

Regulatory Approach to the Gig Economy: A Comparative Study of the United States and China

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ABSTRACT

The Gig economy is a new thriving industry in which mobile digital apps are prevalently adopted to connect freelancers with customers. Regulatory approaches to this new industry have been widely discussed and practicable attempts have been implemented. This paper focuses on discussing the trade-offs of the attempts by the United States and China to regulate this new industry based on the theoretical framework constructed by combining the theory of Arun Sundararajan and Alan Krueger. This comparative study shows that countries around the world should employ a “three-body” regulatory system composed of the government, APP platforms and the public in which each group checks and balances each other. Countries should also made adjustment when employing this pattern according to their actual economic and political situation.

Keywords: *Regulatory Approach, Gig Economy, Independent Workers*

1. INTRODUCTION

The Gig Economy is a new thriving industry that uses mobile digital apps to connect freelancers with customers. The services allow customers to hire independent contractors to provide short-term or asset-sharing services including ride hailing, food delivery and holiday rental services [1]. In a period of a little more than decade, companies such as Airbnb and Uber in the Western world, and Meituan and Ele.me in China, grew into giant service providers and took over their respective markets in a relatively short time as a result of lack of regulations. Airbnb is an online rental service provider; Uber is a ride hailing platform; and Meituan and Ele.me are food delivery platforms. Created in 2008, Airbnb was valued at approximately \$39 billion in 2018. In 2015, six years after Uber was founded in 2009, Uber drivers had accepted 1 billion rides [2]. Since the creation of Ele.me in 2008 and the creation of Meituan in 2013, backed by tech giants such as Alibaba and Tencent, these two companies engaged in a brutal price war in the rapidly developing Chinese food delivery industry and emerged as two dominant rivals. The companies now control a combined 90 percent of the market share in food delivery in China [3].

The Federal Reserve reported in 2018 that in 2017, 31% of all adults, or about 57 million Americans, engaged in gig work the month before the survey, and in

2018 the number rose to about 36% according to Gallup [4]. However, as the new Gig Economy has thrived, the lack of regulations and laws governing the sharing platforms have led to a variety of problems related to employment status, customer safety, and monopolies. In China, the food delivery industry’s rapid development was defined by low delivery fees and aggressive marketing strategies. Furthermore, the industry employs over 3 million food delivery drivers who are facing increasingly bad safety conditions, such as having to deliver during rainstorms and to break traffic rules to get the food on time, decreasing wages, and fewer guarantees of consistent work [3]. Besides, most of these workers are hired as contracted workers and receive little or no employment benefits such as healthcare and retirement and other protections and benefits.

Since most countries lack existing regulations for these workers, when courts have to rule on the status of gig workers, the outcomes are unpredictable and often contradictory. As De Stefano & Aloisi pose the problem in the case of food delivery workers, “a courier performing the same activity can be classified as a quasi-subordinate worker in Italy, as a self-employed worker in France, as an employee in Germany, as a “zero-hours” contract worker in the United Kingdom, or as an intermittent worker in Belgium” [5]. Not only do court decisions result in different definitions of gig workers in different countries, but sometimes the ambiguity of laws

creates opposite court rulings on the same issue within the same country. This is exemplified by the case of Deliveroo vs. Federatie Nederlandse Vakbeweging (FNV) in the Netherlands in 2019. Deliveroo transitioned from renewing fixed-term labor contracts of its riders to hiring independent contractors as riders in 2018, and then was sued by an individual supported by the FNV (the biggest trade union in Netherlands) for violating the rights of their delivery drivers by discontinuing fixed-term labor contracts. The Subdistrict Court of Amsterdam ruled against individual workers in their lawsuits, but when the same Court was asked to judge the overall practice of the Deliveroo, it instead ruled in favor of FNV [6].

In short, the same lack of regulations and laws for this industry that enables the Gig Economy to grow rapidly through innovation simultaneously creates conditions that allow these companies to infringe on workers' rights. A major debate that happens in scholarship and also in legislatures focuses on the problem of how to classify these workers, and whether companies should be free to treat them as contractors or whether they should be required to treat them as full time workers. Recently, the New York State Department of Labor classified Uber drivers as "employees" who are entitled to receive unemployment benefit contributions from Uber [7]. Besides just focusing on Uber drivers, the United States National Labor Relations Board acted presuming that Postmates couriers are also "employees". Similar attempts and legislations include the AB-5 law that compels gig economy companies like Lyft and Uber to treat more of their workforce as employees with employment benefits [8]. Former US presidential candidate Elizabeth Warren also proposed that the safety net should be strengthened so as to catch all who have fallen, which includes ensuring all workers pay into Social Security, are covered by catastrophic insurance and paid leave [9]. She also stated that employee benefits should be made available to everyone, that vague areas in labor laws should be eliminated, and that other benefits such as post-secondary educations should also be provided by employers [9].

Another issue is that under the current situation, workers find themselves economically dependent on transacting platforms while not benefiting from the employee status, and at the same time, they bear the risk of an independent contractor while not enjoying the benefits as an independent business [10]. As a result, scholars such as Krueger and Harris proposed that gig economy workers could be classified as an intermediate "independent worker", which is a place between independent contractor and worker; or just let workers choose from more freedom or more protections [11]. These workers can enjoy the right to bargain with the platforms for rights including employment benefits and insurances.

Besides efforts in the United States, China has also strengthened its protection of its food delivery workers recently. The State Administration for Market Regulation and six other departments including the National Development and Reform Commission, the Cyberspace Administration of China and the Ministry of Public Security issued a guideline in July that requires Chinese food delivery companies, mainly Meituan and Ele.me, to provide a minimum wage, insurance and relaxation of delivery deadlines for their workers [12].

To ensure the continuous development of this new industry as well as the protection of workers' rights, a complex government oversee self-regulating system may be developed. Central government can issue some guidelines on some basic points such as requiring minimum wages for all workers, and state or regional governments can develop specific regulations based on these guidelines. The responsibility to enforce these guidelines will fall on the shoulder of companies through means including peer review and rating systems and Data Driven Delegation. The public should also serve as a speculator that will raise problems through medias when the companies are doing something that will seriously harm the benefits of workers. Since different countries may encounter different problems in this area, the model can be similar but slightly different. In the US, the platforms can take up more responsibility, while in China the government should take up more of the responsibility to enforce the laws. In this way, the companies, the workers and the governments can engage in a win-win relationship and benefit the society as a whole.

The research paper will be structured as follows. Section 2 will begin with an introduction of Arun Sundararajan's theory on regulations in general, non-government regulations and alternative ways of regulations. Other proposals aimed at providing employment benefits for sharing economy workers will also be introduced, such as the proposal from Harris and Kruger suggesting the creation of a "third category of workers" besides full-time and part-time. Section 3 will introduce case studies of legislations efforts by countries around the world and will focus mainly on the United States and China. The recent guidelines issued by Beijing regulating the food delivery industry, Elizabeth Warren's proposal and the AB-5 laws will be introduced. Various opinions concerning these regulations will be presented in this section as well. Section 4 will be a discussion on the Trade-Offs alternatives to the regulations previously introduced, and the author's own idea to solve the problems. Besides, whether US attempts should be the leading model for legislations attempts around the world and how China should handle the issue better will also be discussed in this section. Section 5 will be a conclusion that briefly summarizes the discussions above, completes the analysis, and reviews what could be done better in future researches to provide better solutions for the ongoing debates on the Gig Economy.

2. THEORY

In order to respond to the problems that occur throughout the development of the sharing economy, scholars raised various theories to explain the phenomena and counter specific issues. Arun Sundararajan proposes his own understanding of the needs and forms of regulations in this new industry and provides several alternatives in Chapter 6 of *The Sharing Economy*. His theory will serve as the basic theoretical framework of this research essay. Other scholars' proposals, including Harris and Kruger's idea of creating a "third category of workers," will also be introduced in this section.

Sundararajan proposes that "[g]enerally, regulations are instruments used to implement social and economic policy objectives. Expressed another way, they are legal and administrative mechanisms designed to encourage economic activity" [13]. The economy needs regulations to correct inefficient, inequitable or insufficient outcomes that are often produced by market practices, which are referred to as market failures. When these market failures are corrected, more trust can be established among groups in transactions, thus promoting the level of economic activities and generating more social benefits. Historically, Sundararajan observes, regulations have been imposed by the government and law to achieve these outcomes but, as we will see below, there are other non-government options for developing regulations as well.

Sundararajan divides the current market failures faced by the sharing economy into three categories: information asymmetry, externalities and blurring of boundaries between personal and professional. Information asymmetry is the case when one party in an economic transaction knows more about the intended exchange, including about the advantages and disadvantages of the product or the service, than the other party. Information asymmetry is especially prevalent in peer-to-peer exchanges because it involves two private individuals working in the context where there is no standardization. For example, an Airbnb host has more information about his or her house than the potential customers, and a Uber driver will know more about his or her safety record than passengers. According to Sundararajan, "information asymmetry can lead to the situation of 'adverse selection': if there's no good way of distinguishing between lower and higher quality providers, then a customer is likely to be willing to pay, on average, a price commensurate with the value they'd get from an average quality provider" [13]. As a result of this situation, high quality service providers will be more unlikely to provide services to those in need, which will lead to the average service quality to continually worsen. The continuously lowering services will further lower customer's willingness to pay and cause the market to disappear or remain stagnant and underperform in the economy.

Another type of market failure that Sundararajan brings is the negative externality. According to him, "[t]he choices of a buyer or provider in a peer-to-peer transaction may impose costs on (or result in benefits to) others" [13]. For example, a noisy Airbnb guest will certainly impose negative externalities on the neighborhoods. The effects of these externalities can sometimes be small, affecting only a handful of individuals. However, sometimes the impact can be more global, as exemplified by pollution caused by more cars on the road. Finally, Sundararajan also brings up a third market failure: the blurring of boundaries between personal and professional. According to him, "today's sharing platforms have brought these informal exchanges into the mainstream economy, creating service providers who are 'in between' personal and professional" [13]. For example, when somebody rents his or her house to one's friends, this action will be considered personal. However, when an Airbnb host is renting his or her house to a stranger, the stranger may expect cleanliness and other standards that are closer to a hotel than to a private home, even though they are not staying at a hotel. So, an Airbnb rental is not a personal transaction, yet neither is it an entirely professional exchange governed by hotel standards. The non-professional nature of services provided by these platform users will inevitably create unsatisfactory results, and the ethical problems can take the risk of being made more severe.

These market failures can hardly be addressed by current regulation methods. According to Sundararajan, applying government regulations from established industries like hotels to these non-professional service providers will be too costly, in terms of money and time. According to Sundararajan, another issue is that "regulators often delay innovation by fitting innovative services in existing legal categories and failing to update the extant legal framework to the current state of technology" [13]. This is because the imposition of these kinds of strict standards that govern hotels onto AirBnB, for instance, where hosts are mostly doing this on a more non-professional level for additional income by renting their own living spaces and homes, will create a situation in which most individuals will no longer be able to afford, or will lose the economic incentive, to provide services, as exemplified by Sundararajan's example of a grassroots petition started by a New Yorker called Michelle that asked the New York legislature to reconsider the law [13].

Sundararajan starts his explanation of the kind of regulations that are best suited to the sharing economy by drawing on historical examples. He proposes that historically the ability of an industry to regulate itself can create trust that reduces the need for government intervention. This is a form of what he calls an "industry regulation" or a "self-regulation." To illustrate this, Sundararajan discusses the example of the 11th century Maghribi traders. Without modern communication devices and transportations, these traders relied on

overseas agents to help them send, receive, transfer, and ultimately sell their goods. However, without means to directly monitor the goods and these overseas agents, Maghribi traders had to develop a way of reducing corruption among the agents. In order to address this problem, these traders united together to create a trust system. The traders offered their agents “premium” wages (wages greater than any available to these agents elsewhere). Additionally, they established a “coalition” or a “network” with other similar traders and used a rating system to exclude corrupt agents from ever being hired by any of traders [13]. Through these two means, the traders were able to create trust in their network and between themselves and agents. Accordingly, they succeeded at regulating the market without any government intervention.

Another approach to regulate the sharing economy is brand-based trust. According to Sundararajan, “[m]uch of human interaction is structured by constraints of our own devising. We call these constraints institutions. As the Nobel Prize-winning economist Douglass North notes, some of these are formal constraints like rules, laws, and constitutions, while others are informal constraints like norms of behavior. Collectively, they form what North calls the ‘rules of the game’ of a society” [13]. When establishing trust in a society, a brand can also serve the same function as a government agent. Sundararajan presents the example of a food industry. People now trust food safety not only because of FDA regulations of the food industry, but also because of specific brands of good they recognize as trustworthy. This explains why someone is willing to buy a Coke in a country whose food safety standards are unclear or even low, only because he or she trusts the brand. In the sharing economy, in pursuit of long-run profits, companies such as Airbnb, Lyft and Uber understand the power of brands, so they invest in providing high level and safe services for their customers.

Sundararajan, drawing on the work of Adam Thierer of George Mason University and Sofia Ranchordàs of Yale Law School, argues that there should be “permissionless innovation” in the sharing economy. This means that new experiments with technologies or business models should be permitted by the government by default, in order to encourage innovative companies to form which would otherwise never be founded if they had to face existing government regulation. Because of the distinct features of the sharing economy, it is more effective for them to regulate themselves based on data than to rely on government interventions.

Based on the reasonings above, Sundararajan proposes several innovative ways of regulating this new industry. He believes that in the future, we may see simultaneous operations of many formal and informal regulatory systems. Among these systems, Sundararajan selects three models of regulations that will shift

regulatory burdens from governments to other stakeholders in this society. The three systems are “peer regulation, self-regulatory organizations, and delegated regulation through data” [13].

Peer regulation is a cost-efficient way of regulating an industry from the inside of the system, without reliance on the government, and it is well suited for peer-to-peer situations. There are two types of peer regulation. One involves inspectors masquerading as peers, which is not well suited for the peer-to-peer platforms because in this situation it is still the government that take up the role to enforcing the regulations it set, only using “peers” to replace the original inspectors who do the work. The other kind of peer regulation involves peers creating standards for each other, which is quite suitable for the sharing economy. For example, Airbnb has developed a review system that enables the guests to provide general reviews open to the public and private reviews that can only be viewed by hosts. This does serve as a regulatory function since if a host produced less satisfactory services, other potential guests will be notified by negative reviews and would not choose the host anymore. This thus motivates the hosts to provide at least an average level of services. An advantage of this system is that different standards can be applied to different hosts. For example, on the Airbnb platform, different standards will be applied to a luxury house and a small apartment. Besides, different customers can also find the best rentals suited for the price they are willing to pay. According to Sundararajan, “[i]n essence, platforms can support myriad context- and customer-specific standards within a single regulatory framework” [13].

Another model is self-regulatory organizations (SROs). According to Sundararajan, SROs do not mean the absence of regulation or an entity policing itself. Instead, according to him, “SROs are meant to police an industry by formulating regimes of collective rulemaking in which entities come together to develop, monitor, and, at times, enforce standards to govern the behavior of members” [13]. Historical examples include the Maghribi traders and other merchant and craft guilds that emerged in the same period. There are also successes in current attempts of SROs in the sharing economy. The state of California created the Transportation Network Companies (TNCs) in 2013, and the commissioners of the California Public Utilities Commission (CPUC) issued guidelines regarding the activities of drivers using Uber and Lyft. However, the enforcement responsibility is transferred to these platforms, as they have to register as a TNC entity and ensure the compliance of their workers with these guidelines. The advantage is that the government will bear fewer burdens, while the platforms are perfectly capable for this kind of regulation.

The last model is Data-Driven Delegation. Now capable of collecting large amounts of data, large sharing economy platforms can now easily detect serious

problems, such as systemic forms of discrimination. Sundararajan proposes that these data should be researched together by SROs, instead of being given to regulators, to provide innovative solutions to various problems that are hard to address through uniform government interventions.

Besides Sundararajan, other scholars also provided specific solutions for specific problems in the sharing economy such as providing employment benefits and protections to sharing economy workers. The representative proposal is the one made by Harris and Krueger on a third category of “independent workers” besides the existing category of employees and independent contractors in the United States. They argued that the legislative framework should reflect three guiding principles: immeasurability of hours (recognizing the line between work and nonwork can be impossible to measure), neutrality (companies will not intentionally put a group of workers in a higher status than others), and efficiency (that companies and workers should maximize cooperative benefits in their relationship). They also proposed that these independent workers should have certain rights including the right to organizing collective bargaining, insurances, civil rights protections, employee benefits and tax withholdings. However, the independent workers are not required to receive workers’ compensation, overtime payments, or a minimum wage guarantee since their working hours can be hard to measure [14]. Krueger and Harris believe that this new proposal may fill a void in the new industry, enhancing protections of workers and enabling innovations to move forward with greater legal certainties.

The case studies in the next section will be based entirely on the theories proposed above, and new solutions as well as other solutions will also be drawn based on these theories.

3. CASE STUDY

There are a number of approaches taken by countries around the world to deal with the problems that occur as a result of the development of the sharing economy. This section of the paper will focus on policies in China and the US that attempt to address problems posed by food-delivery platforms, ride-hailing platforms, and rental service platforms in these two countries. The effects of those policies imposed by Chinese governments on the platforms are effective, and the Chinese platforms are all willing to incorporate with the Chinese government. However, in the US, the policies applied by the state legislatures have created even more problems instead of solving problems.

Before 2015, the Chinese governments took *laissez-faire* regulatory approaches to the emerging sharing economy by not intervening directly in the platform’s

operations [15]. The companies took a four-party self-regulatory attempt, which includes the platform companies, a car rental company, a labor dispatch company, and the driver. According to Heng Wang, Professor and Co-Director of Herbert Smith Freehills China International Business and Economic Law (CIBEL) Centre, “[t]he arrangement is so designed that the platform company rents a private car from a car rental company, and recruits a driver through a labor dispatch company; the recruited driver is in fact the owner of the private car leased to the car rental company” [15]. Since the renting of private cars is permitted in China, this business model can work without any of the four parties needing to obtain a license in the taxi industry.

After 2016, recognizing the booming sharing economy, Chinese policy makers are active in constructing a framework to ensure the continuous growth of this new industry. According to “The 13th Five-Year Plan for Economic and Social Development of the People’s Republic of China,” the Chinese policy makers declared the sharing economy to be a national priority and issued several guidelines to regulate and promote the growth of the sharing economy [16]. For example, in July 2016, the State Council issued “The Guiding Opinion of the General Office of the State Council on Deepening Reform and Promoting the Healthy Development of the Taxi Industry” to regulate rapidly expanding third party transportation service providers such as Didi. According to Jiang and Wang, the Guiding Opinion “specifies five principles in regulating the taxi-industry, including (1) ensuring passengers’ safety; (2) insisting on reform and innovation; (3) coordinating the benefits of different stake holders; (4) adhering to the rule of law; and (5) recommending local autonomy” [17]. Besides the Guiding Opinion, the Ministry of Transport issued “The Interim Measures for the Administration of Online Car Hailing Operations and Services” in 2016. These Interim Measures provide specific standards for online ride hailing service providers and institute means to safeguard the interests of consumers [18]. Because these Interim Measures were only general guidelines, the task of developing specific regulations was left to the local governments.

In response to this Interim Measure, the local governments issued stricter standards for the drivers to meet. For example, in Shanghai, the local government issued guidelines requiring each ride-hailing driver to: (1) be a permanent resident of the municipality; (2) have no more than five violations of road traffic safety laws within one year of the date of application; (3) have no records of revocation of the taxi-qualification certificate within five years before the date of application; (4) have no more than five cases of failure to accept punishment within the time limit for violations of road traffic rules as of the date of application [15]. Beijing also issued a guideline in 2016 that required ride hailing drivers to: (1) have a certificate of driving; (2) have no record of traffic

accident crime and dangerous driving crime, no record of drug abuse, no record of driving after drinking; (3) have no record of violent crimes [19].

Besides regulation attempts on ride-hailing services, the Chinese government has also imposed some regulations on the food-delivery services. In July 2021, the State Administration for Market Regulation and six other departments including the National Development and Reform Commission, the Cyberspace Administration of China and the Ministry of Public Security, issued guidelines requiring Chinese food delivery platforms such as Meituan and Ele.me to guarantee their workers with income above minimum pay, insurance and a relaxation in delivery deadlines [12].

On the self-regulatory level, Didi launched its rating system months before the Interim Measures and introduced a new safety measure of in-car video and audio recording functions in late 2018. On June 17, 2019, Didi introduced the first anti-fatigue safety measures in China that required drivers to have a rest for 20 minutes after they have serviced for 4 hours [20]. In September of 2021, Meituan's founder Xing Wang also announced in a teleconference that Meituan will undergo strict self-inspection to prevent any violation of Chinese guidelines and laws.

In general, the regulatory actions imposed by Chinese policy makers on these platforms have been increasingly strict and more specific, in response to the many incidents that occurred during the operations of these platforms including incidents in 2018 of passengers being hurt by ride hailing service drivers. Local governments also tend to create more specific regulations for these platforms. Platforms' cooperation with policy-makers and their self-regulation attempts have ensured the continuous growth of this industry. It can be drawn from this analysis that Chinese regulatory attempts ended up reinforcing platforms' self-regulatory attempts somehow as a result of platform's corporation. The industry continues to expand rapidly even after direct government intervention in 2016, and the market size has grown from \$193.41 billion in 2016 to \$464.84 trillion in 2019 [21]. It is interesting to note that instead of the indication by Sundararajan that "regulators often delay innovation by fitting innovative services in existing legal categories and failing to update the extant legal framework to the current state of technology," [13] Chinese regulators have developed new regulatory frameworks that protect workers' and customers' rights and safety while at the same time ensuring the growth of the industry.

In the United States, policy makers, scholars and politicians have made some attempts regarding the regulation of the sharing economy. Former US presidential candidate Elizabeth Warren proposed that "all workers should have some basic protections and be able to build some economic security for themselves and their families." Specifically, she stated that first, every

worker needs to contribute to Social Security from their current income so that they may be eligible for its retirement benefits in the future. Second, "every worker should be covered by catastrophic insurance," which can be paid by spreading the fee over the entire workforce and making each individual payment relatively small. Finally, "all workers...should have some paid leave" guaranteed by the platforms and companies that employ them. She also claimed that employment benefits should be "portable," which means following individual workers to whatever place they work, and that retirement plans operated by unions or other organizations should be created for independent contractors, self-employed workers and other workers with no access to regular retirement benefits provided by employers for full-time non-contract workers. On the legislative level, Warren proposed that the federal government and the states should "create some legal and regulatory certainty in the labor market," [9]. Warren proposes that this can be achieved in the following four ways: (1) enforce the already existing laws; (2) "streamline labor laws" to make the definition of employee clear; (3) "streamline laws at the federal level" to help employers operating cross-states; (4) develop laws to protect "the right [of workers] to bargain as a group" and to protect them from "retaliation or discrimination for doing so." Instead of asking governments or companies to cover the fee of those social security programs or insurances, Warren asks workers to take up the responsibility of paying for these programs themselves. Her idea is quite similar to Harris and Krueger's position that gig workers should enjoy some basic rights such as employment benefits and insurances. The differences lay in that Harris and Krueger want companies to pay for these benefits, and Warren believes that gig workers should pay for themselves.

While Elizabeth Warren proposed some regulations to address the sharing economy in elections, legislators in different states have also made some actual attempts to regulate this new industry. According to an article in the *Journal of Law and Policy*, "in 2010, New York amended its Multiple Dwelling Law to combat the 'illegal hotel problem' posed by the operation of Airbnb. The author further stated that, "[l]egislators therefore amended the law to state that 'illegal hotel activity' occurs '[w]hen permanent residential apartments in buildings with three units or more are rented out for less than thirty days to transient visitors instead of residents'" [22]. According to Sundararajan, New York's new law "struck at the heart of what was appealing about Airbnb's service in New York to visitors: being able to rent someone's entire apartment in a real city neighborhood for a few days when you visited" [13]. What New York is trying to do is to stop the innovative practice of Airbnb by, according to him, "fitting innovative services in existing legal categories and failing to update the extant legal framework to the current state of technology." Since the Hotel Association ultimately supported the 2010 law, it

can be reasonably inferred that the law was passed partly since large hotels are trying to stop the development of Airbnb to prevent their profits from being harmed by the practice of Airbnb.

Besides attempts on rental services, in order to regulate the ride-hailing service platforms, states in US have created different laws. As mentioned above, in 2013, the CPUC created TNCs to regulate the market. Recognizing the need for regulation, the state legislature of Colorado also enacted Colorado Revised Statute §40-10.1-602, which is a law designed specifically to regulate TNCs such as Uber. Unlike the California regulation, it details specific rules and responsibilities for platforms and drivers. It provides a very clear definition for TNCs to set them apart from taxi services and requires specific safeguards such as insurance and background checks to protect passengers. In 2014, Washington created a more effective act than that introduced by Colorado and California named the “Vehicle for Hire Innovation Amendment Act,” which introduces a new class for platforms like Uber and Lyft. According to Jonas, “[t]he Act specifically states that companies cannot set exorbitant fares, even during a state of emergency,” in addition to those requirements set by the California and Colorado state legislatures [22].

Specifically targeting the treatment of independent contractors hired by the platforms, California state legislature introduced the AB-5 law in 2019, which went into effect in 2020. The AB-5 law incorporated the ABC test which states: “[a] worker is presumed to be an employee, unless the hiring entity can establish that: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) The person performs work that is outside the usual course of the hiring entity’s business; and (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. A worker cannot be classified as an independent worker unless all three requirements are met” [8]. Similar efforts were inspired in New York, New Jersey and Illinois as well. However, even though the purpose of this legislation is good, it met lots of pushback. A coalition of tech companies have pledged a reported \$110 million for a new measure on the November ballot to exclude app-based drivers. Lyft and Uber believe that the law does not apply to their drivers and are also trying other ways to escape this law [23]. According to a Barclays analysis, the benefits now required by the AB-5 law could increase the cost companies pay to workers by 20% to 30% and could be as high as a \$500 million and \$290 million increase in cost for Uber and Lyft respectively. Louis Hyman, professor of economic history at Cornell University concludes that it is unclear if any of these platforms will survive, and that workers may be the ones who will be harmed ultimately.

Even though there are lots of attempts by US legislators and politicians to regulate the sharing economy, the effects of these policies are mostly less effective compared to the initial expectation, and enforcement remains a serious problem. The platforms are not as cooperative as their counterparts in China, leaving the future unclear now. The next section will discuss the trade-offs and alternatives of those attempts mentioned above and some of the author’s thought about future regulatory patterns both in China and in US.

4. DISCUSSION

In this section, the trade-off of the AB-5 law, which is the most recent attempt by the state of California to provide a direct solution to the definition of employment status, will be discussed. A conclusion will then be provided about whether the AB-5 law should be considered as a national solution, which many Democratic Party politicians want to implement on the federal level. Other alternatives (especially the “third classification” beyond “full-time” or “contractor”) as well as new regulatory models for the United State will also be discussed in this section. In the end, there will be a quick discussion about how China will handle this new industry.

The California Assembly Bill 5 (AB-5) has been celebrated by those who seek to expand employment benefits for gig economy workers in the US. According to Veena Dubal, Associate Professor of Law at University of California Hastings College of the Law, the AB-5 law is “the first significant step in pulling [app-based] workers back under the ‘employee’ umbrella” by introducing a well-constructed test to determine the status of workers [24]. Dubal argues that in spite of the claim of these platforms that they facilitated “micro-entrepreneurship,” these individual workers actually bear all the risks of their “individual businesses” [24]. He believes that the AB-5 law will serve as the foundation for organizations of gig-workers such as Ride-share Drivers United (RDU) to bargain further with platforms such as Uber and Lyft for more rights and to “fight poverty while building a just and vibrant democracy” [24].

However, this law is not as perfect as these advocates think. According to Edward A. Zelinsky, the Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University, “the ABC test incorporated into AB-5 has its own interpretative challenges” [25]. As I mentioned in the Case Study section, AB-5 employ the “ABC Test,” which involves three factors that distinguish independent contractors from employees. As I discussed in the Case Study section, the “A” component of the AB-5 test asks whether or not the “employee” is “free from the control and direction of the hiring entity” to determine if he or she is a contractor or a full-time employee. Zelinsky argues the ambiguity

of the law mainly lies in the word “control.” However, the idea of lack of controls is defined in very elusive codes such as “is customarily engaged in an independently established trade, occupation, or business” or “performs work that is outside the usual course of the hiring entity’s business” [25]. To further clarify the issue, Zelinsky provides the example of an individual who is hired as a driver by Dynamex, a company that uses contract workers for deliveries.

Dynamex provides “a one-day delivery service throughout the nation” as well as in California. From the start, Dynamex treats its workers as employees with employment benefits. However, in 2004, Dynamex changed to define its drivers as “independent contractors . . . requiring [them] to provide their own vehicles and pay for all of their transportation expenses . . .” As a result, Dynamex drivers can now employ other drivers to help them deliver the goods and can work for themselves when not being dispatched by Dynamex [25].

As Zelinsky point out, because of this two-tier arrangement of workers and system of employment of drivers, it is hard to determine the status of a Dynamex driver under prong A of the ABC test of AB-5, which determines the issue of employment “control.” Zelinsky points out, when Dynamex drivers hire second-tier workers, it is unclear who “controls” them: the Dynamex driver or the Dynamex company [25]. Another issue that Zelinsky points out is that prong B of the ABC test stated that to be classified as independent contractors, workers must “perform[] work that is outside the usual course of the hiring entity’s business.” As Zelinski argues, given that today’s companies are very complex and that they touch or encompass various industries, it will be hard to establish, or may require extensive investigation to determine, whether a person works “outside the usual course” of their business.” Arun Sundararajan stated in his book that governmental investigation into individual platforms can be costly and ineffective [13]. Accordingly, implementing AB-5 will be very costly and potentially intrusive into operations of business, and it would require intense investigation for each application of the law.

Besides, Zelinsky believes that AB-5 is full of “exemptions and exceptions” from the ABC test for the classification of employee status and that “boundaries” of these exemptions “are often opaque” [25]. As an example, he points to AB-5’s exemption of “marketing services” from its ABC test. The law states that a stated individual who does “marketing services” would be exempt from the ABC test if the work that he or she performs “is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the [individual]” [25]. However, Zelinsky points out that the law does not indicate how to determine if the marketing work is “creative” or “imaginative” enough to qualify for this exemption and that it will require the

Courts to determine this in the future [25]. As a result, paradoxically, California’s attempt to provide clarity and simplicity to the problem of employee classification through government intervention has inadvertently created all kinds of new legal and employment classification problems that will require further resolution by the judiciary.

In short, AB-5 law sacrifices the simplicity, uniformity and clarity of employment law by automatically extending of work-based benefits and protections to all employees. Besides the exemptions I already mentioned, California’s AB-5 makes further accommodations and compromises lawyers, architects and engineers because many of these of professionals work on contract, as defined by treasury regulations that “[g]enerally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees” [25]. Uber and Lyft are also trying to lobby the state to exempt them from the AB-5 law. If Congress were to adopt AB-5 as a national model, it would inevitably encounter similar implementation problems in other states in the US and will require similar compromises and exemptions, as well as even more government intrusiveness into business operations to classify workers. Since the simplicity of the definition of employee statue is very significant for various areas including tax payment and employment benefits, it is unwise to trade the valuable simplicity of the definition of employee statue for an extension of protection for workers. One more problem is that since the AB-5 law is introduced in the most democratic state of the democratic party, and yet has to include a number of exceptions and exemptions, it is no wonder that when the law is introduced to other states, especially those republican states, more exceptions and exemptions will be introduced, thus creating more complexity.

When considering other alternatives, proposals for the creation of a third category of workers is not a good solution as well. For example, Harris and Krueger introduce a third category of workers called “independent workers”. The third category seems to be a good idea since these third category workers can at the same time retain their independence and enjoy certain valuable rights including the right to organizing collective bargaining, insurances, civil rights protections, employee benefits and tax withholdings. Krueger believes that the new category of workers can create more legal certainty. However, this is not the case. As in the case of the AB-5 law, this new category of workers needs laws to determine their status. The same things that happened to the AB-5 law will happen again to laws that attempt to create and define this new category of workers. Adding a new category of workers will only increase the complexity of the already complex problem, creating more legal uncertainty, which will make the law more

difficult to enforce and create more holes for those who want to seek unfair advantages.

Given the serious trade-offs of the AB-5 law and the ineffectiveness of relying on government enforcement of regulation, a government overseen self-regulatory system will be a better solution. In America, the federal government can issue general laws and guidelines clearly defining employees and independent contractors. The laws should include certain basic protections for independent contractor including minimum wage and certain basic insurance. States can then develop some more specific regulations that serve the different conditions in different states best to set the basic boundaries for platforms' activities and those independent contractors that work for these gig companies. The responsibility to enforce these regulations will mainly fall on these gig companies, which will mainly be achieved by Self-Regulatory Organizations (SROs) and Data-Driven Delegations as proposed by Sundararajan. Peer review systems and rating systems should also be constructed for the public and customers to speculate on the operation of the platforms and behaviors of individual independent contractors. The public will speak through medias and the internet when problems are observed and rely on the power and influence of medias to force government and companies to act to correct the problems. In this model of regulatory systems, the government, platforms and the general public each serve an important role, creating a system that is similar to the check-and-balance system that is now operating the US government. Each of these three groups will exercise some influences on each other and make sure no group will raise above the power of the other two groups. In general, the rights of customers and gig workers will be enforced, the government will bear fewer burdens of enforcement, while the platforms can continue to enjoy the benefits of their new business models.

The regulatory system for China will be slightly different. The Chinese government exerts much more control of the market and country than the US government, therefore having more power to more closely regulate the markets. It can be seen from past experiences that the regulations and enforcement of laws by the Chinese government achieved the goal of stabilizing the market and ensuring the healthy development of the gig economy. Though not 100 percent willing to cooperate with the Chinese government, platforms are forced to operate under the current regulatory system and work with the government to protect the gig workers and rights and safety of customers. In China, a government control regulatory system can be developed to regulate the market. The government will set specific law codes and guidelines for platforms to follow all over the country. Provincial governments will take up the burden of enforcing these laws and regulations. Platforms will enjoy an extent of

independence that will allow them to continue to innovate and create more efficient business models that benefit the society the most. The platforms will continue to operate the rating systems currently in use for customers to oversee the quality of services of individual gig workers and to discover problems while raising possible solutions. In short, as a result of the great power that the Chinese government exerts over the market, the government should and will take up most of the responsibility to regulate the market and protect the rights of the workers and customers.

5. CONCLUSION

The rapid development of the sharing economy, which is the new industry that allows customers to use digital apps to hire workers to provide services, raises numerous new problems in the area of regulation. Scholars have raised their ideas regarding the issues. Their ideas are represented in this research essay by Arun Sundararajan's proposal of a combination of Self-Regulatory Organizations (SROs), peer regulation and Data-Driven Delegations as well as Harris and Krueger's proposal of a third category of workers called "independent workers." There are numerous attempts historically by both the US and China to regulate this new industry. Direct governmental interventions in the gig economy, including the New York illegal hotel law and the California AB-5 law, have been proven ineffective in this essay. These regulations do not solve problems but create even more problems that make the situation more complex. In China, platforms cooperate with government to enforce the laws and regulations set by the Chinese government and ensure the rights and safety of market participants as well as the long-term growth of this industry in China.

As discussed in the discussion section of this research paper, the US and China should take similar but different approaches toward regulating this industry in the future. They should all develop a system of government, platforms and the public to cooperate and enforce the laws, but different groups will take up different amounts of responsibility in different countries. The difference in government power and political systems determines that these two most powerful countries with the biggest sharing economy markets will take different steps toward the same goal of protecting the rights of workers and customers while ensuring the continuous growth and prosperity of the sharing economy. There may still be other better ways for these two countries other than the two systems that are proposed in this section, and time will select the best of these for these two countries' growing sharing economy.

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