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E. Gary Spitko

A STRUCTURAL-PURPOSIVE INTERPRETATION OF "EMPLOYMENT" IN THE PLATFORM ECONOMY

E. Gary Spitko[*]

Abstract

The considerable growth of the platform economy has focused attention on the issue of whether a provider engaged through a transaction platform should be classified as an employee of the platform operator, and therefore within the purview of workplace protective legislation or as an independent contractor, thus outside the scope of such legislation's protections. This Article focuses specifically on whether the operator's reservation of the right to impose quality control standards on the provider ought to give rise to employment obligations running in favor of the provider and against the operator. This narrow issue is of great importance to the future of the platform economy. Quality control standards promote trust between platform consumer and provider, enabling network effects leveraging, and benefitting the platform operator, consumer, and provider. Yet, if the law considers the operator's right to impose quality control standards on the provider as a factor that will weigh in favor of finding that the provider is an employee of the operator, then the operator is more likely to forgo the right to impose such standards.

With respect to much workplace protective legislation, neither the statutory language nor the legislative history is even minimally helpful in defining "employment." Thus, this Article engages in a structural-purposive inquiry into the definition of employment as applied to the platform economy. The analysis proceeds in three steps. First, this Article explores the structure of workplace protective legislation generally and identifies a "control bargain" implicit in that structure pursuant to which the state imposes a scheme of workplace protective regulation on the firm only if the firm retains a certain type and degree of control over its worker. Second, this Article examines the nature of the platform economy and the function of quality control standards within that economy. From this examination, this Article concludes that the nature of the platform economy suggests that the platform operator's retention of the right to impose quality control standards on providers should be seen as outside the scope of the control bargain and, therefore, should not weigh in favor of finding an employment relationship. Finally, this Article considers case law addressing the meaning of employment in the similar context of

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* Presidential Professor of Ethics and the Common Good and Professor of Law, Santa Clara University. The author is grateful to Naomi Cahn, June Rose Carbone, Keith Cunningham-Parmeter, Ronald J. Krotoszynski, Jr., Jeremias Prassl, and Michael Risch for their helpful comments on earlier drafts of this Article and to Kerry L. Macintosh and Gary G. Neustadter for responding to my research inquiries.

the franchisor-franchisee relationship. This case law supports this Article's principal conclusion by demonstrating that the control bargain allows for exceptions to the rule that the firm's retention of control over a worker weighs in favor of finding that the firm employs the worker, that the firm's reservation of the right to impose quality control standards can be such an exception, and that such an exception can be discerned from the nature of the relevant workplace structures.

INTRODUCTION

This Article considers whether “platform economy” workers who are engaged through transaction platforms should be classified as “employees” of the platform operators within the purview of workplace protective legislation or as “independent contractors” outside the scope of such legislation’s protections.[1] This Article uses the term “platform economy” in a narrow sense to refer to business models that use transaction platforms to bring together consumers and service providers and thereby facilitate commercial transactions.[2] More specifically, this Article focuses on platform operators that meet the U.S. Department of Commerce’s definition of a “digital matching firm.”[3] These platform operators facilitate peer-to-peer transactions using internet platforms such as mobile apps; utilize a user-based rating system to evaluate platform providers; afford platform providers flexibility in deciding their working hours; and rely upon platform providers to supply their own tools and assets necessary to provide the service at issue.[4]

Uber Technologies, Inc. (Uber), for example, is a well-known platform operator. Uber provides an “on-demand” transaction platform that enables consumers who need a ride to find drivers who are willing to supply a ride for a fee.[5] Other well-known platform operators include Handy (professional home cleaners and “handymen”),[6] Instacart (grocery delivery),[7] Rover (dog boarding and dog walking),[8] TaskRabbit (freelance labor to help with chores),[9] and Zeel (in-home massages).[10]

1. *See, e.g.*, Trebor Scholz & Frank Pasquale, *Serfing the Web: On-Demand Workers Deserve a Seat at the Table*, NATION (July 16, 2015), http://www.thenation.com/article/serfing-the-web-on-demand-workers-deserve-a-place-at-the-table/ (labeling the worker classification issue “the most fundamental labor issue of the digital economy”).

2. *See* PETER C. EVANS & ANNABELLE GAWER, CTR. FOR GLOBAL ENTERPRISE, THE RISE OF THE PLATFORM ENTERPRISE: A GLOBAL SURVEY 5, 9 (2016), http://thecge.net/wp-content/uploads/2016/01/PDF-WEB-Platform-Survey_01_12.pdf; Irving Wladawsky-Berger, *The Rise of the Platform Economy*, WALL ST. J.: CIO J. (Feb. 12, 2016, 3:26 PM), https://blogs.wsj.com/cio/2016/02/12/the-rise-of-the-platform-economy.

3. RUDY TELLES, JR., U.S. DEP’T OF COMMERCE: ECON. & STATISTICS ADMIN., DIGITAL MATCHING FIRMS: A NEW DEFINITION IN THE “SHARING ECONOMY,” 1, 2–4 (June 3, 2016), https://www.esa.gov/sites/default/files/digital-matching-firms-new-definition-sharing-economy-space.pdf.

4. *Id.*

5. *See* UBER, https://www.uber.com/?exp=home_signup_form (last visited Nov. 5, 2017).

6. *See* HANDY, https://www.handy.com (last visited Nov. 5, 2017).

7. *See* INSTACART, https://www.instacart.com (last visited Nov. 5, 2017).

8. *See* ROVER, https://www.rover.com (last visited Nov. 5, 2017).

9. *See* TASKRABBIT, https://www.taskrabbit.com (last visited Nov. 5, 2017).

10. *See* ZEEL, https://www.zeel.com (last visited Nov. 5, 2017). For an extensive list of platform operators meeting the U.S. Department of Commerce’s definition of a “digital matching firm,” see TELLES, JR., *supra* note 3, at 23–25.

In the platform economy, platform operators argue that they do not supply the end products or services.[11] Rather, they argue, platform users who are providers supply end products or services to other platform users who are consumers.[12] Platform operators typically facilitate the provision of these end products or services by furnishing software and an algorithm to match the provider and consumer, and by making available an online rating system to foster trust among the platform's users.[13] Uber itself, for example, argues that it does not provide transportation.[14] Indeed, Uber owns no vehicles and steadfastly maintains that it does not employ any drivers.[15]

Yet, frequently, the platform operator is no mere intermediary. In many cases, the platform operator dictates critical terms of the transaction, including details of the provider's compensation and provider's services.[16] Indeed, Professors Martin Kenney and John Zysman have suggested that "we are in the midst of a reorganization of our economy in which the platform owners are seemingly developing a power that may be even more formidable than was that of the factory owners in the early industrial revolution."[17]

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11. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 98 (2016).

12. *Id.*

13. *Id.* at 98–99.

14. UBER, U.S. TERMS OF SERVICE, https://www.uber.com/legal/terms/us/ (last visited Nov. 5, 2017).

15. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015); Salovitz v. Uber Techs., Inc., No. A-14-CV-823-LY, 2014 WL 5318031, at *1 (W.D. Tex. Oct. 16, 2014); Bos. Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *6 (D. Mass. Mar. 24, 2014).

16. *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1080 (N.D. Cal. 2015) (noting that platform operator Lyft dictates to the drivers who use its platform the rates at which the drivers are compensated); *O'Connor*, 82 F. Supp. 3d at 1142 ("Uber sets the fares it charges riders unilaterally."); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1686 (2016) ("[T]he significant influence that on-demand firms have over working conditions—from setting non-negotiable wage rates, to implementing behavior codes, to 'deactivating' (i.e., firing) individuals who perform poorly—reflects a more traditional employer-employee dynamic."). Some platform operators allow platform providers to set their own rates for their services. *See, e.g.*, TASKRABBIT SUPPORT: HOW PRICING WORKS, https://support.taskrabbit.com/hc/en-us/articles/205313140-How-Pricing-Works (last updated Sept. 23, 2017).

17. Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES IN SCI. & TECH., Spring 2016, at 61, 62; *see also* Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. TIMES (Feb. 2, 2016), https://nyti.ms/23HRrKU ("In the rapid growth of the online gig economy, many workers have felt squeezed and at times dehumanized by a business structure that promises independence but often leaves them at the mercy of increasingly powerful companies.").

A dearth of systematic information makes it difficult to estimate confidently the size and scope of the platform economy.[18] What is clear, however, is that the platform economy has grown dramatically in recent years.[19] A 2016 study sponsored by the Center for Global Enterprise reported that the largest 160 transaction platforms had a total market capitalization of $1.1 trillion.[20] Millions of workers now match up with clients and consumers through platforms.[21] The still nascent platform economy has already radically transformed a variety of industries and longstanding workplace arrangements, especially in the service economy.[22] Among the industries that have been most profoundly affected are the transportation, hotel, and home repair and cleaning industries.[23]

An oft-touted feature of the on-demand platform economy is the worker's increased control over her work schedule.[24] Platform economy providers commonly enjoy the freedom to determine for themselves when and for how long they will work through the platform.[25] The flip

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18. TELLES, JR., *supra* note 3, at 6–7.

19. *See, e.g.*, *id.* at 2, 7–8 ("[S]tudies suggest that digital matching firms are quickly growing in size, yet remain a relatively small part of the greater U.S. economy."); MCKINSEY GLOB. INST., INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY 12–13 (2016), http://www.mckinsey.com/~/media/McKinsey/Global%20Themes/Employment%20and%20Growth/Independent%20work%20Choice%20necessity%20and%20the%20gig%20economy/Independent-Work-Choice-necessity-and-the-gig-economy-Executive-Summary.ashx; JPMORGAN CHASE & CO. INST., PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY 21 (2016), https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf; Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 51 (2017) ("On-demand employment, also known as the Gig Economy, is growing at a rapid rate along with the supply of gig workers who provide their labor on a short-term basis via digital platform technologies."); Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), http://time.com/4169532/sharing-economy-poll/.

20. EVANS & GAWER, *supra* note 2, at 14.

21. TELLES, JR., *supra* note 3, at 7; Steinmetz, *supra* note 19.

22. Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 86–90 (2015) (discussing Uber's effect on the ride-hire sector); *see* EVANS & GAWER, *supra* note 2, at 4; Lobel, *supra* note 11, at 95 ("The new generation of platform business is increasingly challenging conventional industries in every realm. . . . Industries affected by the platform include [operators in fifteen industries]."); Farhad Manjoo, *Uber's Business Model Could Change Your Work*, N.Y. TIMES (Jan. 29, 2015), https://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html; *see also* Kenney & Zysman, *supra* note 17, at 61 ("Together [digital platforms] are provoking reorganization of a wide variety of markets . . . .").

23. TELLES, JR., *supra* note 3, at 10; Lobel, *supra* note 11, at 95; Lobel, *supra* note 19, at 51–52.

24. *See* PRICEWATERHOUSECOOPERS, CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY 20 (2015) ("Among the sharing economy providers we spoke with, 'flexibility' was a top two appeal of providing, close behind 'a way to earn more money.'"); Manjoo, *supra* note 22.

25. Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST COMPANY (Feb. 17, 2015, 6:00 AM), https://www.fastcompany.com/3042248/the-gig-economy-

side of this flexibility is a more tenuous relationship between firm and worker, with an increase in part-time and temporary work and a lack of certain significant employment-related benefits.[26] Platform operators tend to classify—though some would say misclassify—the providers who use their platforms as independent contractors, rather than as employees.[27] As discussed below,[28] independent contractors lack certain benefits and protections that employees may claim. There is growing concern that platform operators are undercompensating the providers that use their platforms and, more broadly, are undermining working standards in the industries that the platform operators disrupt.[29]

Broadly speaking, this Article is concerned with the definition of "employment" in the platform economy. More narrowly, this Article considers the role that the platform operator's right to exercise a certain type and level of control over the provider engaged through its platform should play in defining employment status. As discussed in detail below,[30] whether a firm enjoys the right to exercise control over a worker has long been a central inquiry when courts determine whether the firm is an employer and the worker its employee.[31] Specifically, this Article focuses on whether the platform operator's right to impose quality control

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wont-last-because-its-being-sued-to-death ("Thanks to these new on-demand startups, though, whether you're a stay-at-home mom with a few odd hours to spare or a recently unemployed fast-food worker who needs to make ends meet while looking for a job, you can work whenever you want, doing whatever you want.").

26. TELLES, JR., *supra* note 3, at 14; Noam Scheiber, *Growth in the 'Gig Economy' Fuels Work Force Anxieties*, N.Y. TIMES (July 12, 2015), https://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html; Manjoo, *supra* note 22.

27. Greg Bensinger, *Startups Scramble to Define 'Employee,'* WALL ST. J. (July 30, 2015, 12:01 AM), https://www.wsj.com/articles/startups-scramble-to-define-employee-1438228860; Jeremias Prassl & Martin Risak, *Uber, TaskRabbit, & Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. 619, 637–41 (2016); *see* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1073 (N.D. Cal. 2015) ("The plaintiffs allege that because [platform operator] Lyft misclassifies its drivers as independent contractors, the drivers have been deprived of California's minimum wage, reimbursement for work-related expenses, and other protections that California law confers upon employees."); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (plaintiffs alleging that Uber misclassified them as independent contractors, thus, denying them various statutory protections California law provides for employees).

28. *See* discussion *infra* Section II.A.

29. Rogers, *supra* note 22, at 91, 101; Kevin Roose, *Does Silicon Valley Have a Contract-Worker Problem?*, N.Y. MAG. (Sept. 18, 2014, 8:42 AM), http://nymag.com/daily/intelligencer/2014/09/silicon-valleys-contract-worker-problem.html.

30. *See* discussion *infra* Section II.B.

31. *See, e.g.*, Vane v. Newcombe, 132 U.S. 220, 233–34 (1889) (explaining that a worker's right to control his own work schedule and efforts weighs in favor of finding the worker to be an independent contractor and not an employee within the meaning of an Indiana lien statute).

standards or conduct codes on the provider ought to weigh in favor of imposing employment obligations that run in favor of the provider and against the operator.

This Article uses the term "quality control standards" to mean platform operator mandates that seek to maintain uniformity of service and product across platform providers, as opposed to operator directions with respect to a provider's day-to-day operations. The line between the two may be difficult to draw in some cases. Still, there is a body of case law in the franchise context that has relied upon this distinction.[32]

Platform operators understand that consumers who use their platform are sensitive to the quality of the service accessed through the platform. Thus, platform operators seek to apply quality control standards to the providers who perform work through their platform to ensure a minimum level of service for the platform's consumers.[33] Often, the operators enforce these standards by rough approximation by using consumers' ratings of the platform providers from whom the consumers have obtained a service or product.[34] The critical issue is whether this type and amount of control should weigh in favor of employee status for the provider and employer status for the operator.

Significant costs to both the worker and the public arise from a failure to extend the protections of workplace legislation to platform providers.[35] For example, the platform worker who is classified as an independent contractor and is injured on the job will not be covered by workers' compensation insurance, and the public may bear much of the cost relating to the injury.[36] Indeed, figuring out how best to extend the protections of workplace legislation to platform economy workers is a principal employment law challenge confronting society and workplace scholars. This Article argues, nonetheless, that—as a matter of statutory

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32. *See* discussion *infra* Section III.C.

33. *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1072–73, 1078 (N.D. Cal. 2015) (setting out quality control standards that Lyft imposes on drivers who use its platform, such as requiring that the driver keep her car clean inside and out, ensure that the car seats and trunk are clear for passenger use, and refrain from smoking in the car); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1149–50 (N.D. Cal. 2015) (listing quality control standards that Uber imposes on the drivers that use its transaction platform, including instructions with respect to professional dress and choice of radio programming (soft jazz or National Public Radio)).

34. *See, e.g.*, *Cotter*, 60 F. Supp. 3d at 1071, 1079 (noting that Lyft may block a driver from using its transaction platform if the driver's customer rating falls below a certain threshold); *O'Connor*, 82 F. Supp. 3d at 1151 ("Uber documents make it clear that Uber uses these [customer] ratings and feedback to monitor drivers and to discipline or terminate them."); *see also* Lobel, *supra* note 11, at 152 ("[Dynamic rating systems] incentivize consistently good service and behavior.").

35. *See, e.g.*, Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM & TECH. L. REV. 341, 353 (2016).

36. *Id.*

interpretation and as a normative matter—weighing the platform operator's retention of the right to impose quality control standards on the worker in favor of finding an employment relationship is not an appropriate way forward.

This Article develops this argument below. Part I summarizes this Article's methodology and structural-purposive analysis. Part II discusses the consequences of the employee/independent contractor classification—for the worker and the firm—and sets out the traditional framework that U.S. workplace law uses to classify workers as employees or, alternatively, as independent contractors.[37] Part II also briefly examines how courts have applied this framework in the context of platform economy providers and the frustrations that have arisen from the traditional framework's application to an innovative workplace model.[38] Part III identifies the control bargain implicit in the structure of U.S. workplace regulation.[39] Next, Part III demonstrates various ways in which platform providers, as well as platform operators and consumers, might directly benefit from a platform operator's imposition of quality control standards.[40] Finally, Part III argues that, in light of the control bargain, the imposition of quality control standards by platform operators should not weigh in favor of employee status with respect to platform economy providers who benefit directly from the imposition of such standards.[41] This argument is informed by an analysis of relevant workplace structures and case law arising in the franchise context.[42]

I. A STRUCTURAL-PURPOSIVE ANALYSIS

In general, courts have split on the issue of whether a firm's right to impose quality control standards on a worker should weigh in favor of finding that the firm employs the worker.[43] In the specific context of the

37. *See infra* notes 71–102 and accompanying text.

38. *See infra* notes 103–07 and accompanying text.

39. *See infra* notes 108–20 and accompanying text.

40. *See infra* notes 121–40 and accompanying text.

41. *See infra* notes 141–53 and accompanying text.

42. *See infra* notes 154–82 and accompanying text.

43. *Cf.* Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1042 (9th Cir. 2014) ("FedEx's detailed appearance requirements [including with respect to clothing, hair style, facial hair, and body odor] clearly constitute control over its drivers."), *and* Scantland v. Jeffrey Knight, Inc., 721 F.3d 1308, 1316 (11th Cir. 2013) (rejecting firm's argument that because its quality control standards arose from "the nature of the business" such standards should not be relevant to an economic dependence analysis), *and* Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 81–82, 85 (Kan. 2014) ("[R]equiring a driver to wear clothes of a certain type or exit the delivery vehicle in a certain manner is clearly exercising control over the manner and means by which packages are picked up or delivered. . . . [and] point[s] to an employer/employee relationship."), *with* FedEx Home Delivery v. NLRB, 563 F.3d 492, 501 (D.C. Cir. 2009) ("[A] uniform

platform economy, there is little case law on point. In two recent high-profile class actions, one against Uber and one against its ridesharing competitor, Lyft, both courts held that, under California law, the platform operator's right to impose quality control standards on drivers weighs in favor of finding that the drivers are employees of the platform operator.[44]

Moreover, current law generally does not concern itself with who benefits from the firm's control of the worker. That is to say, the firm's retention of the right to exercise control over the worker may weigh in favor of finding the worker to be the firm's employee even if the worker herself—along with the firm and the public—directly benefits from the firm's exercise of control. This approach is questionable in that it may encourage firms to sacrifice control in the structuring of working relationships even when the firm, the worker, and society would all be better off with greater firm control.[45]

With respect to workplace protective regulation, the classification of platform economy providers as employees, who fall within the scope of such regulation, or as independent contractors, who fall outside the scope, is ultimately a question of legislative intent.[46] Typically, however, the

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requirement often at least in part 'is intended to ensure customer security rather than to control the [driver].' . . . And once a driver wears a FedEx logo, FedEx has an interest in making sure her conduct reflects favorably on that logo, for instance by her being a safe and insured driver . . . [which] are "constraints imposed by customer demands and . . . do not determine the employment relationship." (second alteration in original)), *and id.* at 503 ("True, these drivers . . . must wear uniforms and the like, but a rule based on concern for customer service does not create an employee relationship."), *and* Mission Ins. Co. v. Workers' Comp. Appeals Bd., 123 Cal. App. 3d 211, 221 (Cal. Dist. Ct. App. 1981) ("But the fact that [the firm] prescribed standards of performance and that the applicant on occasion attended lectures or classes concerning proper methods of installation and service was not evidence that [the firm] controlled the manner in which the desired result was to be achieved.").

The U.S. Department of Labor's Wage and Hour Division has rejected the argument that a firm's imposition of quality control standards that are inherent to the nature of the firm's business ought not to weigh in favor of employee status. DAVID WEIL, U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2015-1, at 9 (2015), https://www.blr.com/html_email/AI2015-1.pdf.

44. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1078–79 (N.D. Cal. 2015); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1150–52 (N.D. Cal. 2015); *see also* Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at * 6 (Cal. Dept. Lab. June 3, 2015) (hearing officer weighing the platform operator's imposition of quality control standards as a factor suggesting that the operator was the platform provider's employer).

45. *See infra* notes 150–52 and accompanying text.

46. *See, e.g.*, S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 405–06 (Cal. 1989) (noting that the definition of "employment" embodied in California's workers' compensation statute "must be applied with deference to the purposes of the protective legislation" and that federal case law "deem[s] the traditional 'control' test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover").

relevant workplace legislation fails to define "employee" or "employer" meaningfully.[47] Moreover, with respect to much workplace protective legislation, the relevant legislative histories offer little guidance.[48] Compounding this uncertainty, most workplace regulation was enacted long before the rise of the innovative workplace structures associated with the platform economy. Thus, the challenge addressed by this Article is to construct the intent of legislators who enacted workplace protective legislation to discern how those legislators would apply that legislation in a platform economy context.

In the absence of legislative clarity, courts tasked with classifying platform economy providers are likely to default to application of one of two generic standards: the common law test of agency or the economic realities test. The courts themselves, as well as academic commentators, however, have decried these standards as outmoded in the context of the platform economy.[49] Still, the courts in the recent Uber and Lyft litigation mechanically applied these standards to the classification of platform economy providers.[50]

In considering the significance of a platform operator's imposition of quality control standards on a platform economy provider to the classification of that provider, this Article steps back from the specific criteria of the generic standards. Further, this Article forgoes the textualist and intentionalist methods of statutory interpretation. As noted above, with respect to most workplace protective legislation, neither the statutory text nor legislative history of the statute under consideration provides reliable indicators of legislative intent with respect to the meaning of "employment" in the platform economy.

Rather, this Article employs a broad structural analysis. Specifically, in seeking to interpret "employment" in the context of the platform economy, this Article focuses on the structure of workplace protective regulation generally, as well as on the structure of the platform economy that is being regulated. Further, the analysis is informed by case law

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47. *See infra* notes 85–87 and accompanying text.

48. The Fair Labor Standards Act (FLSA) provides a somewhat more useful definition of employment and a richer legislative history than do most federal workplace protective statutes. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992). Moreover, several other federal workplace protective statutes adopt the FLSA's definition of employment. *See* Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1802(5) (2012); Family and Medical Leave Act, 29 U.S.C. § 2611(3) (2012).

49. *See, e.g.*, Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 493 (2016).

50. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1078–81 (N.D. Cal. 2015); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1148–53 (N.D. Cal. 2015).

addressing the meaning of "employment" in the similar context of the franchisor-franchisee relationship.[51]

This Article labels this structural analysis a "structural-purposive" inquiry, principally because the analysis relies heavily on public policy arguments. The purposive label also emphasizes the argument's agreement with the cardinal principal that a court's object in interpreting a statute should be enforcing the legislature's intent.[52]

Structural analysis examines relationships in order to derive meaning.[53] Thus, when interpreting a statute, one might consider structure in various ways.[54] First, in interpreting statutory language, one might consider how the language at issue is situated within a sentence, a section, or the statute as a whole.[55] As Judge Kenneth Starr has put it, "Answers may emerge from a study of the whole [statute] that might not be suggested by a narrowly focused parsing of a solitary provision in a complex statute."[56]

Second, the relationship between two or more separate statutes might inform one's interpretation of statutory language. For example, one might find meaning in the placement of a statute within a particular code.[57] Also, such an interstatutory analysis would likely be helpful in most field preemption inquiries.[58] In addition, one might focus on similarities in

51. *See infra* notes 154–82 and accompanying text.

52. *But see* Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1543 (1994) ("For a structuralist, a statute is not a fixed dictate from a superior organ of government that mandates unquestioned obedience. A statute, rather, is an interactive engagement among legislators, administrators, the judiciary, and the regulated." (footnote omitted)).

53. *Id.* at 1463.

54. *See generally* Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703, 706–08 (1988) (noting that a court can consider the structural relationship between two statutes, compare a current statute to a prior version, or interpret individual parts of a statute by viewing them in the context of the entire statute).

55. United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("A provision [of a statute] that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (citation omitted)); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 341–54 (1995); Chibundu, *supra* note 52, at 1463–64.

56. Starr, *supra* note 54, at 708; *see also id.* at 706 ("[S]tatutes are to be studied carefully, as a whole, and with due regard for the structure of the statutory edifice and the interpretive lessons to be drawn from that edifice.").

57. Chibundu, *supra* note 52, at 1464.

58. Starr, *supra* note 54, at 707 ("[W]e have seen structural analysis take on considerable importance in preemption cases, especially with the courts' focusing on the comprehensiveness of Congress's regulatory regime.").

language, approach, or purpose between two or more statutes, and on the case law interpreting the statute or statutes relied upon for reference.[59]

Professor Maxwell O. Chibundu has commented on the utility of interstatutory structural analysis:

> The structural relevance of other statutes to the interpretive process may be derived either from the similarity or dissimilarity of language—whether in terms of the words chosen or the internal organization of the provisions—or from a desire to create an intellectually coherent corpus in the sense of filling in most of the gaps while eliminating as many redundancies as possible.[60]

Chibundu further points out that while the former use is a textual analysis,[61] the latter use is purposive.[62] This Article's structural analysis is more purposive than textual in the way it seeks to derive meaning from the overarching objectives of a range of workplace protective legislation. Further, this Article's structural analysis broadly encompasses consideration of the statute's effect on the entities that the statute regulates.

From this broad structural-purposive inquiry, this Article first identifies a "control bargain" implicit in the structure of workplace protective regulation. As detailed below,[63] the state agrees to exempt a firm from protective workplace regulation provided that the firm and its worker arrive at an arrangement pursuant to which the firm does not control the means and manner of the worker's performance. Alternatively, the firm may exercise a certain level of control over its worker but, in exchange, the state will impose workplace protective regulations upon the firm.[64] This control bargain can be seen from the time of the earliest U.S. workplace protective regulation, as well as across foreign jurisdictions.[65]

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59. *See, e.g.*, Lorance v. AT&T Techs., Inc., 490 U.S. 900, 909–12 (1989) (interpreting the statute of limitations provision of section 706(e) of Title VII by examining the NLRA's statute of limitations provision, including language common to the two statutes, the unusual requirement of an administrative complaint before a civil action may be filed common to both statutes, and the cases interpreting the NLRA's statute of limitations), *superseded by statute* as stated in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 652 (2007) (Ginsburg, J., dissenting).

60. Chibundu, *supra* note 52, at 1464.

61. For a discussion of the structural textualist approach to statutory interpretation, see generally Taylor, *supra* note 55 (emphasizing the benefits of textualism and its focus on textuality, textual structure, and textual conduct).

62. Chibundu, *supra* note 52, at 1464.

63. *See infra* notes 108–20 and accompanying text.

64. *See infra* notes 108–20 and accompanying text.

65. *See infra* notes 108–15 and accompanying text.

Various elements of the common law test (which, despite the name, is frequently applied in statutory analysis) and the economic realities test function to implement the control bargain.[66] Still, the control bargain should be thought of as a separate construct. This construct is helpful in understanding the legislative intent behind certain protective workplace legislation, particularly where such legislation predates the advent of the platform economy. The control bargain construct allows for a helpful and less formalistic inquiry into how the state and the firm would structure the control bargain in the platform economy.[67]

A focus on the nature of the platform economy also informs the broad structural-purposive inquiry. Quality control standards and the rating systems that enforce them by rough approximation are inherent to the nature of the platform economy. Professor Orly Lobel has explained how dynamic quality monitoring (and, implicitly, quality control standards) in the platform economy reduce transaction costs arising from information asymmetries:

> Consumers do not know the quality of the experience they are paying for until they actually consume it; individuals are not familiar with the service they pay for until after they complete the transaction. To combat this, the platform offers dynamic ratings, reviews, and information, which reduce uncertainty and deepen consumer confidence. It also reduces monitoring costs because the certainty that one will receive a bad review creates ex-ante incentives to comply with the terms of the deal.[68]

Thus, quality control standards are essential to leverage the network effects that allow the platform to flourish. At the same time, they mitigate the free-rider problem that would otherwise arise if a platform provider were allowed to use the platform and its good reputation without living up to the platform's standards that are necessary to maintain that reputation.[69] Accordingly, platform economy providers benefit directly from the imposition of quality control standards in that such standards help grow the providers' market.[70]

Application of the control bargain construct supports the argument that a platform operator's imposition of quality control standards on a provider should not weigh in favor of employee/employer status where the provider herself directly benefits from the quality control standards, along with the platform operator and the platform consumer. As a matter

66. *See infra* notes 93–102 and accompanying text.

67. *See* Starr, *supra* note 54, at 706 ("[S]tructuralism provides a useful mechanism for getting at Congress's intent.").

68. Lobel, *supra* note 11, at 112.

69. *See infra* notes 132–39 and accompanying text.

70. *See infra* notes 132–39 and accompanying text.

of legislative intent, the legislature is unlikely to wish to impose workplace regulation that discourages firm behavior that directly benefits all concerned. Therefore, the legislature would be unlikely to enter into a control bargain that includes sanctions against a firm for beneficial firm behavior. Thus, the law should not convey additional advantages on the platform provider or penalize the platform operator because of the beneficial control. This is especially so when the public also benefits from the operator's control of the provider.

II. APPLICATION OF THE TRADITIONAL WORKER CLASSIFICATION FRAMEWORK TO PLATFORM ECONOMY PROVIDERS

An appreciation of the traditional framework used by U.S. workplace law to classify workers as employees or as independent contractors is critical to fully understanding the argument set out in Part I. An appreciation of the consequences of these classifications, for workers and for firms, is of similarly crucial importance. Part II sets out this framework and discusses the consequences of classifying a worker as an employee or as an independent contractor.

A. *The Consequences of "Employment" for the Worker and the Firm*

Whether a worker is an employee or an independent contractor in relation to a firm has far-reaching consequences for both the worker and the firm.[71] For example, pursuant to the doctrine of respondeat superior, an employer is vicariously liable for the tortious conduct of its employee when such conduct is committed within the scope of her employment.[72] In contrast, a firm is generally not liable for the torts of its independent contractor.[73] The theory grounding this assignment of liability is that control over the means and manner of a worker's performance—which gives rise to the classification of the worker as an employee and the firm as an employer—renders a firm well-positioned to protect third parties from a worker's tortious conduct.[74] This assignment of vicarious liability

71. *See, e.g.*, 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, 162–63, 166 (2003).

72. RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (AM. LAW INST. 2006).

73. Rainey v. Langen, 998 A.2d 342, 346 (Me. 2010) ("Because an employer may be held vicariously liable for the negligence of its employees, but is not usually responsible for the negligence of independent contractors, a prerequisite to imposing vicarious liability is the existence of an employer-employee relationship." (citation omitted)).

74. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958); RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (AM. LAW INST. 2006) ("Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to

also incentivizes an employer to ensure that its employee takes reasonable care in carrying out her duties.[75]

Further, most federal and state statutory protections for workers apply to employees and not to independent contractors.[76] Thus, the employee, but not the independent contractor, may claim protections under federal anti-discrimination statutes;[77] wage, hour, and benefit laws;[78] and family leave legislation.[79] Similarly, the National Labor Relations Act (NLRA) protects the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[80] The NLRA does not extend these protections to independent contractors.[81] Further, a firm is generally responsible for payroll taxes, payments for workers' compensation plans, and unemployment insurance contributions with respect to its employees, but not with respect to its independent contractors.[82]

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reduce the incidence of tortious conduct."); S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989).

75. Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 336 (Wis. 2004) ("Exposure to vicarious liability creates an incentive for masters who control or have the right to control the conduct of their servants to take steps to ensure that their servants exercise due care in carrying out the master's business.").

76. *See, e.g.*, Cotter v. Lyft, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) ("California law gives many benefits and protections to employees; independent contractors get virtually none."); Befort, *supra* note 71, at 162–63, 166.

77. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(f) (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2012); Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4) (2012). *But see* 42 U.S.C. § 1981(a) (2012) (prohibiting discrimination on the basis of race and alienage in contracting).

78. *See* Employee Retirement and Income Security Act, 29 U.S.C. §§ 1002(5)–(6) (2012); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–202 (2012).

79. *See* Family Medical Leave Act of 1993, 29 U.S.C. § 2611(3) (2012).

80. National Labor Relations Act, 29 U.S.C. § 157 (2012).

81. *Id.* § 152(3) (2012) ("The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor . . . ."); *see also* 29 U.S.C. §§ 157–158 (2012).

82. Cotter v. Lyft, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) (citing California statutory law with respect to this point); Befort, *supra* note 71, at 163. Other consequences that flow from the classification of a worker as an employee would tend to encourage a firm to organize its workforce so that certain workers are more likely to be found to be employees of the firm. For example, an employee owes a duty of loyalty to her employer that an independent contractor does not. Thus, limitations exist on the ability of an employee to compete with her employer while an independent contractor is under no such limitations with respect to the firm. TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 15–16 (2d ed. 2011). Also, the firm is the default owner of certain intellectual property created by its employees, but not its independent contractors, in the course of their employment. *Id.* at 471–74.

Given the consequences that follow from the classification of a worker as either an employee or an independent contractor, workplace advocates, scholars, and courts tend to focus their attention, perhaps excessively, on the precise question of whether a certain worker or type of worker qualifies as an employee. With respect to protective workplace regulation, the line that the law draws between employee and independent contractor is meant to separate vulnerable workers who are most in need of protective workplace regulation with respect to a firm from workers who are better able to protect themselves with respect to a firm.[83] A narrow focus on the employee/independent contractor distinction, however, can actually obscure the predicate question of whether workplace law ought to offer various protections to a certain worker or type of worker.[84] This Article seeks to relate this normative question to the very definition of employment with respect to platform economy providers in relation to the platform operator's imposition of quality control standards.

B. *The Traditional Framework for Classifying Workers as Employees or as Independent Contractors*

Most federal and state statutes regulating the workplace fail to provide a helpful definition of "employer" or "employee."[85] Consequently, courts

83. Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 358–59, 375–76 (2002).

84. JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER 4 (2015) ("As long as attention remains focused on the employee category and related secondary conceptions alone, it will be very difficult to address the relevant questions at all."); Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 289 (2011) ("The right question to ask is . . . to what extent should firms be able to choose organizational structures that preclude unionization by avoiding having employer-employee relationships at all."); *id.* at 294 ("[The question] tends to be obscured by our endless wrangling over who is an employee and who is an independent contractor."); *see* Davidov, *supra* note 83, at 359–60 (lamenting "the situation in Britain and in many other countries, where courts still decide the scope of labour and employment regulations in a formalistic manner, without consideration of the *purpose* of the regulation in question" (emphasis in original)); *id.* at 401 ("Experience has taught us that the purpose behind the employee/independent contractor distinction—the basic goals of differentiating some (more vulnerable) workers from others—is often forgotten all too quickly.").

85. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. 203(e)(1) (2012) ("[T]he term 'employee' means any individual employed by an employer."); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2012) ("The term 'employee' means an individual employed by an employer."); CAL. GOV'T CODE § 12940(j)(4)(A) (West 2016) ("[E]mployer means any person regularly employing one or more persons."); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003) (remarking that the definition of employee in the ADA is merely a "nominal definition" that is "circular" (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992)); *Darden*, 503 U.S. at 322 ("We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it.").

interpreting such statutes tend to default to the common law of agency’s definitions of employer and employee[86] or, especially in the context of social welfare legislation such as the Fair Labor Standards Act, to the definitions of employer and employee provided for by the “economic realities” test.[87] Although most everyone agrees that the economic realities test is broader than the common law test,[88] the two tests tend to yield a roughly similar result.[89] The tests focus, respectively, on the extent to which the firm enjoys the right to control the worker and the extent to which the worker is economically dependent upon the firm.[90] Thus, U.S. workplace law is similar to that of many foreign legal systems in that it focuses on worker subordination and economic dependence when determining the existence of an employment relationship.[91]

The common law standard defining employment arose within the context of determining a master’s respondeat superior tort liability.[92] The common law standard is a multi-factor test, the primary inquiry of which is the extent to which the firm controls or has the right to control the manner in which the worker performs the job, as opposed to controlling or having the right to control merely the result of the work.[93] Thus, the Restatement (Third) of Agency provides that “an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.”[94]

In determining whether a firm is an employer and a worker an employee, courts applying the common law test also focus on a host of subsidiary, nonexclusive factors other than firm direct control. These factors include how the firm and the worker understand the nature of their

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86. *See, e.g.*, *Clackamas*, 538 U.S. at 445, 448 (discussing the ADA’s definition of employee); *Darden*, 503 U.S. at 322–23 (discussing ERISA’s definition of employee); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989) (discussing the Copyright Act); NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (discussing the National Labor Relations Act); Patterson v. Domino’s Pizza, LLC, 333 P.3d 723, 743 (Cal. 2014) (Werdegar, J., dissenting) (discussing the California Fair Employment and Housing Act).

87. *See* Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

88. *See, e.g.*, *Darden*, 503 U.S. at 325–26 (rejecting application of the economic realities test as broader than the common law test); Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1047 (9th Cir. 2014) (“The economic-realities test is broader than the right-to-control test.”).

89. Davidov, *supra* note 83, at 365; Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL’Y J. 201, 216 (2011).

90. *See* Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

91. Davidov, *supra* note 83, at 365.

92. MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 133–70 (1989); Davidov, *supra* note 83, at 366 n.29.

93. *See, e.g.*, Borello & Sons v. Dep’t of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989).

94. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006).

relationship, the duration of the work relationship, the skill the work requires, whether the firm or the worker supplies the instrumentalities of the work, whether the work is part of the firm's regular business, and whether the worker "is engaged in a distinct occupation or business."[95] A consensus is lacking as to whether these factors are independent of the principal control inquiry or are merely additional ways to gauge the extent of the firm's control over the worker. At least some of these factors speak to the firm's indirect "bureaucratic control" over the worker.[96]

The economic realities test for determining the status of employer and employee is also a multi-factor test. The principal focus of the test is whether, "as a matter of economic reality," the worker is dependent upon the firm to which the worker renders her service.[97] Factors relevant to this inquiry include the duration of the relationship between the worker and the firm, the level of skill the work requires, the worker's opportunity for profit or loss arising from the work, and the extent to which the work the employee performs is an integral part of the firm's business.[98] The nature and degree of the firm's control over the manner in which the worker performs her work is also an important factor in the economic realities test.[99]

In sum, under both the common law and the economic realities tests for determining a worker's employee/independent contractor status, the degree of control the firm exercises or has the right to exercise over the worker's performance of her duties is a critical factor.[100] The firm's right to exercise control is the principal factor under the common law test;[101]

95. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992); Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 171 (Cal. 2014); *Borello*, 769 P.2d at 404.

96. *Ayala*, 327 P.3d at 176–77 ("[Some secondary factors may only be] relevant to support an inference that the hiree is, or is not, subject to the hirer's direction and control." (citation omitted)); Davidov, *supra* note 83, at 366–67; *see also* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 186 (2015) (Miscimarra & Johnson, dissenting) ("The [secondary] factors provide useful indicia of the putative employer's direct-and-immediate control, or its right to control.").

97. Bartels v. Birmingham, 332 U.S. 126, 130 (1947); United States v. Silk, 331 U.S. 704, 713–19 (1947).

98. *Bartels*, 332 U.S. at 130; Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988).

99. *See Brock*, 840 F.2d at 1059; Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539–40 (7th Cir. 1987); Cunningham-Parmeter, *supra* note 16, at 1705 (2016) ("But even though various factors appear in these assorted employment definitions, the concept of control remains constant in both the common law and economic realities tests.").

100. Glynn, *supra* note 89, at 203 ("Statutory protections for workers, including wage and hour laws, impose duties only on 'employers,' which, despite variation in the underlying tests, ultimately hinges on how much control a firm exercises over the work.").

101. *Ayala*, 327 P.2d at 169 ("Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved.").

the firm's right to exercise control is a central factor under the economic realities test.[102]

C. *Difficulties Arising from the Application of the Traditional Framework for Classifying Workers to a Platform Economy Workplace*

Courts and commentators alike have lamented that the traditional test for determining whether a worker is an employee or an independent contractor is outmoded and ill-suited to determining worker status in the platform economy.[103] In recent litigation challenging platform operator Lyft's classification of drivers who use its transaction platform, the federal district court judge remarked, "the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem."[104] Similarly, in a worker classification class action filed against Uber, the federal district court judge suggested that "many of the factors in [the traditional] test appear outmoded" as applied to the platform economy and further opined that, "[t]he application of the traditional test of employment—a test which evolved under an economic model very different from the new 'sharing economy'—to Uber's business model creates significant challenges."[105]

In light of these concerns, the question of how best to distinguish between employee and independent contractor with respect to providers engaged through a transaction platform has recently become the focus of a great deal of scholarly attention.[106] Workplace law scholars have offered a variety of proposals to fundamentally alter existing standards

102. Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 76 (Kan. 2014) ("The primary distinction between the right to control test and the economic reality test is that under the latter, the right to control is not considered the single most important factor in determining the worker's status.").

103. *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1082 (N.D. Cal. 2015); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015); Martin Kenney & John Zysman, *Choosing a Future in the Platform Economy: The Implications and Consequences of Digital Platforms* 4 (Berkeley Roundtable on the Int'l Econ. (BRIE, 2015)), http://www.brie.berkeley.edu/wp-content/uploads/2015/02/PlatformEconomy2 DistributeJune21.pdf.

104. *Cotter*, 60 F. Supp. 3d at 1081.

105. *O'Connor*, 82 F. Supp. 3d at 1153.

106. *See, e.g.*, Cunningham-Parmeter, *supra* note 16, at 1678 (2016) ("[C]ourts [should] rethink three aspects of workplace control . . . the subjects of control, the direction of control, and the obligations of control to accurately delineate the reach of the nation's core workplace protections."); Lobel, *supra* note 19, at 61 (asserting that "the problem at the heart of classification disputes is not the newness of the Gig Economy, but rather the inherent complexity of the existing legal classification" and arguing for clarification and simplification of the doctrine).

for defining employment in the platform economy.[107] This Article, in contrast, does not propose any global changes to the existing framework for worker classification. Rather, in considering how best to balance the need to protect platform providers with the goals of promoting the welfare of platform consumers and enabling platform operators and the platform economy to thrive, this Article suggests a significant refinement in the application of the existing framework: A platform operator's right to impose quality control standards on providers who are engaged through its platform should not weigh in favor of a finding of employee/employer status when the providers themselves, as well as the public and the operator, directly benefit from the quality control standards.

III. THE CONTROL BARGAIN AND ITS RELATIONSHIP TO A PLATFORM OPERATOR'S IMPOSITION OF QUALITY CONTROL STANDARDS

The rationale for this Article's suggested refinement is grounded in the control bargain implicit in the structure of U.S. workplace regulation. In Part III, this Article turns to identification of the control bargain and an explication of its relevance to the classification of providers in the platform economy.

A. *Identification of the Control Bargain*

The structure of U.S. protective workplace regulation suggests an implicit bargain between firms and their workers, centering on control over the worker. Pursuant to this control bargain, the worker agrees to subordinate herself to the firm's control with regard to the means and manner of her performance. In exchange, the firm subjects itself to extensive protective workplace regulation that otherwise would not apply with respect to the worker. Thus, the worker bargains to give up control

107. *See, e.g.*, Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1515 (2016) (arguing that the critical inquiry in determining the classification of workers as employees or independent contractors should be the degree of flexibility the workers have in choosing "the time, place, price, manner, and frequency" of the their work as such flexibility is a means to evaluate the degree of the employer's control); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 496 (2016) ("[E]mployment law duties should be levied where doing so will discourage domination of workers by companies or by market forces."); *see also* Prassl & Risak, *supra* note 27, at 647 (proposing a functional conceptualization of the employer, pursuant to which "the concept of the employer should be understood as the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law"); *Cf.* Lobel, *supra* note 11, at 136 ("Contemporary realities may necessitate extending protections we find valuable as a society—dignity and anti-discrimination principles, whistleblowing protections, insurance and portable benefits, and occupational health and safety—to all laborers regardless of their employment status.").

in exchange for workplace protections, and the firm bargains to gain control in exchange for the assumption of workplace obligations.

In reality, most workers have relatively little bargaining power vis-à-vis their employer or potential employer. The state, however, is in a much stronger bargaining position with respect to the firms that it may regulate. Thus, the control bargain is one that the state strikes with the firm on behalf of workers or, more precisely, helps workers to strike with the firm. With respect to any particular worker, the state agrees to exempt a firm from protective workplace regulation provided that the firm and its worker arrive at an arrangement pursuant to which the firm does not control the means and or manner of the worker's performance. Alternatively, the firm may exercise a certain type and level of control over its worker but, in exchange, the state will impose workplace protective regulations upon the firm. The worker who agrees to the latter arrangement gives up control but gains the workplace protections imposed by the state. French employment scholar Jean-Christian Vinel has identified this trade-off—what this Article labels the control bargain—in both French and U.S. workplace law.[108] Speaking of U.S. workplace law, Vinel writes, "Progressive laws strengthened the inequity of the wage bargain by making it the source of a number of social rights that were trade-offs for the worker's social and technical submission to the new industrial order."[109]

Other scholars of foreign workplace law also have identified this trade-off in legal systems outside of the United States.[110] The comparison to foreign legal systems is apt, given that workplace law in many foreign legal systems shares with U.S. workplace law a focus on worker subordination and economic dependence when determining the existence of an employment relationship.[111] French legal scholar Alain Supiot describes the tradeoff between worker dependence on the firm and state regulation of the firm that developed under European workplace law:

> Under the model of the welfare state, the work relationship became the site on which a fundamental trade-off between economic dependence and social protection took place. While it was of course the case that the employee was subjected to the power of another, it was understood that, in

108. JEAN-CHRISTIAN VINEL, THE EMPLOYEE: A POLITICAL HISTORY 37–39 (2013).

109. *Id.* at 37 ("[I]n protecting some workers from the overweening power of their employers, such laws [limiting working hours] also, *sub silentio*, legitimized and objectivized the workers' lack of discretion on the job and their submission to managerial rule.").

110. *See supra* note 91 and accompanying text.

111. *See supra* note 91 and accompanying text.

> return, there was a guarantee of the basic conditions for participation in society.[112]

Similarly, speaking of English workplace law, Professor Jeremias Prassl argues that "the concept of the employer . . . serves as the attachment point for regulation which ensures the trade-off between economic dependence and social protection."[113] Prassl describes how what is in essence a control bargain evolved from the United Kingdom's Employers' Liability Act of 1880, which enabled workers who have been injured by the negligence of a fellow employee to recover from their employer.[114] Prassl notes that this fundamental trade-off, between worker subordination to the firm's managerial power and firm responsibility for worker social welfare, "continues to exert considerable force."[115]

Returning to U.S. workplace law, the firm's ability to structure its workforce so as to opt out of various protective workplace regulations provides evidence of the control bargain. This freedom to opt out even extends to workplace statutes that further the anti-discrimination principle. For example, the firm that forgoes control over the means and manner of the worker's performance such that its worker is found to be an independent contractor is not subject to Title VII's prohibition on sex discrimination.[116] The firm is then free under federal statutory law to discriminate against its worker on the basis of sex in a way that would give rise to liability were she the firm's employee.[117]

Evidence of the worker's ability to participate in control bargaining can be seen, for example, in the trade-off between worker autonomy and worker protections found in the structure of the Taft-Hartley Act. The Taft-Hartley Act excludes forepersons and supervisors from its protections for those joining a union and, indeed, from being part of a bargaining unit.[118] This trade-off can be seen as the product of a control bargain. The worker retains her status as an employee when she ascends to the role of supervisor. Still, the worker who ascends to the role of supervisor, which the Act defines to include the exercise of significant

112. PRASSL, *supra* note 84, at 112.

113. *Id.* at 229.

114. *Id.* at 212 ("Having gained a foothold in the liability of employers for injuries caused by managerial or superior staff, this latter 'principle that the employer should assume responsibility for the social and economic risks arising from the employment relationship began to take shape.'" (footnote omitted)).

115. *Id.*

116. *See* 42 U.S.C. § 2000e(f) (2012); Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 313 (4th Cir. 2001).

117. *See* 42 U.S.C. § 2000e(f); *Farlow*, 259 F.3d at 313.

118. 29 U.S.C. § 152(3) (2012).

authority requiring the use of independent judgment,[119] gains more autonomy in her work performance and is subject to less firm supervision. In exchange, the supervisor gives up certain rights against the firm.[120]

B. *Implications of the Control Bargain for Classification of Platform Economy Providers*

The control bargain is a useful construct for analyzing whether a platform operator's right to impose quality control standards on the providers engaged through its platform should weigh in favor of employee status for the provider and employer status for the operator. The construct aids in thinking through the normative question of what the law should be and informs the question of legislative intent.

This Article's arguments with respect to both the normative question and likely legislative intent are predicated upon the conclusion that the platform operator, consumer, and provider are all better off when the platform operator retains the right to impose quality control standards on the provider. Thus, this Article next seeks to demonstrate that this predicate conclusion is correct. This Article will then return to the normative argument and the question of legislative intent.

1. The Benefits to Platform Economy Operators, Consumers, and Providers from the Operator's Imposition of Quality Control Standards

Trust between consumers and providers is critical to the success of the platform economy.[121] Consumers must be confident that their platform transactions will be consistently completed safely and to their satisfaction. As the authors of a 2015 PricewaterhouseCoopers analysis of the "sharing economy" concluded, "[y]es, convenience and cost savings are beacons, but what ultimately keeps this economy spinning—

119. *Id.* § 152(11) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.").

120. *See* VINEL, *supra* note 108, at 141 ("[T]he right to organize was not a universal social right of the wage or salary worker, but rather a kind of compensation for factory workers who accepted the strict work regime of the mass-production system.").

121. PRICEWATERHOUSECOOPERS, *supra* note 24, at 9 (reporting that 89 percent of U.S. adults familiar with the "sharing economy" agree that its success is "based on trust between providers and users"); *The Future of Work: There's an App for That*, ECONOMIST (Jan. 3, 2015), http://www.economist.com/node/21637355/print ("One key [to enable the platform operator to exploit low transaction costs] is providing the sort of trust that encourages people to take a punt on the unfamiliar.").

and growing—is trust. It's the elixir that enables us to feel reassured about staying in a stranger's home or hitching a ride from someone we've never met."[122] Quality control standards and the ability to enforce those standards are key to building and maintaining that trust.[123]

For the platform operator, the imposition of quality control standards is an essential means to protect its brand. The platform, in essence, is a marketplace that facilitates the coming together of a consumer and a provider. The consumer who enjoys a positive experience with the provider she engages through the platform is more likely to return to the marketplace—to use the platform again—than is the consumer who has a negative experience with the provider.[124]

Consider, for example, the passenger who uses a transportation platform to engage a driver to transport her and her friends to the airport. The platform operator does not impose quality control standards on the drivers who are engaged through the platform. The driver arrives in a car that has no available trunk space and smells of cigarette smoke. The consumer and her fellow passengers are forced to situate their luggage on their laps for the duration of the journey and arrive at the airport smelling like cigarette smoke. Assume also that a competitor transportation platform imposes and enforces quality control standards on the drivers who are engaged through its platform. These quality control standards include a requirement that the driver's car be free of cigarette smoke odors and provide ample trunk space. One might reasonably posit that the consumer and her fellow passengers are likely to migrate to the competitor platform.

The hypothetical scenario above also demonstrates how the consumer benefits from the platform operator's right to impose and enforce quality control standards on the provider who uses its platform. Transaction platforms reduce search costs in the pre-deal stage, bargaining and decision costs in the deal-making stage, and policing and enforcement costs in the post-deal stage by means of highly efficient matching and

122. PRICEWATERHOUSECOOPERS, *supra* note 24, at 16; *see* Lobel, *supra* note 11, at 153 ("The identification, review, and ratings systems in turn create reciprocal trust that is multi-layered: trust in participants; in value exchanged; in platform/network.").

123. *See* TELLES, JR., *supra* note 3, at 14; PRICEWATERHOUSECOOPERS, *supra* note 24, at 12.

124. *See* Ellen Huet, *What Really Killed Homejoy? It Couldn't Hold on to Its Customers*, FORBES (Sept. 15, 2017), http://www.forbes.com/sites/ellenhuet/2015/07/23/what-really-killed-homejoy-it-couldnt-hold-onto-its-customers/#63c8acb4114c (former operations manager of the now defunct platform operator Homejoy stating that the firm's concerns about being found to be the employer of home cleaners retained through the Homejoy platform "affected our ability to put together a strong product, since we couldn't train or equip our cleaners, which in turn led to average customer experiences and low customer retention").

dynamic quality monitoring.[125] Platforms thus allow for more efficient use of capital.[126]

Again, Uber provides a positive example. The Uber platform makes it significantly easier for the consumer (a potential passenger looking for a ride-share driver) and the provider (a ride-share driver looking for a potential passenger) to find each other, to negotiate the specifics of their transaction, and to promote the likelihood of consumer and provider satisfaction with the transaction.[127] Thus, Uber also makes the consumer's choice to forgo owning an automobile significantly more practical, especially when the consumer resides in an urban area.[128] These efficiencies, however, depend on the platform operator's imposition and enforcement of quality control standards.[129] Firm-imposed quality control standards help to ensure that the consumer receives a similar, positive experience each time she uses the platform operator to engage a provider.[130] Absent such assurance, the consumer may be better off forgoing the platform altogether.

The case that platform operators and consumers directly benefit from the firm's imposition and enforcement of quality control standards is an easy one to make. The case with respect to platform providers is more complicated. In most instances where a firm exercises control over its worker, the worker benefits only indirectly, if at all. For example, where the firm requires that the worker work the specific hours that the firm schedules for her, it is difficult to see how the firm's exercise of control directly benefits the worker. When the firm subjects its worker to this type of control that directly benefits the firm but not the worker, the law should weigh such control in favor of finding that the firm is the worker's

125. *See* TELLES, JR., *supra* note 3, at 11; Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1075 (2015); Lobel, *supra* note 11, at 106 ("The platform, which increases connectivity, access to information, and the application of advanced technology to every aspect of the deal, impacts the relevant transaction costs at all three stages.").

126. EVANS & GAWER, *supra* note 2, at 4.

127. Rogers, *supra* note 22, at 87–89.

128. *See* TELLES, JR., *supra* note 3, at 13; PRICEWATERHOUSECOOPERS, *supra* note 24, at 17; Rogers, *supra* note 22, at 90–91.

129. *See* Eric Goldman, *The Regulation of Reputational Information*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 293, 293 (Berin Szoka & Adam Marcus eds., 2010) ("[The role of reputational information explains how well-functioning marketplaces depend on the vibrant flow of accurate reputational information, and how misdirected regulation of reputational information could harm marketplace mechanisms.").

130. *Cf.* Dawn Donut Co., Inc. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959) ("Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.").

employer, and the worker its employee, to encourage the firm to refrain from frivolously or unnecessarily exercising control.[131]

The platform operator's imposition and enforcement of quality control standards on the platform provider is different. In that case, the provider benefits directly from the positive reputation and good will attached to the operator's brand.[132] The firm's quality control standards are critical to directly growing the platform provider's market. For example, a home painter who uses TaskRabbit to be matched with consumers who need their home painted benefits directly when every home painter (and, indeed, every provider) who uses TaskRabbit must meet certain quality control standards.

Some platform operators allow consumers to choose a specific provider through their platform. TaskRabbit, for example, allows consumers to choose their specific "Tasker."[133] Other platform operators, however, do not afford consumers the ability to select a specific platform provider. Uber, for example, does not allow a consumer using its platform to request a particular driver.[134]

Where the consumer using the platform lacks the ability to select her specific provider, the platform provider's benefit from the operator's imposition of quality control standards is magnified. Such quality control standards mitigate the free-rider problem. Indeed, in this context, such quality control standards prevent a sort of tragedy of the commons that could ultimately threaten the platform's survival.[135] In this version of the tragedy, consumer trust in the specific platform and the platform economy generally serves as the relevant shared resource.

Sticking with the example of Uber's transportation platform, each Uber driver should strongly desire that all other Uber drivers live up to stringent quality control standards because, as discussed above, maintenance of such standards increases the market for the Uber driver's business. While hoping that her fellow Uber drivers maintain those

131. *See* Vane v. Newcombe, 132 U.S. 220, 233–34 (1889) (listing the fact that a worker was "free to dispose of his own time" as a factor in favor of classifying the worker as an independent contractor); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (discussing the understandings that an employee is someone who works fairly regular hours and that a worker's freedom to schedule her own hours suggests that the worker is not an employee).

132. *See* Patterson v. Domino's Pizza, 333 P.3d 723, 725 (Cal. 2014) ("By following the standards used by all stores in the same chain, the self-motivated franchisee profits from the expertise, goodwill, and reputation of the franchisor.").

133. *How to Hire for Future Date*, TASKRABITT (Sept. 15, 2017), https://support.taskrabbit.com/hc/en-us/articles/210861763-How-to-Hire-for-Future-Date (explaining that a user may directly hire a Tasker using the online dashboard).

134. *Requesting a Specific Driver*, UBER (Sept. 15, 2017), https://help.uber.com/h/1aaf0913-484f-4695-9042-e61fc7613f24 ("The Uber app cannot match you with a specific driver.").

135. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (discussing the problems of free riding and overuse that arise when a group shares a public resource).

standards, however, the individual driver herself may profitably choose to avoid compliance with those standards. Given that the Uber consumer cannot select a specific driver, the individual driver need not fear that her lax personal quality standards will result in a consumer avoiding her specifically. The Uber platform's loss resulting from the individual driver's choice to forgo high quality standards will be absorbed by the platform operator and the substandard provider's fellow Uber drivers as a whole. Thus, the individual Uber driver's personal gain from choosing to forgo stringent quality standards will likely exceed her personal loss, as the loss associated with her low-quality service will be spread among the platform and all of its drivers. The cumulative effect, however, of each Uber driver making the economically rational decision to personally forsake stringent quality standards is widespread substandard, and perhaps unsafe, performance and the catastrophic collapse of the platform. The platform operator's ability to impose and enforce stringent quality control standards on all of its platform providers and, thus, to safeguard the common good of public trust in the platform and the platform economy, prevents this tragedy of the commons, to the benefit of each platform provider.

Network effects amplify the negative impact of quality control shirking and the positive impact of quality control compliance on the platform ecosystem. Network effects are inherent to the platform ecosystem: Obtaining a critical mass of users—both providers and consumers—is the key to a platform's survival and success.[136] A platform becomes more valuable to its operator, its providers, and its consumers as more providers and consumers use the system.[137] As more providers join the network, the platform becomes more attractive to consumers, who have an easier time matching with a provider, and as more consumers join the network, the platform becomes more attractive to providers, who have a greater chance of matching with a consumer.[138]

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136. Lobel, *supra* note 11, at 155 ("Success in the platform economy often comes down to reaching and retaining more users."); ECONOMIST, *supra* note 121 ("The on-demand model obviously has network effects: the home-help company with the most help on the books has the best chance of providing a handyman at 10:30 sharp.").

137. EVANS & GAWER, *supra* note 2, at 6 ("A fundamental feature of platforms is the presence of network effects: platforms become more valuable as users use them. As more users engage the platform, the platform becomes more attractive to potential new users." (footnote omitted)); Katz, *supra* note 125, at 1122 ("Sharing platforms benefit from indirect network effects—the more providers operate on the platform, the more valuable the service becomes for users.").

138. EVANS & GAWER, *supra* note 2, at 6.

These network effects account, in large part, for the viral growth that certain platforms have experienced.[139]

Quality control standards are intrinsic to the nature of the platform economy, in that such standards encourage joining and also allow for the leveraging of network effects.[140] Of crucial importance, this leveraging of network effects is a two-way street. The absence of quality control standards compliance can lead to mass migration from the platform, which might then lead to the platform's death spiral.

2. In Light of the Control Bargain, the Platform Operator's Imposition of Quality Control Standards that Directly Benefit the Provider Should Not Weigh in Favor of Employee Status

A principal challenge for the drafters of protective workplace regulation is to optimally balance and promote the interests of not only the worker and the firm, but also of society as a whole.[141] Indeed, much protective workplace regulation that is the product of the control bargain and that appears on its face to be concerned principally with the rights of workers is, in fact, more broadly concerned with societal interests.[142] Employment discrimination legislation, for example, which situates in the employee the right to sue and recover relief for certain invidious workplace discrimination, is concerned not only with preventing and remedying economic and psychic harms to the individual employee, but to a great extent with fostering a societal norm of non-discrimination and encouraging an allocation of human resources that is more beneficial to

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139. *Id.* ("[Network effects go] a long way toward explaining why some platforms have had viral growth.").

140. *Id.* at 19.

141. S.G. Borello & Sons v. Dep't of Indus. Rel., 769 P.2d 399, 409 (Cal. 1989) (noting that California's workers' compensation statute has "a public purpose beyond the private interests of the workers themselves," including protecting the public treasury from the risks of workplace injuries); ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 34 ("The firm, the individual, and the public good are the three forces that we constantly try to balance."); VINEL, *supra* note 108, at 54 (discussing Francis J. Haas's argument in the early 1930s during the debate over enactment of the National Labor Relations Act that "the time had come to part with the idea that the 'wage contract concerns only an employer and an employee'" and to acknowledge that "'[i]t concerns everybody else'"); *see also* Richard Epstein, *Uber and Lyft in California: How to Use Employment Law to Wreck an Industry*, FORBES (Mar. 16, 2015, 10:57 AM), http://www.forbes.com/sites/richardepstein/2015/03/16/uber-and-lyft-in-california-how-to-use-employment-law-to-wreck-an-industry/ (expressing concern that extensive regulation of labor markets may threaten the business model and, thus, stifle innovation of platform operators in the transportation arena).

142. VINEL, *supra* note 108, at 54 (discussing "the Progressive and new liberal idea that the regulation of the employment relationship produced *positive* freedoms, that is, freedoms that did not inhere in the citizen but rather in the public interest for a well-ordered society").

society.[143] As an additional example, Sections 7 and 8 of the National Labor Relations Act, which guarantee employees the right to collective bargaining, are concerned not only with the economic betterment of workers, but more so with the promotion of industrial peace for the greater well-being of the worker, the firm, and society.[144]

Thus, as a normative matter, protective workplace regulation governing the platform economy ought to be concerned not only with protecting the platform provider, but also with accommodating the success of the platform operator and promoting the interests of the platform consumer and of society.[145] The law governing enforcement of workplace noncompete agreements is particularly instructive.[146] Under the law of the vast majority of states, a covenant not to compete will be held to be enforceable if it is reasonable.[147] Courts arrive at their reasonableness determination by balancing (1) the firm's interest in protecting a legitimate business interest, such as its trade secrets and other confidential information and its client relationships; (2) the worker's interest in free movement across the job market; and (3) society's interest in promoting innovation and the public's reasonable access to various

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143. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 975 (1997) ("At least in part because of the Civil Rights Act of 1964—the most important statutory embodiment of the ideal of racial justice—American culture, American government, and the American people have absorbed the concepts of equality and integration embodied in the Act as the proper ethical framework for the resolution of issues of race." (footnote omitted)).

144. Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employe[r]s."); *id.* at 790 ("[T]he [National Labor Relations] Act's goal [is to] achiev[e] industrial peace by promoting stable collective-bargaining relationships."); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the [NLRA] is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.").

145. *See* Lobel, *supra* note 11, at 118 (noting that the goals of regulation include correcting market failures, incentivizing competition, and enhancing the public welfare); *cf.* LOBEL, *supra* note 141, at 34 ("In the legal world we talk about two vectors that often need to be reconciled: fairness, focusing on the individual rights of employees and the individual interests of firms, and welfare, considering the overall gains and losses from a public perspective.").

146. *See generally* LOBEL, *supra* note 141, at 53–64 (discussing the reasonableness standard in evaluating noncompete agreements).

147. *See* RESTATEMENT (SECOND) CONTRACTS § 188 (AM. LAW INST. 1981); LOBEL, *supra* note 141, at 53. California law is the principal exception, voiding most noncompete agreements. *See* CAL. BUS. AND PROF. CODE § 16600 (West 2017) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); *see also* LOBEL, *supra* note 141, at 50, 53, 64–72 (discussing California law on noncompete agreements).

services.[148] The law also recognizes that the worker benefits when the firm is willing to expose her to the firm's confidential information and its client relationships.[149]

The law governing the definition of employment in the platform economy should be the product of a similar balancing exercise. That law should balance the need to protect vulnerable platform providers with platform operators' interest in protecting their relationships with consumers, and society's interest in nurturing the innovations of the platform economy and leveraging its network effects. The law should also recognize that the platform provider benefits directly from the platform's relationship with consumers and the operator's willingness to expose the provider to the operator's consumer relationships.

Critical to this balancing calculus is a full appreciation of the law's constitutive function. In the context of protective workplace regulation specifically, the law relating to the classification of workers as either employees or independent contractors influences firm choices as to how to structure workplace relationships.[150] Employment law scholar Noah D. Zatz, speaking on the law's constitutive role in this context, has explained, "Law does not just come in after the fact and decide whether a particular structure is employment subject to labor law. Instead, law shapes what structures arise in the first place, and it channels work toward some structures and away from others."[151]

With respect to quality control standards, if the law considers the platform operator's right to impose quality control standards on the platform provider as a factor that will weigh in favor of finding that the provider is an employee of the operator, the operator is more likely to forgo the right to impose such standards.[152] To be sure, the rational platform operator will not give up its right to impose quality control standards lightly. Rather, the rational operator will balance the costs of

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148. Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 539 (Wyo. 1993); LOBEL, *supra* note 141, at 53–55, 56–61; Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 648–49 (1960).

149. *See, e.g.*, *Hopper*, 861 P.2d at 546 ("The employee benefits during his tenure with the employer by his or her greater importance to the organization as a result of the exposure to the trade secrets, customer contacts or special training.").

150. PRASSL, *supra* note 84, at 193; Glynn, *supra* note 89, at 207–09 (discussing the "feedback loop" by which "labor and employment law seeks to define the boundaries of the firm for purposes of allocating legal responsibility, and, in so doing, alters the relative costs of internal and external production"); Lobel, *supra* note 19, at 69–70 ("[M]ost benefits are linked to employment, including health care, retirement, workers' compensation, and leave. This link is increasingly outdated and creates the moral hazard of a further push to labor supplied by independent contractors and workers.").

151. Zatz, *supra* note 84, at 288.

152. Huet, *supra* note 124.

additional employment regulation against the costs of forgoing the right to impose quality control standards.[153] Still, given the benefits of quality control standards for the operator, the consumer, and the provider, workplace protective regulation should not be applied in a way that provides such a disincentive to the operator to insist on compliance with a code of conduct. As a normative matter, the control bargain should not be viewed so expansively as to encompass an arrangement that would be to the individual and collective detriment of all parties involved.

With respect to existing protective workplace regulation, the question of the platform provider’s status as employee or independent contractor should ultimately be a question of legislative intent. Understanding the nature of the control bargain allows for insight into this legislative intent. As a theoretical matter, the parties, especially the state, would likely not intend to enter into a control bargain that would make all parties worse off: The state should be presumed reluctant to dictate that it will impose onerous protective workplace regulations upon the platform operator unless the operator refrains from engaging in behavior that benefits all the concerned parties. Thus, one should presume that the legislature never intended for the control bargain to extend to the platform operator’s imposition of quality control standards.

C. *Insights into the Control Bargain Gained from the Franchise Context*

This Article’s argument with respect to the limitations on the control bargain in the context of quality control standards and the platform economy presents an extension rather than a radical break from existing law. In particular, case law from the franchise context supports this argument. This case law is particularly apt given that the franchise business model shares significant similarities with the transaction platform business model.

Pursuant to the franchise model, a franchisee pays a royalty or fee for the right to sell a product or service that is connected with the franchisor’s trademark or trade name.[154] Typically, the franchisee pays the franchisor a one-time front-end fee, as well as royalties and advertising fees based on a percentage of sales.[155] Thus, the franchisee is similar to the platform provider, which pays the platform operator a portion of its fee for the right

153. *See* Roose, *supra* note 29 (discussing start-up companies that offer on-demand services and that have chosen to employ workers who interface with customers in the hope that employees will provide better and more consistent service than independent contractors).

154. *See generally* Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 420–21 (2005) (describing the franchisor–franchisee relationship).

155. *Id.* at 476.

to attract and connect with customers using the platform and the platform operator's name. Neither the franchisee nor the platform provider receives a salary from the franchisor or platform operator, respectively.[156] Rather, both the franchisee and the platform provider retain their profits after paying the franchise or platform fees.[157]

Moreover, similar to the platform provider, the franchisee also agrees to abide by the franchisor's standards and procedures designed to protect the franchisor's trademark.[158] As in the case of a platform operator and provider, when the franchisor requires certain uniform standards of all its franchisees, the franchisee directly benefits from the control. This is so because consumers come to rely on the uniform standard associated with the franchisor's name.[159]

The franchise case law informs this Article's argument with respect to several critical points. First, the control bargain allows for exceptions to its cardinal principle that a firm's retention of control over a worker weighs in favor of finding that the firm employs the worker and should be subjected to the imposition of workplace protective regulations. Second, the firm's retention of the right to enforce quality control standards can be one of the control bargain's exceptions. And finally, exceptions to the control bargain can be discerned from the nature of relevant workplace structures.

Appreciating the relevant workplace structures in the franchise context begins with consideration of the Lanham Act.[160] The Lanham Act requires that a trademark licensor exercise control over the use of its trademark, lest the trademark lose its significance and be deemed abandoned.[161] Thus, quality control standards are inherent to the franchise form, which is essentially a lease of a trademark.[162] Moreover,

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156. *Id.* at 481.

157. *See* Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 98–99 (1993) (making this point with respect to franchisees).

158. *See* Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 733 (Cal. 2014); Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 331, 337 (Wis. 2004).

159. *Kerl*, 682 N.W.2d at 331, 337 ("For the franchisee, the arrangement mitigates the risks of starting a new business by enabling it to capitalize on the good will and established market associated with the franchisor's trademark or trade name."); Browning-Ferris Inds. of Cal., Inc., 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015) (Miscimarra & Johnson, dissenting) ("[O]ne important aspect of the franchising relationship is the franchisee's ability to reap the benefits of manifesting to the customer the appearance of a seamless enterprise through the use and maintenance of the franchisor's trademark.").

160. *See* 15 U.S.C. § 1051 (2012).

161. *Id.* § 1127 ("A mark shall be deemed to be 'abandoned' if . . . any course of conduct of the owner . . . causes the mark . . . to lose its significance . . . .").

162. Kevin M. Shelley & Susan H. Morton, *"Control" in Franchising and the Common Law*, 19 FRANCHISE L.J. 119, 119–21 (2000) (discussing how quality control standards are inherent to the franchisor-franchisee relationship); *see also* Rainey v. Langen, 998 A.2d 342, 348 (Me. 2010)

the value of the franchise is inextricably linked to the strength of the trademark, which is itself dependent upon quality control standards.[163]

A body of franchise case law holds that franchisor-imposed quality control standards inherent to the franchise form should not weigh in favor of finding that the franchisee's worker is an employee of the franchisor.[164] Much of this case law can be read as reasoning that the legislature that created the franchise structure, which enables a firm to lease its trademark to a separate firm, must not have intended that quality control standards inherent to protecting the trademark would make the franchisor the employer of the franchisee's employees: The state that authorized the franchise form would not want to impose regulation inimical to that form.[165]

Accordingly, courts in numerous jurisdictions have narrowed the control test in the franchise context.[166] These courts distinguish between control by the franchisor that relates to the franchisee's day-to-day operations and quality control standards imposed by the franchisor that seek to maintain uniformity of service and product across franchisees and, thus, to protect the franchisor's trademark.[167] Under this case law, the former type of control suggests an agency or employment relationship between the franchisor and the franchisee or its employee, while the latter type of control does not.[168]

Thus, numerous courts have held that the control inherent in the franchise business model necessary to protect the franchisor's trademark is not sufficient to establish an agency or employment relationship.[169] For

("[A]t its core, the franchise system involves the licensing of intellectual property, usually in the form of the franchisor's trademark.").

163. King, *supra* note 154, at 468 ("Franchising depends on the use of shared trademarks, the value of which is sustained by controlling the uniformity and quality of the products and services marketed under the trademark.").

164. Shelley & Morton, *supra* note 162, at 124–26.

165. *See, e.g.*, *Rainey*, 998 A.2d at 348 (discussing the Lanham Act's abandonment provisions and concluding that "[a]s a result, it is necessary to evaluate the franchise relationship in light of the franchisor's duty to police its trademark"); *cf.* Flynn, *supra* note 157, at 91 ("This traditional rule [of agency] . . . does not work well in the franchise paradigm: the very nature of a franchised good or service implies some, but not total, franchisor control over the means of performance."); William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 FRANCHISE L.J. 162, 164 (2005) ("The problem with applying the *Restatement* test to franchising is that franchising is all about controls.").

166. King, *supra* note 154, at 431.

167. Shelley & Morton, *supra* note 162, at 124–26 (discussing in some detail several such cases).

168. King, *supra* note 154, at 431–32, 435–36; Shelley & Morton, *supra* note 162, at 124–26.

169. *See, e.g.*, Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 733–39 (Cal. 2014); Billops v. Magness Constr. Co., 391 A.2d 196, 197–98 (Del. 1978) ("If, in practical effect, the franchise

example, in 2014, the California Supreme Court held in *Patterson v. Domino's Pizza, LLC*[170] that

> the mere fact that the franchisor has reserved the right to require or suggest uniform workplace standards intended to protect its brand, and the quality of customer service, at its franchised locations is not, standing alone, sufficient to impose "employer" or "principal" liability on the franchisor for statutory or common law violations by one of the franchisee's employees toward another.[171]

Rather, for the franchisor to be an "employer," the franchisor must retain "a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the

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agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists."); Hoffnagle v. McDonald's Corp., 522 N.W.2d 808, 814 (Iowa 1994) (holding that a franchisor was not liable for the injuries suffered by its franchisee's employee where the franchisor did not control the day-to-day operations of the franchisee); *Rainey*, 998 A.2d at 349 ("The traditional test allows a franchisor to regulate the uniformity and the standardization of products and services without risking the imposition of vicarious liability."); *see also* Ketterling v. Burger King Corp., 272 P.3d 527, 533 (Idaho 2012) ("General franchise operating requirements are usually not enough to establish control or a right of control giving rise to [vicarious] liability."); Papa John's Int'l, Inc. v. McCoy, 244 S.W.3d 44, 54, 56 (Ky. 2008) ("Because a franchisor typically concentrates its control on the quality and operational requirements relating to its trade or service mark, as opposed to the day-to-day operations and management of the business, '[t]he perceived fairness of requiring a principal who closely controls the physical conduct of an agent to answer for the harm caused by the agent is diminished in this context.' . . . A franchisor is vicariously liable for the tortious conduct of the franchisee when it, in fact, has control or right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm." (alteration in original) (quoting Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 338 (Wis. 2004)); Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1064 (Mass. 2013) ("Today we join these courts in concluding that a franchisor is vicariously liable for the conduct of its franchisee only where the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff."); *Kerl*, 682 N.W.2d at 331, 338–41 ("If the operational standards included in the typical franchise agreement for the protection of the franchisor's trademark were broadly construed as capable of meeting the 'control or right to control' test that is generally used to determine respondeat superior liability, then franchisors would almost always be exposed to vicarious liability for the torts of their franchisees."); *cf.* Love's Barbeque Rest., 245 N.L.R.B. 78, 118 (1978) ("Yet, the Board has consistently pointed out that the need for uniformity of operation [for the mutual benefit of the franchisor and franchisees] will not, of itself, suffice to establish a joint employer relationship."), *aff'd in part, rev'd in part sub nom.* Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981); *id.* at 120 (reasoning that standards aimed at protecting the quality of the franchise brand or product do not suggest a joint-employer relationship).

170. 333 P.3d 723 (Cal. 2014).

171. *Id.* at 739 n.21; *see also id.* at 726 ("The imposition and enforcement of a uniform marketing and operational plan cannot *automatically* saddle the franchisor with responsibility for employees of the franchisee who injure each other on the job.").

workplace behavior of the franchisee’s employees.”[172] “Any other guiding principal,” the court reasoned, “would disrupt the franchise relationship.”[173]

The court in *Patterson* recognized that a certain level of franchisor control over the franchisee and the franchisee’s employees is inherent in the nature of the franchising business model, given that the franchisor imposes standards on the franchisee designed to protect the franchisor’s trademarked brand.[174] Indeed, in the case at hand, the court accepted that the franchisor had prescribed and “vigorously enforced” “standards and procedures involving pizza-making and delivery, general store operations, and brand image.”[175]

In its analysis, the court highlighted the purpose that such franchisor-imposed standards serve: The standards seek to ensure that a customer of any franchisee of the franchisor receives a similar experience each time she patronizes a franchisee.[176] In other words, “[t]he systemwide standards and controls provide a means of protecting the trademarked brand at great distances.”[177]

The *Patterson* court also focused on the benefit to the franchisee under this type of franchisor control: The franchisee benefits from the goodwill attached to the franchisor’s brand, goodwill that, in large part, comes from the standards that the franchisor imposes on its franchisees.[178] “The goal—which benefits both parties to the contract—is to build and keep

172. *Id.* at 726; *see also id.* at 739; *Kerl*, 682 N.W.2d at 341 (“[A] franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm.”).

173. *Patterson*, 333 P.3d at 739.

174. *Id.* at 725–26 (“A franchisor, which can have thousands of stores located far apart, imposes comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way.”); *see also* Depianti v. Jan-Pro Franchising Int’l, Inc., 990 N.E.2d 1054, 1063 (Mass. 2013) (“Broadly extending the ‘right to control test’ for vicarious liability to the franchisor-franchisee relationship, where franchisors are obligated to maintain certain controls, could have the undesirable effect of penalizing franchisors for complying with Federal [trademark] law.”); *Kerl*, 682 N.W.2d at 338 (“[B]ecause many franchise relationships include a license to use the franchisor’s trade or service mark, the detailed quality and operational standards and inspection rights specified in the franchise agreement are integral to the protection of the franchisor’s trade or service mark under the Lanham Act.”); David Laufer & David Gurnick, *Minimizing Vicarious Liability of Franchisors for Acts of Their Franchisees*, 6 FRANCHISE L.J. 3, 3–4 (1987) (discussing how franchisor control over the franchisee is inherent in the franchisor-franchisee relationship and concluding that “[r]eservations of controls as a means to protect reputation and meaning of trademarks are thus important tools to franchisors”).

175. *Patterson*, 333 P.3d at 726; *see also id.* at 733–34.

176. *Id.* at 727.

177. *Id.* at 733.

178. *Id.* at 725 (“By following the standards used by all stores in the same chain, the self-motivated franchisee profits from the expertise, goodwill, and reputation of the franchisor.”).

customer trust by ensuring consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves."[179]

Finally, the court concluded that the control inherent in the very nature of a franchise agreement could not alone support a finding that the franchisor was the employer of the franchisee's employee, especially given that the franchisee benefits from that control:

> The 'means and manner' test generally used by the Courts of Appeal cannot stand for the proposition that a comprehensive operating system alone constitutes the 'control' needed to support vicarious liability clams like those raised here. As noted, a franchise contract consists of standards, procedures, and requirements that regulate each store for the benefit of both parties. This approach minimizes chain-wide variations that can affect product quality, customer service, trade name, business methods, public reputation, and commercial image.[180]

The franchise form enables the franchisor to license its trademark to a franchisee, which remains a distinct entity despite its use of the trademark. One should presume that the legislature that created the franchise form must not have intended for the franchisor's efforts to protect its licensed trademark to give rise to employment obligations running against the franchisor and in favor of the franchisee or its employees.[181] Employer liability should not attach to the franchisor merely because of actions that the franchisor takes that are inherent to the franchise form—namely steps to safeguard the trademark and reputation of the franchise.[182]

Thus, the franchise cases teach that the control bargain allows for categorical exceptions whereby a firm's exercise of a certain type and amount of control over its worker will not weigh in favor of finding employee/employer status. Indeed, the cases make plain that the firm's retention of the right to enforce quality control standards with respect to a worker can be the type of control that is the subject of such a categorical exception. The cases also teach that legislative intent with respect to such exceptions can be deduced from the structure of the work relationship at issue in conjunction with the nature of the control being exercised.

179. *Id.* at 733.

180. *Id.* at 738.

181. *See* King, *supra* note 154, at 469 ("It quickly becomes manifest that traditional rules for vicarious liability . . . are ill-suited for the franchisor-franchisee relationship.").

182. *See* Cislaw v. Southland Corp., 6 Cal. Rptr. 2d 386, 391 (1992) ("The cases, taken as a whole, impliedly recognize that the franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent.").

This franchise case law supports this Article's argument that a platform operator's retention of the right to impose quality control standards on a platform provider should not weigh in favor of a finding that the operator employs the provider. Quality control standards are inherent to the nature of the platform economy. Moreover, such standards directly benefit not only the platform operator, but also the platform consumer and the platform provider. Thus, one may reasonably conclude that the legislature would not want to enter into a control bargain that incentivizes platform operators to refrain from imposing such beneficial quality control standards.

CONCLUSION

The advent of the platform economy has generated innovative workplace structures whereby consumers engage service providers through various transaction platforms. The proliferation of these new workplace arrangements raises the issue of whether a provider who is engaged through a transaction platform should be classified as an employee of the platform operator within the purview of workplace protective legislation or, rather, as an independent contractor outside the scope of such legislation's protections. This Article has focused more specifically on whether the platform operator's reservation of the right to impose quality control standards on the provider who is engaged through its platform ought to give rise to employment obligations running in favor of the provider and against the operator.

Ultimately, a court's determination of whether workplace protective legislation encompasses the relationship between platform operator and platform provider should be decided by reference to legislative intent. For most workplace protective legislation, however, neither the text nor legislative history is even minimally instructive as to such intent. Thus, this Article looks more broadly for insight into legislative intent, examining the structure of workplace protective legislation generally, considering the nature of the platform economy, and reasoning from case law addressing the meaning of "employment" in the similar context of the franchisor-franchisee relationship.

This structural-purposive inquiry into the definition of "employment" as applied to the platform economy suggests that a platform operator's imposition of quality control standards on the provider that uses its platform should not weigh in favor of finding that the operator is the provider's employer. One can discern from the structure of workplace protective legislation generally a "control bargain" pursuant to which the state imposes a scheme of workplace protective regulation on the firm only if the firm retains a certain type and degree of control over its worker. The nature of the platform economy suggests that the platform operator's retention of the right to impose quality control standards on providers engaged through its platform should be seen as outside the scope of this control bargain.

A platform operator's enforcement of quality control standards is inherent to the structure of the platform economy in that the maintenance of such standards promotes trust between consumer and provider and, thus, enables leveraging of network effects. Enforcement of such standards also mitigates the platform provider free-rider problem whereby a provider benefits from the platform's positive reputation while simultaneously flouting the code of conduct essential to the maintenance of that reputation. Indeed, with respect to platforms that do not allow the consumer to select a specific provider, the operator's enforcement of quality control standards is necessary to prevent a tragedy of the commons of sorts in which each rational provider maximizes her individual welfare by avoiding the costs of providing a high-quality product or service to the collective detriment of all other providers and the imperilment of the platform.

Thus, quality control standards directly benefit platform providers by protecting and growing the providers' market. A legislature presumptively would not enter into a control bargain that incentivizes the platform operator to eschew control that would benefit all concerned—the provider as well as the public and the operator. Therefore, a legislature presumptively would not wish for the platform operator's retention of the right to impose quality control standards on the operator who is engaged through its platform to weigh in favor of finding an employer/employee relationship between operator and provider.

Case law interpreting the term "employee" in the similar context of a franchisor-franchisee relationship informs this structural-purposive analysis. In sum, this case law holds that the franchisor's retention of the right to impose quality control standards on the franchisee is not the type of control necessary to support a finding that the franchisee's employee is an employee of the franchisor. This case law teaches that the control bargain allows for exceptions to the rule that the firm's retention of control over a worker weighs in favor of finding that the firm employs the worker, that the firm's reservation of the right to impose quality control standards can be such an exception, and that such an exception can be discerned from the nature of the relevant workplace structures.