker categories broader than the binary distinction between employee and independent contractor which is common today. Part I also traces how the distinction between employee and independent contractor eventually migrated from agency law to twentieth-century American-employment statutes. Part II illustrates the danger posed by failing to create a third statutory category to account for rideshare drivers. Finally, Part III shows how creating a third category can obviate this danger.

## I. THE MIGRATION OF “EMPLOYEE”

Some have criticized the binary distinction between “employee” and “independent contractor” in employment statutes as an outmoded “vestige of the early law of ‘masters’ and ‘servants.’”<sup>11</sup> These scholars are correct to ascribe this distinction to the law of masters and servants, which long predates modern U.S. employment statutes. However, this criticism obscures the fact that use of the term “employee” to delineate the coverage of modern-employment statutes is a relatively new phenomenon. Although pre-twentieth-century English and American labor laws referred to “servants” as one of the classes of workers to whom the law applied, that term was not used in the same sense as “employee” is used today—as a label applied to *every* worker who is covered by a given employment statute. The terms “employee” and “independent contractor” come principally from the doctrine of respondeat superior, and the view (in employment statutes) that these terms account for all possible work relationships is characteristic of the twentieth century and later.

Section I.A gives a brief overview of the doctrine of respondeat superior, as well as the right-of-control test, which is the traditional test for distinguishing employees from independent contractors. Section I.B gives a brief history of employment statutes in the common-law tradition, showing that the earlier laws acknowledged a collection of worker categories that was broader and more nuanced than the

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11 HARRIS & KRUEGER, *supra* note 8, at 7.

modern binary divide between employee and independent contractor. Finally, Section I.C gives an account of the early development of modern U.S. employment law and the adoption of the binary distinction.

### A. *The Doctrine of Respondeat Superior*

Prior to the enactment of most twentieth-century employment statutes, third-party tort claims formed the “largest single category of cases in which the question whether the person employed to perform the stipulated work was an independent contractor [was] a determinant factor.”<sup>12</sup> Although variously formulated by different courts, the test to determine whether a worker was an employee asked whether the worker was “free from the control of the employer as respects the manner in which the details of the work are to be executed.”<sup>13</sup> If an employer held the right to control *how* a worker did his work, as well as the final result of the work, that worker was an employee. However, if the employer could only control the final result, the worker was an independent contractor.

This right-of-control test formed the basis of the common-law doctrine of respondeat superior, which permits an employer to be held vicariously liable for negligent acts committed by his employees (but not independent contractors).<sup>14</sup> Originating in the common law of masters and servants,<sup>15</sup> respondeat superior traditionally has been justified by notions of fairness to third parties:

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12 Annotation, *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226, § 12 (1922).

13 *Id.* §§ 1–4.

14 See Edward P. Harrington, *The Extent and Limitations of the Doctrine of Respondeat Superior*, in *THE JOHNSON PRIZE ESSAYS FROM VARIOUS LAW SCHOOLS* 511, 516, 523 (George Wharton Pepper ed., Philadelphia, T. & J.W. Johnson & Co. 1890).

15 Although respondeat superior is today generally considered a part of agency law, the doctrine actually originated in a distinct system of law, called the law of servants. For example, a 1915 treatise on agency law drew a distinction between the liability incurred by a “master” (from the law of servants) from that incurred by a “principal” in agency. See GLEASON L. ARCHER, *THE LAW OF AGENCY* 4–9 (1915). A servant was an individual hired to do “tasks that are menial in their nature, such as manual labor.” *Id.* at 6. On the other hand, an agent was entrusted with “higher duties of acting [on the employer’s] behalf in business transactions,” particularly the power to bind his employer in contract. *Id.* However, the treatise notes that the “broader view” of agency law includes the law of servants as a subset, due to the existence of identical vicarious-liability doctrines in both systems. *Id.* at 5. Since both a servant and an agent could impute tort liability, occurring within the scope of their duties, to their employers, respondeat superior came to be regarded as part of agency law. Cf. WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 113 (3d ed. 2001) (“In a very broad way, the field of Agency has been said to concern itself with the distinction between principal and agent, master and servant, employer and independent contractor.”); Harrington, *supra* note 14, at 516 (“The general rule or maxim of the law

No one has a right to evade a responsibility which justly devolves upon him. If a man employs another to do an act for him, and the act in itself, or the results of that act, are detrimental to the interests of third persons, the proprietor has no right to shirk the responsibility. He must be held liable.<sup>16</sup>

At the most basic level, respondeat superior simply states that, as between a “servant” and his “master,” a particular kind of relationship existed whereby the servant had “placed himself under [his master’s] direction and control,”<sup>17</sup> and thus could impute liability to his master.

The doctrine of respondeat superior was introduced into the English common law in the seventeenth century,<sup>18</sup> and it made its way to the United States by the nineteenth century.<sup>19</sup> Courts applying the doctrine proceed in two steps. First, the court asks whether the tortfeasor is an “employee.” For this step, the traditional common-law test is the right-of-control test.<sup>20</sup> Second, the court asks whether the act of the tortfeasor occurred within the scope of employment—specifically, whether it was an act “of the kind the employee [was] employed to perform, . . . occur[ing] within the authorized time and space limits, and further[ing] the employer’s business ‘even if the employer has expressly forbidden it.’”<sup>21</sup>

Older formulations of respondeat superior tend to use the term “servant,” rather than “employee,” to label a worker that could impute tort liability to his “master.” As will be discussed in Section I.B., a “servant” was a particular class of worker, one who generally undertook manual labor or other unskilled work. Thus, similar to the use of the term “employee” in modern employment statutes, the term “servant” played a role both in tort vicarious liability and in defining the coverage of employment statutes. However, as will be seen, the category “servant” did not purport to include *all* types of workers covered by a given employment statute (unlike the modern use of “employee”).

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appertaining to agency is equally applicable to the relation of master and servant; for the servant is, in a measure, the agent of his employer.”).

16 Harrington, *supra* note 14, at 528–29.

17 *Id.* at 515 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 532 (Chicago, Callaghan & Co. 1880)).

18 *Id.* at 516.

19 See Wright v. J. & S. Wilcox, 19 Wend. 343 (N.Y. Sup. Ct. 1838) (applying respondeat superior).

20 See *supra* text accompanying notes 12–14.

21 GREGORY, *supra* note 15, at 118 (quoting Baker v. Stewart Title & Tr. of Phx., Inc., 5 P.3d 249, 254 (Ariz. Ct. App. 2000)).

### B. *Employment Statutes in the Common Law Tradition*

In contrast to contemporary American employment statutes, the labor laws of medieval and Tudor England recognized more than two categories of workers, with laws applying differently to each category. By and large, these laws were not primarily oriented toward the protection of *workers*, so much as the interests of *employers*. The Ordinance of Labourers, laid down in 1349, was the first major installment of English labor statutes.<sup>22</sup> At least in part an attempt to ensure a continuous supply of labor,<sup>23</sup> the Ordinance required all persons covered by the Act to work for any landowner who might require services.<sup>24</sup> Idleness was criminalized, and a person caught avoiding work could be imprisoned.<sup>25</sup> Finally, the Ordinance required that workers not be paid a salary greater than was customary in a given region.<sup>26</sup> Two years later, the Statute of Labourers was enacted to remedy certain defects in the Ordinance.<sup>27</sup> Both laws explicitly extended coverage to “servants” and “laborers.”<sup>28</sup> Moreover, as Marc Linder notes, the distinction between covered and noncovered workers had mostly to do with economic dependence, not the employer’s right of control.<sup>29</sup> The mandatory work provision of the Ordinance applied to all persons (under the age of sixty-one) who had neither land, a craft, nor something else “whereof he may live.”<sup>30</sup> Thus, the laws created a “class of servants and laborers . . . categorically defined by reference to their lack of productive assets and hence . . . dependence.”<sup>31</sup>

The Statute of Artificers, enacted in 1563, was a broad attempt to regulate many aspects of the national labor market.<sup>32</sup> The statute regulated several important aspects of the employment relationship, such as the wages that a worker of a particular type could be paid, the permissible duration of employment contracts, and the ability of an employer to compel work.<sup>33</sup> The statute continued the tradition of

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22 L.R. Poos, *The Social Context of Statute of Labourers Enforcement*, 1 LAW & HIST. REV. 27, 29 (1983).

23 See *id.* at 28; MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* 46 (1989).

24 See Ordinance of Labourers 1349, 23 Edw. 3 c. 1. (Eng.).

25 *Id.* c. 2.

26 *Id.* c. 1.

27 See LINDER, *supra* note 23, at 47–48.

28 See *id.*

29 See *id.* at 47.

30 See *id.* (quoting Ordinance of Labourers 1349, 23 Edw. 3 c. 1. (Eng.)); Poos, *supra* note 22, at 29.

31 LINDER, *supra* note 23, at 51.

32 See *id.*

33 See *id.* at 52–53 (citing Statute of Artificers 1562, 5 Eliz. c. 4, §§ II–III (Eng.)). In a similar vein as the Ordinance of Labourers, the Statute of Artificers threatened



requiring certain classes of people to work,<sup>34</sup> and for some types of workers, abandoning employment before the agreed-upon date was a crime.<sup>35</sup> Like the earlier laws, the statute delineated its coverage with a view toward economic dependence. For example, persons with training in certain crafts—such as weavers, tailors, and butchers, to name a few—had a minimum one-year requirement for any employment relationship. However, if a practitioner of one of these arts was not dependent on wage labor for his livelihood, he was exempt from the requirement.<sup>36</sup>

Thus, under these laws, considerations of economic dependence were fundamental in drawing distinctions between covered and non-covered workers. Moreover, unlike the binary distinction between “employee” and “independent contractor” in most contemporary American statutes, these earlier laws acknowledged a range of different classes of workers. Broadly speaking, nonapprenticed, wage-earning workers fell into three main classes: servants, laborers, and artificers.<sup>37</sup> Generally, a servant was employed by his master for a set term (usually a year), during which he lived in his master’s household.<sup>38</sup> Servants performed a variety of unskilled work in fields such as agriculture, housework, and various crafts.<sup>39</sup> Unlike servants, laborers and artificers did not live with their employers, and they generally worked on a daily, weekly, or task basis.<sup>40</sup> Although laborers might perform the same sorts of unskilled tasks as servants, a laborer could work for several different employers within a short period of time.<sup>41</sup> Artificers, who exercised a skilled craft, had similar work flexibility.<sup>42</sup>

During the colonial period, these worker classifications made their way to America, along with some English labor laws.<sup>43</sup> In their labor laws, states classified workers using the same terms employed in the English statutes, defining the coverage of different provisions via

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imprisonment for a servant who abandoned his employment before the agreed-upon time. *See id.* at 53.

34 *See* ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870*, at 23 (1991).

35 *See* LINDER, *supra* note 23, at 53; STEINFELD, *supra* note 34, at 24.

36 LINDER, *supra* note 23, at 52–53 (citing Statute of Artificers 1562, 5 Eliz. c. 4, §§ II–III (Eng.)).

37 *See* STEINFELD, *supra* note 34, at 19–20.

38 *Id.* at 19.

39 *See id.* Robert Steinfeld notes that the word “servant” was commonly used in both a broad and narrow sense. Broadly, the term referred to wage workers generally, which included wage-earning laborers and artisans. *Id.* at 20. However, premodern English labor statutes most commonly used the term in the narrow sense above. *Id.*

40 *See id.* at 19–20.

41 *See id.*

42 *See id.*

43 *See id.* at 41.

these terms.<sup>44</sup> Over time, however, the categories shifted. Following the War for Independence, the classification “servant” began to fall out of favor, becoming increasingly associated with slavery.<sup>45</sup> Eventually, by 1800, the classes of servant and laborer had more or less collapsed into a single class of “hired labor.”<sup>46</sup> This class was contrasted against that of indentured labor, the latter having markedly less freedom to enter or leave employment relationships than the former.<sup>47</sup> Indentured laborers contracted with an employer to provide service for a term of several years.<sup>48</sup> They were often unpaid, having exchanged the promise of services for transatlantic passage or discharge from a prior debt.<sup>49</sup> By 1775, indentured laborers were the only workers (apart from slaves) who could be compelled to remain at their employment.<sup>50</sup> Through the first half of the nineteenth century, however, the use of indentured labor became increasingly controversial. Finally, in 1867, Congress outlawed the practice.<sup>51</sup>

This history shows that, when Congress started using the terms “employee” and “independent contractor” to delineate the coverage of twentieth-century employment statutes, this was a break with the past.<sup>52</sup> Gone are the days of employment statutes which recognize more than two types of work relationships. On the contrary, the binary divide between employee and independent contractor now purports to cover the entire gamut of categories of workers.

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44 For an overview of American labor laws in the colonial period, see *id.* at 41–54.

45 See *id.* at 126–28.

46 *Id.* at 129.

47 See *id.*

48 See *id.* at 44–45.

49 See *id.* at 45.

50 See *id.* at 121.

51 The Anti-Peonage Act outlawed all forms of servitude, both voluntary and involuntary. See *id.* at 183–84 (quoting Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified at 42 U.S.C. § 1994 (2018))).

52 Cf. Simon Deakin, *The Many Futures of the Contract of Employment*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 177, 178–79 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002) (“The contract of employment, as we know it today, is a very *recent* innovation. The concepts used by nineteenth century judges and legislators to describe employment relationships—independent contractor, casual worker, servant, labourer, workman—do not map neatly on to the ‘binary divide’ between employees and the self-employed with which we are familiar today.” (footnotes omitted) (citing Mark Freedland, *The Role of the Contract of Employment in Modern Labour Law*, in *THE EMPLOYMENT CONTRACT IN TRANSFORMING LABOUR RELATIONS* 17 (Lammy Betten ed., 1995))).

### C. *Twentieth-Century Employment Statutes*

The enactment of the National Labor Relations Act (NLRA) in 1935 marked a major turn in American labor relations.<sup>53</sup> Up until the eighteenth century, there was a general belief in the United States that concerted activity by workers was a crime—specifically, that such activity could be prosecuted as criminal conspiracy.<sup>54</sup> However, the American unionization movement gained strength in the nineteenth century, and some courts and prosecutors began to move away from the conspiratorial view of collective action.<sup>55</sup> Finally, in 1842, the Massachusetts high court held that labor unions were not per se criminal conspiracies, and that in order to charge a union member with conspiracy, it must be proved that “the actual, if not the avowed object of the association, was criminal.”<sup>56</sup> Other states soon adopted positions similar to that of Massachusetts.<sup>57</sup> However, employers continued to fight unionization with moderate success, obtaining injunctions against certain forms of concerted activity and persuading the Supreme Court that activities such as strikes and boycotts qualified as illegal “restraints on trade” under the Sherman Antitrust Act of 1890.<sup>58</sup> To protect workers against these attacks, Congress passed the Clayton Antitrust Act in 1914.<sup>59</sup> Although the Supreme Court soon thereafter restricted the Clayton Act’s protections of unions,<sup>60</sup> political support of unionization remained strong, leading Congress to pass the Norris La-Guardia Act in 1932.<sup>61</sup> This law effectively cemented a “hands off” approach toward labor relations by the national government.<sup>62</sup> The law prohibited federal courts from issuing injunctions in labor disputes, but it did not permit the government to adopt an explicitly pro-union national policy, nor did it create any new structures to facilitate the bargaining process.<sup>63</sup>

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53 See WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 28 (6th ed. 2019).

54 See JULIUS G. GETMAN & JOHN D. BLACKBURN, *LABOR RELATIONS: LAW, PRACTICE AND POLICY* 1 (2d ed. 1983).

55 See *id.*

56 *Id.* at 1–2 (quoting *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 128–30 (1842)).

57 *Id.* at 2.

58 Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7 (2018)); see GETMAN & BLACKBURN, *supra* note 54, at 2–4.

59 Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27 (2018), 29 U.S.C. §§ 52–53 (2018)); see GETMAN & BLACKBURN, *supra* note 54, at 5. The Clayton Act gave unions an exemption from antitrust law and blocked employers from using injunctions in labor disputes. *Id.*

60 See GETMAN & BLACKBURN, *supra* note 54, at 5.

61 Norris La-Guardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115 (2018)); see GETMAN & BLACKBURN, *supra* note 54, at 18.

62 GETMAN & BLACKBURN, *supra* note 54, at 18.

63 See *id.*

In passing the NLRA, Congress substantially increased the government's involvement in collective bargaining. The Act granted employees a "triad of rights"—specifically, the rights to self-organize, to "bargain collectively through representatives of [the employees'] own choosing," and to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>64</sup> The Act also established the National Labor Relations Board (NLRB), which was tasked with administering the NLRA and holding elections for union representation.<sup>65</sup>

Concerning coverage, the NLRA extended the triad rights of self-organization, collective bargaining, and collective action to all "employees."<sup>66</sup> Congress, however, did not provide a clear definition for "employee" in the Act, much less indicate that the Act's coverage was to be judged by doctrines of agency law.<sup>67</sup> The effect of this was to offload the task of defining "employee" to the Supreme Court. In 1944, the Court heard the case of *NLRB v. Hearst Publications, Inc.*<sup>68</sup> There, the Court explicitly rejected the right-of-control test,<sup>69</sup> choosing instead to focus on the "history, terms and purposes" of the Act.<sup>70</sup> According to the Court, Congress, by enacting the NLRA, sought to promote "industrial peace" by "substituting . . . the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established."<sup>71</sup> Since "[t]he mischief at which the Act [was] aimed and the remedies it [offered were] not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors,'" the Court deemed it improper to apply "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants."<sup>72</sup> Thus the Court deferred to the NLRB's conclusion that the newspaper merchants in this case were employees under the Act, regardless of whether they might be independent contractors in agency law.<sup>73</sup>

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64 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 2-4 (John E. Higgins, Jr., Patrick E. Deady, Barry J. Kearney, Joseph J. Torres & Anna Wermuth eds., 7th ed. 2017) (quoting National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified at 29 U.S.C. §§ 151-69 (2018))).

65 See GETMAN & BLACKBURN, *supra* note 54, at 29.

66 National Labor Relations Act § 7.

67 See *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 120 (1944).

68 *Id.*

69 See *id.* at 120-21, 120 n.19.

70 *Id.* at 124.

71 *Id.* at 125.

72 *Id.* at 126, 129 (quoting *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 80 (1940)).

73 See *id.* at 131-32.

In a string of 1947 cases, the Court applied this same rationale to the Social Security Act and the Fair Labor Standards Act (FLSA).<sup>74</sup> Enacted in 1935 and 1938,<sup>75</sup> respectively, both of these laws similarly used the term “employee” to delineate the coverage of certain provisions, without providing a robust definition for that term.<sup>76</sup> In these cases, the Court implicitly recognized that the economic considerations and policy rationales which motivated Congress to act as it did could not lead necessarily to the adoption of the right-of-control test. In other words, the ends of the respective statutes were better served by a broader definition of “employee.” Thus, the Court found it necessary to “dethrone[]” the right-of-control test.<sup>77</sup>

However, the control test did not remain dethroned for long. In 1947, Congress passed the Taft-Hartley Act,<sup>78</sup> which amended the NLRA. Among other things, Taft-Hartley added language which explicitly excluded “independent contractors” from coverage.<sup>79</sup> In making this change, the House committee explained that:

An “employee,” according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire. But in the case of [*Hearst*], the Board expanded the definition . . . beyond anything that it ever had included before, and the Supreme Court . . . upheld the Board. . . . In the law, there always has been a difference, and a big difference, between “employees” and “independent contractors.” “Employees” work for wages or salaries under direct supervision. “Independent contractors” undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. . . . Congress intended [in 1935],

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74 See *United States v. Silk*, 331 U.S. 704, 713–14 (1947) (“Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case.”); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (similar); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–27, 730–31 (1947) (agreeing with the lower court, which held that the test for coverage under the FLSA “was not the common law test of control”).

75 Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–219 (2018)); Social Security Act, ch. 531, 49 Stat. 620 (codified at 42 U.S.C. §§ 301–1397mm (2018)).

76 See *Silk*, 331 U.S. at 710–11 (concerning the Social Security Act); *Rutherford*, 331 U.S. at 728–29 (concerning the Fair Labor Standards Act (FLSA)).

77 LINDER, *supra* note 23, at 192.

78 Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 1341–1344 (2018)).

79 GOULD, *supra* note 53, at 56 n.104.

and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.<sup>80</sup>

Thus, Taft-Hartley overruled the Court's view that the term "employee," used in the context of employment statutes, had a meaning independent of the term's definition in agency law. Indeed, a little over two decades later, the Supreme Court itself acknowledged that agency principles were controlling in the Act.<sup>81</sup>

The employee and independent contractor distinction occupies a similar gatekeeping function in other important federal employment statutes, including Title VII,<sup>82</sup> the Employee Retirement Income Security Act (ERISA),<sup>83</sup> the Family and Medical Leave Act (FMLA),<sup>84</sup> and the FLSA,<sup>85</sup> as well as a large number of state laws. For these statutes, an employer's right to control the manner of the work is an important consideration. If a federal statute does not stipulate an alternative test to determine "employee" status, the right-of-control test is operative.<sup>86</sup> And even when statutes contain their own tests, these tests often have a high degree of overlap with the employer-control analysis.<sup>87</sup> Given

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80 H.R. REP. NO. 80-245, at 18 (1947).

81 See LINDER, *supra* note 23, at 196 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968)). The Court in *United Insurance* stated that, due to Taft-Hartley, "there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor [under the NLRA]." *United Ins.*, 390 U.S. at 256. The Court then considered a number of facts tending to show the extent of control held by the employer over his alleged employees, including whether the employees had the power to fix their own work schedules or exercise independent initiative. *Id.* at 258–59.

82 See 42 U.S.C. § 2000e–2(a) (2018) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment . . . [on the basis] of such individual's race, color, religion, sex, or national origin.").

83 See 29 U.S.C. § 1003(a) (2018). Employee Retirement Income Security Act (ERISA) applies to any "employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce" "or by any employee organization or organizations representing employees engaged in commerce." *Id.* ERISA defines "employee" as "any individual employed by an employer." *Id.* § 1002(6).

84 See 29 U.S.C. § 2612(a)(1) (2018) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . .").

85 Both the minimum wage and overtime compensation requirements in the FLSA apply only to employees. See 29 U.S.C. § 206(a) (2018) ("Every employer shall pay to each of his employees [no less than the applicable minimum wage]."); 29 U.S.C. § 207(a)(1) (2018) ("[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.").

86 See Muhl, *supra* note 5, at 5.

87 See *id.* Even the so-called "economic reality test" focuses on employer right of control. For example, the FLSA looks to "[t]he nature and degree of control by the [purported employer]" and "[t]he degree of independent business organization and operation." *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF

the difference in policy rationales underlying agency law and most employment statutes, justice is better served by having separate tests and terminology. The issue of the classification of rideshare drivers presents a fortuitous opportunity to begin to address this problem.

## II. THE DANGER OF HAVING ONLY TWO CATEGORIES

Rideshare companies have come to occupy a central position in the U.S. public-transportation industry. As of 2022, over a third of Americans report having used a rideshare app at least once.<sup>88</sup> Moreover, 26% of rideshare app users utilize the service at least once a month.<sup>89</sup> Uber and Lyft account for 6% of vehicle miles travelled in the United States, and in 2021, the combined total sales of these two companies equaled over \$13 billion.<sup>90</sup>

Uber has around 3.9 million drivers, while Lyft has roughly 1.4 million.<sup>91</sup> For both companies, applicants must meet certain age and driving experience requirements, as well as pass a background check.<sup>92</sup> Drivers supply their own vehicles, which must pass an inspection and meet specific requirements.<sup>93</sup> Although these might vary by geographic area, Uber generally requires that vehicles used by its drivers be no more than fifteen years old and in good condition.<sup>94</sup> Lyft requires its drivers' vehicles to have certain basic characteristics, such as fully functioning door locks, moveable front seats, sufficient tread on the tires, and windows and mirrors without cracks.<sup>95</sup>

When successful applicants agree to begin driving for Uber, they must sign Uber's Software License and Online Services Agreement, which sets the fundamental terms of the work relationship between Uber and its driver.<sup>96</sup> The Services Agreement characterizes the driver as an "independent contractor."<sup>97</sup> However, driver-plaintiffs frequently argue that the requirements and restrictions placed on them

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LAB. (Mar. 2022), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> [<https://perma.cc/39TP-R5XS>]; see also Muhl, *supra* note 5, at 7–8.

88 Flynn, *supra* note 3. This is up from 15% of the U.S. population in 2015. *Id.*

89 *Id.*

90 *Id.*

91 Saige Driver, *6 Steps to Become an Uber or Lyft Driver*, BUS. NEWS DAILY (Nov. 15, 2022), <https://www.businessnewsdaily.com/10250-how-to-become-rideshare-driver.html> [<https://perma.cc/BS2F-QA4L>].

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 Sara Burns & Mike Whelan, *What's in the Uber Driver's Terms of Service?*, LAW INSIDER (May 26, 2022), <https://www.lawinsider.com/resources/contract-teardown/whats-in-the-uber-drivers-terms-of-service> [<https://perma.cc/7XRH-8YT5>].

97 *Id.*

(in the Services Agreement and ancillary documents) regarding how to complete ride requests, as well as Uber's unilateral ability to determine driver compensation (excepting any tip the driver receives), reserve to Uber a level of control more characteristic of an employer-employee relationship.<sup>98</sup>

Section II.A gives an overview of how courts have dealt with the question of whether rideshare drivers are employees, in both employment law cases and respondeat superior cases. Section II.B shows how the policy rationales underlying these two areas of law are fundamentally different. In light of this, Section II.C illustrates the danger of applying a single body of precedent to respondeat superior and employment statute cases.

### A. *Judicial Attempts to Categorize Rideshare Drivers*

Courts have struggled to characterize rideshare drivers as either employees or independent contractors under employment statutes that utilize the distinction. Although these laws vary to some degree in the factors they use to determine worker status, many include a right-of-control analysis.<sup>99</sup> In the context of rideshare-driver cases, courts often struggle to apply the right-of-control analysis due to the fact that rideshare companies exercise widely varying degrees of control over different parts of the job.

In *O'Connor v. Uber Technologies, Inc.*, the Northern District of California considered whether Uber drivers were independent contractors under the California Labor Code.<sup>100</sup> Until 2018,<sup>101</sup> California employed a list of factors to determine worker status, the most important of which was “the putative employer’s ‘right to control work

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98 See *infra* Section II.A.

99 See *supra* notes 82–87 and accompanying text.

100 *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

101 In the 2018 decision *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018), the California Supreme Court instituted a new test for employee status applicable to certain state laws. See MARION G. CRAIN, PAULINE T. KIM, MICHAEL SELMI & BRISHEN ROGERS, *WORK LAW: CASES AND MATERIALS* 77 (4th ed. 2020). Under the so-called ABC Test, the employer's showing that he does not exercise control over the manner of work is not enough to prove independent-contractor status—the employer must also show that (1) the work performed is outside the usual course of the employer's business and (2) the worker is customarily engaged in a trade of the same sort as the work performed. See *id.* A year later, the California legislature made the ABC Test controlling for all California labor laws. See *id.* at 77–78. And in 2021, the California Supreme Court ruled that the ABC Test could be applied retroactively to incidents occurring before *Dynamex* was decided. Alston & Bird, *The California Supreme Court Holds That Its Worker Classification Decision in Dynamex Is Retroactive*, JD SUPRA (Jan. 25, 2021), <https://www.jdsupra.com/legalnews/the-california-supreme-court-holds-that-6476614/> [<https://perma.cc/99EP-AE5A>].



details.”<sup>102</sup> Applying this factor to the Uber-driver plaintiffs proved difficult because, although Uber exercised a fair amount of control over *how* the drivers transported their passengers between locations, Uber had very little say over *when* the drivers made themselves available to work.<sup>103</sup> Uber could, for example, require its drivers to dress professionally, play only jazz or NPR on the radio, and open the door for the rider.<sup>104</sup> However, apart from requiring its drivers to complete at least one job every 180 days to maintain access to the driver app, Uber had no power over its drivers’ schedules—the drivers could work whenever and for however long they pleased.<sup>105</sup> Noting that a worker’s power over his own work schedule had in other cases weighed heavily in favor of independent contractor status, the court nonetheless considered “[t]he more relevant inquiry [to be] how much control Uber has over its drivers *while they are on duty* for Uber.”<sup>106</sup> Due to the ambiguity surrounding the application of the right-of-control factor, the court held that it could not, as a matter of law, say that the Uber drivers were independent contractors.<sup>107</sup>

The Third Circuit faced the same difficulty in *Razak v. Uber Technologies, Inc.*, where it considered an action by UberBLACK drivers under the FLSA.<sup>108</sup> The Third Circuit’s test for worker status under the FLSA considers six equally weighted factors, one of which is “the degree of the alleged employer’s right to control the manner in which the work is to be performed.”<sup>109</sup> In reversing the lower court’s ruling at summary judgment that the drivers were independent contractors, the *Razak* court noted that a genuine dispute remained as to the right-of-control factor: “While Uber determines what drivers are paid and directs drivers where to drop off passengers, it lacks the right to control when drivers must drive.”<sup>110</sup> State courts have also grappled with the question, resolving it in different ways. In Florida, Uber drivers are not employees for the purposes of state reemployment assistance because “the central issue” for the right-of-control analysis is the capacity to

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102 *O’Connor*, 82 F. Supp. 3d at 1138 (quoting *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Rels.*, 769 P.2d 399, 404 (Cal. 1989)).

103 *Id.* at 1149–50.

104 *Id.* at 1149.

105 *Id.*

106 *Id.* at 1152.

107 *Id.* at 1152–53. The Northern District of California has likewise stated that this ambiguity precludes it from holding Lyft drivers to be employees as a matter of California law. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (denying Lyft drivers’ cross-motion for summary judgment which argued that the drivers were employees).

108 *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 139 (3d Cir. 2020).

109 *Id.* at 142–43 (quoting *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985)).

110 *Id.* at 146.

decide when to accept a ride request.<sup>111</sup> On the other hand, a New York intermediate appellate court affirmed a state board's decision that Uber drivers were employees for the purpose of receiving state unemployment benefits.<sup>112</sup> The court largely disregarded the issue of self-scheduling, focusing instead on the control Uber exercises once its drivers have chosen to accept a ride request.<sup>113</sup>

No doubt, courts are cognizant of the difficulties they face in applying traditional, control-centric tests to the rideshare-driver context. However, another issue has largely been overlooked. It arises from the fact that courts deciding whether drivers are employees in *both* employment-statute cases and vicarious-liability cases look to a *single* body of precedent for both contexts. For example, in *Doe v. Uber Technologies, Inc.*, the Northern District of California denied in part Uber's motion to dismiss several respondeat superior claims against it arising from two instances of sexual assault by two of its drivers.<sup>114</sup> In reaching its decision that the drivers were employees of Uber, the court relied heavily on *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,<sup>115</sup> a seminal California Supreme Court decision which, until 2018,<sup>116</sup> was the principal authority on the question of worker classification under California labor laws.<sup>117</sup> Decided in 1989, *Borello* held that a group of agricultural laborers, hired on a seasonal basis to harvest cucumbers, were employees under California's worker's compensation law.<sup>118</sup> Although *Borello* was an employment-statute case, the *Doe* court treated it as controlling for a vicarious liability fact pattern.<sup>119</sup> This is, from a jurisprudential standpoint, utterly appropriate. As *Borello* itself explained, although the right-of-control test originated in common-law vicarious-liability cases, "[m]uch 20th-century legislation for the protection of 'employees' has adopted the 'independent contractor'

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111 *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 225 (Fla. Dist. Ct. App. 2017) (quoting *Raiser, LLC*, No. 0026 2834 68-02 (Fla. Dep't of Econ. Opportunity Dec. 3, 2015)).

112 *Uber Techs., Inc. v. Comm'r of Lab. (In re Lowry)*, 138 N.Y.S.3d 238, 239–40 (N.Y. App. Div. 2020). The *Lowry* court applied the right-of-control test: "Although no single factor is determinative, the relevant inquiry is whether the purported employer exercised control over the results produced or the means used to achieve those results, with control over the latter being the more important factor." *Id.* at 240 (quoting *Nassau Reg'l Off-Track Betting Corp. v. Comm'r of Lab. (In re Dwyer)*, 31 N.Y.S.3d 250, 251 (N.Y. App. Div. 2016)).

113 *Id.* at 241–42.

114 *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 790–91 (N.D. Cal. 2016).

115 *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399 (Cal. 1989).

116 *See supra* note 101.

117 *See Alston & Bird, supra* note 101.

118 *Borello*, 769 P.2d at 400–01.

119 *Doe*, 184 F. Supp. 3d at 781–83.

distinction as an express or implied limitation on coverage.”<sup>120</sup> In enacting the worker’s compensation statute, the legislature chose to use terms that already possessed definitions in agency law. Presumably, the legislature intended that those definitions be incorporated along with the terms.<sup>121</sup>

There does not seem to be a doctrinal reason preventing courts from considering employment-statute precedent in vicarious-liability cases, and vice versa. However, given the vast difference in policy rationales underlying the doctrine of respondeat superior and most employment statutes, the practice of having a single body of precedent for all cases could present future problems for courts deciding rideshare cases.

### *B. Differing Policy Rationales*

The term “employee” is prevalent in both the vicarious liability and employment law contexts. However, the policies justifying each area of law are not the same, and the class of persons primarily served by each are distinct. Employment statutes serve a range of interests—these could include interests of workers, employers, or society in general. By contrast, the doctrine of respondeat superior primarily serves the interest of a particular person, not a party to the employment relationship, who is injured by someone in that relationship. On the question of whether a specific worker/tortfeasor is an employee, justice might demand different outcomes in different contexts. Thus, the mere fact that the laws happen to all use the same term “employee” should not by itself create a rule that we must apply the same standards and tests in each context. And with the advent of new work arrangements such as that of rideshare companies, Congress has the opportunity to start untying employment-statute coverage from vicarious-liability law.

Throughout its history, respondeat superior has been justified in various ways. As a preliminary matter, Paula Giliker notes that the doctrine sits uncomfortably with the rest of tort law, which traditionally focuses on “general principles of individual responsibility.”<sup>122</sup> Respondeat superior, by assigning liability to someone other than the tortfeasor, “runs counter to the basic principle of tort law which maintains that a person should only be held accountable for the wrongs he

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120 *Borello*, 769 P.2d at 403.

121 As discussed previously, the contrary view that the terms “employee” and “independent contractor” took on radically new meanings in employment statutes was broadly dispelled by the Taft-Hartley Act. *See supra* Section I.C.

122 PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 1 (2010).

or she commits against another.”<sup>123</sup> The effect of the doctrine, then, is to prioritize the plaintiff’s interest in being made whole over the defendant’s interest in being answerable for only his own wrongdoing. Justifications for respondeat superior must show why this prioritization is reasonable.

Some have rationalized the doctrine by saying that as between two innocent parties, the one that played a role in causing the injury should bear the loss. In the words of a 1915 treatise on agency law: “The principal[,] in employing the agent or servant who has committed the tort[,] stands in the position of one who has made it possible for the other to be wronged,” and thus he should be liable.<sup>124</sup> Others have advanced a transactional account, whereby liability is “a price to be paid in return for benefits received by the master by virtue of the exercise of the privilege of control over others.”<sup>125</sup> Some consider tort liability a business risk inherent in acting through employees, such that “an employer who profits from the activities of his employees, should also bear any losses that those activities cause.”<sup>126</sup> And others simply point to the fact that employers tend to be more capable of paying damages than their employees. As one scholar noted: “However distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant.”<sup>127</sup>

Whatever its justification, respondeat superior only operates when a third party has been wronged by someone acting as an employee of another. Thus, the doctrine primarily focuses on the third party’s interest in being made whole. It is secondarily focused on the employer’s interest in avoiding liability, in that such is balanced against the third party’s interest. To the extent that the doctrine considers the employee-tortfeasor’s interest in having someone else pay for his wrongdoing, this consideration is subordinate to the first two. Employee interest takes a backseat in respondeat superior.

On the contrary, many of the most important employment statutes are primarily concerned with protecting employee interests. The NLRA guards the ability of employees to engage in collective action for mutual aid and protection.<sup>128</sup> The FLSA protects employees’ interests

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123 *Id.* at 2.

124 ARCHER, *supra* note 15, at 133; accord GILIKER, *supra* note 122, at 228.

125 GREGORY, *supra* note 15, at 118.

126 GILIKER, *supra* note 122, at 237; see also Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1287 (2001).

127 Glanville Williams, *Vicarious Liability and the Master’s Indemnity*, 20 MOD. L. REV. 220, 232 (1957).

128 See CRAIN ET AL., *supra* note 101, at 227 (citing National Labor Relations Act, 29 U.S.C. §§ 151–169 (2018)).

in being given reasonable work hours and receiving a sufficient wage.<sup>129</sup> The Occupational Safety and Health Act furthers an employee's interest in having a safe working environment.<sup>130</sup> Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act broadly protect an employee's interest in being free from discrimination on the basis of the employee's race, sex, or some other protected category.<sup>131</sup> To the extent that these statutes take into account the interests of persons not privy to the employment relationship, they do so on a broad, communitarian sense. Title VII might, for instance, be justified for its purpose of fostering social equality.<sup>132</sup> The interests of *individual* third parties, however, are generally unrelated to the policy rationales underlying employment statutes.

And yet, despite their predominant focus on employee rather than third-party interests, modern employment statutes commonly use the agency-law term "employee" to refer to persons presumptively covered by the statutes.<sup>133</sup> As previously noted, this has led to courts applying respondeat superior caselaw in worker-misclassification cases, and vice versa. The law would benefit from a more nuanced approach to the employee and independent-contractor distinction.

### C. *The Danger of Having a Single Body of Precedent*

By applying the same term "employee" to a worker who imputes liability to his employer and a worker who is covered by an employment statute, the law creates a single body of caselaw for all contexts where the term is used. And in doing so, the law risks confusing courts as to the policy rationales operative in each context. Regarding a similar problem in Canadian employment law, Lara Friedlander remarks that "[g]iven the diverging policy rationales for each context, a test that works in one context may be inappropriate for another."<sup>134</sup> Even if

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129 See *id.* at 677–79 (citing Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2018)).

130 See *id.* at 675 (citing Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2018)).

131 See *id.* at 545 (first citing Civil Rights Act of 1964, 42 U.S.C. § 2000e–2000e-16 (2018) (Title VII); then citing Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2018); and then citing Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2018)).

132 Cf. Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 228 (2013) (offering a "social equality theory of individual employment law").

133 See *supra* text accompanying notes 82–85.

134 Lara Friedlander, *What Has Tort Law Got to Do with It? Distinguishing Between Employees and Independent Contractors in the Federal Income Tax, Employment Insurance, and Canada Pension Plan Contexts*, 51 CANADIAN TAX J. 1467, 1513 (2003).

courts happen to achieve justice through applying the same terms and tests to determine (a) the coverage of a given employment statute and (b) whether a given employer should be held vicariously liable, such an outcome is merely coincidental.<sup>135</sup> And such coincidences may be few and far between. In fact, “it seems unrealistic to expect that courts will accidentally reach appropriate conclusions if they are required to apply tests in the absence of a policy context (or, indeed, in the presence of an irrelevant policy context).”<sup>136</sup>

An example will illustrate the problem of having a single body of caselaw. Suppose a rideshare driver, named Joe, spends fifty hours every week logged in to Rideshare Co.’s driver app, either waiting for or completing rides. Suppose also that Rideshare provides Driver Joe’s primary source of income, and that on average he earns \$10 per hour. However, the cost of living in Driver Joe’s area is rather high, and his city has set the hourly minimum wage for “employees” at \$14. If Driver Joe sues Rideshare for employee misclassification under the minimum wage statute, the court will likely draw, in part, from its respondeat superior precedent in determining whether the circumstances of Driver Joe’s employment make him an employee under the statute. The court may ultimately (and reasonably) conclude that, due to Driver Joe’s fairly high economic dependence on Rideshare, the policies justifying the minimum-wage statute dictate that he should be covered. However, the only way the court can give Driver Joe coverage of the statute is to hold that he is an “employee.” In doing so, the court contributes to the body of precedent distinguishing employees and independent contractors *in all contexts*, and thus lends support to the argument that Rideshare’s drivers are “employees” *in vicarious liability cases as well*.

Suppose that, a year after having obtained a satisfactory ruling in his minimum-wage case, Driver Joe is still working for Rideshare, under the same circumstances as before. One day, Driver Joe is in his driveway, washing his car (which he uses to deliver Rideshare passengers). Rideshare has a policy requiring that cars used to carry passengers be washed, on a weekly basis, by a professional service—drivers are forbidden from washing their own cars. Although he usually complies with the policy, Driver Joe decided to save some money this week by washing his own car. In the process, however, Driver Joe negligently allowed his garden hose to lay across the sidewalk in front of his driveway. As Neighbor Nancy walked past Joe’s house, she tripped over the hose, falling and breaking her arm. Neighbor Nancy sues Driver Joe for negligence, and she seeks to hold Rideshare vicariously liable under

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135 See *id.* at 1502.

136 *Id.*

respondeat superior. Assuming Joe is liable to Nancy, how should the court decide the issue of Rideshare's vicarious liability?

Due to its previous ruling in the minimum-wage case, the court seems bound to hold that an employment relationship exists between Driver Joe and Rideshare. Even if the policy underlying the doctrine of respondeat superior demands, in this case, that Rideshare not be liable to Nancy, the court cannot absolve Rideshare by holding that Driver Joe is an independent contractor. If justice is best served by Driver Joe being held solely liable to Nancy, the court will have to find a way to hold that Joe's act of washing his car fell outside the scope of employment. This might be a difficult task in many jurisdictions, despite Rideshare's policy against drivers washing their own cars.<sup>137</sup>

The chances that a single rideshare driver is a party to both types of litigation just described is probably slim. However, were a court to consistently rule that rideshare-driver plaintiffs were "employees" under employment statutes, this body of caselaw would exert a high amount of influence on the same court deciding a rideshare-driver respondeat-superior case. Adhering to its precedent, the court would be effectively foreclosed from holding that the rideshare driver was not an employee.

In light of the different policy rationales underlying employment statutes and respondeat superior, it is advisable that the law look for ways to create separate lines of precedent for each. This is not a job for the courts, which are bound to follow the legislature's choice to include agency-law concepts in statutes. However, were legislatures to start using different terms to delineate the coverage of employment statutes, the law would have more flexibility to serve distinct policy goals in both employment statutes and respondeat superior cases.

### III. A THIRD STATUTORY CATEGORY

It is probably unrealistic to expect that legislatures will be able, in a short period of time, to replace all mention of "employee" or "independent contractor" in employment statutes with new terms—these concepts are too deeply engrained. However, with the rise of rideshare companies and questions surrounding statutory coverage of gig-economy workers generally, legislatures have an opportunity to start moving away from these terms. Were Congress, for instance, to amend federal employment statutes to recognize a third category of worker,

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137 GREGORY, *supra* note 15, at 118 ("Conduct falls within the scope of employment if it is of the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business 'even if the employer has expressly forbidden it.'" (emphasis added) (quoting *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Tr. of Phx., Inc.*, 5 P.3d 249, 254 (Ariz. Ct. App. 2000))).

adopting a new term (such as “dependent contractor,”<sup>138</sup> or perhaps “gig worker”) for that category, courts could grant statutory protections to rideshare drivers, without the fear that doing so would necessarily open rideshare employers to respondeat-superior liability. This could open up the law to the possibility of even greater diversity of worker categories in employment statutes.

Return to Driver Joe’s minimum wage case. If the legislature amended the statute to extend coverage to a third category of worker, hypothetically termed a “dependent contractor,” the court would be freed to serve differing policy rationales. However the statute defined dependent contractor, assume that the typical rideshare driver fell easily within the category. If the court ruled that Driver Joe was a dependent contractor, the court could extend statutory coverage to Joe, without also creating a precedent that would tie the court’s hands in Joe’s respondeat-superior case. The term “dependent contractor” has no meaning in agency law, and thus the court’s first ruling would not be controlling in its second.

Placing rideshare drivers into a third category is but a step in the right direction. Assuming, as this Note has argued, that it is advisable to divorce vicarious-liability concepts from tests for employment-statute coverage, we should anticipate a day when the terms “employee” and “independent contractor” are *only* utilized in agency law. However, short of that ideal, legislatures passing employment statutes should endeavor to step outside the rigid twofold distinction and start creating new categories of workers to accommodate the realities of the modern job market.<sup>139</sup> This will have the effect of normalizing the idea that more than two categories of workers can exist in employment statutes, which in turn would highlight the fundamental differences between respondeat superior and employment statutes. When courts are presented with a third category, judges will have to develop new tests for determining whether a given worker falls into that category. Since the terminology is new, these tests will have to be developed primarily in light of the policy rationales underlying employment statutes, rather than from the precedents and restatements of agency law. In time, awareness of the policy differences might alert judges and legislators to the need for even greater terminological change.

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138 In Germany and Canada, some workers are categorized as “dependent contractors.” The hallmarks of the categorization include a long-term, primarily exclusive work relationship, where the worker is economically dependent on the employer. See HARRIS & KRUEGER, *supra* note 8, at 7.

139 Cf. HARRIS & KRUEGER, *supra* note 8, at 6 (noting that gig economy workers “do not fit into either of the two legal statuses currently available under U.S. labor, employment, and tax law: employees or independent contractors”).



## CONCLUSION

So far, much of the discussion on whether a third category of worker should be created to account for rideshare drivers and other gig-economy workers has centered around questions relating to what rights these workers are owed and how best to secure those rights. So long as the focus remains exclusively centered on the efficient delivery of employee rights, an argument like that of this Note might not be overly persuasive. Legislation is a slow process, and courts are likely able to deliver rights to drivers far more quickly than Congress is. So an objection to this Note's argument might be the following: Why change a status quo that, for close to a century, has worked just fine? Courts have so far proved themselves willing and able to squeeze new types of workers into the "employee" category in employment statutes.<sup>140</sup> If this jurisprudence produces quicker justice for rideshare drivers, how is legislative change preferable?

To a certain extent, this practice by courts is unavoidable. This Note's argument has been that by utilizing a single body of caselaw for *all* contexts, courts undermine their ability to do justice in *individual* contexts. However, so long as legislative change remains in the future, courts have no choice but to use a single body of caselaw. Any doubt that the terms "employee" and "independent contractor" in employment statutes differ radically from their definitions in agency law has more or less been dispelled.<sup>141</sup> Thus, any jurisprudence that gives controlling weight to legislative intent and precedent must continue in the view that the categories of employee and independent contractor cover all types of work relationships. Faced with a rideshare-driver plaintiff entitled to statutory protection, courts have no choice but to conclude that such plaintiff is an "employee" under the statute, *as well as in agency law*. Even if Congress tomorrow began working on a bill to add a third category to federal-employment statutes, courts would still have to decide interim cases in the same manner as they have been doing.

For this Note's argument to stand, it must be the case that justice is ill served when a court is bound to classify a worker in a respondeat-superior case in the same way that the court classified that worker in past employment-statute cases, and vice versa.<sup>142</sup> Whatever danger a unified body of precedent poses, it must outweigh the benefits of allowing courts to continue indefinitely in the status quo. Given the fundamental differences in policy rationales underlying respondeat

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140 See *supra* Section II.A.

141 See *supra* text accompanying notes 66–81.

142 See, e.g., *supra* Part III.

superior and employment statutes,<sup>143</sup> this seems likely. However, the theory probably cannot be proved until the fact pattern outlined in Section II.C plays out, on a broad scale, in a particular jurisdiction. If such a situation occurs and leads to inequity, a natural question will be whether the crisis could have been avoided by the legislature's prior enactment of a third category.

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143 See *supra* Section II.B.

