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The New Racial Wage Code

*Veena Dubal**

Abstract: The legal identity of on-demand platform workers has become a central site of conflict between labor and industry. Amidst growing economic inequality, labor representatives and workers have demanded that platform workers be afforded employee benefits and protections, including minimum wage and overtime rights. Platform industrialists, meanwhile, have proffered a new regulatory category of worker—neither employee nor independent contractor—that limits the protections available to the workforce, legalizes unpredictable, digitally-personalized piece-pay, and constricts a worker's right to negotiate different terms. To date, legal and socio-legal scholars have primarily analyzed this third category of worker, codified by Proposition 22 in the state of California, in race-neutral terms.

In this Article, I make visible the racial politics of this tiered system of worker protection. Using historical, legal, and ethnographic methodologies, I argue that the wage system created by Prop 22 and the third category of worker has been both rationalized (by industry) and contested (by labor) through a recognition of systemic racial inequalities. Adopting the language of racial justice, platform employers justified the legal elimination of pay for all time spent laboring (and other worker protections) as a means of providing economic opportunities to struggling immigrants and racial minorities. Workers, however, argued that the corporate recognition of racial inequality strategically neutralized political support for employment protections, including the minimum wage, thereby remaking racialized economic hierarchies and undermining labor solidarity.

Drawing on historical comparisons made by platform workers campaigning against Prop 22, Part I situates the third category of worker within a genealogy of industry-sponsored racial wage codes, proposals, and debates during the First and Second New Deals. In Part II, I argue that companies supporting Prop 22, like their early twentieth century counterparts, strategically used race as a resource to eliminate access to employment protections. Finally, in Part III, I analyze how platform workers who collectively fought the passage of Prop 22 rejected the rhetorical liberalism of their employers and examine their actions and visions for a path to racial and economic justice. Building on the workers' analyses and actions, I argue that facially neutral employment and labor rights carve-outs for the gig workforce are made possible by and reproduce racial subjugation. As the platform companies attempt to spread their Prop 22 wage model in other locales, lawmakers and labor representatives shaping or re-defining minimum employment standards must consider the racialized consequences of this formative reality.

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INTRODUCTION

On August 28, 2020, the anniversary of Martin Luther King's "I have a Dream" speech at the historic March on Washington for Jobs and Freedom, residents of downtown Oakland awoke to a prominent new billboard. On the corner of Broadway and Webster Street, directly above a popular lounge in the city's East African immigrant community, a large black and white advertisement displayed the slogan, "If you tolerate racism, *delete Uber*." Uber's Chief Diversity and Inclusion Officer triumphantly celebrated the campaign by tweeting, "Now is the time for all people and organizations to stand up for what is right."[1] During a summer of widespread Black Lives Matters protests prompted by the police killings of George Floyd and Breonna Taylor, as well as a global pandemic that disproportionately killed Black and Latinx workers, Uber erected similar billboards in cities across the U.S.[2]

The phrase, "If you tolerate racism, *delete Uber*," reappropriated the language from the memorable #DeleteUber campaign, launched as a direct action against the company by the New York Taxi Workers' Alliance (NYTWA) four years earlier.[3] In response to President Donald Trump's 2016 Executive Order 13769, which restricted immigration from seven Muslim-majority countries, thousands of protestors descended upon major U.S. airports and demanded that Trump rescind what became known as "the Muslim Ban." In solidarity with protestors and Muslim immigrants, including the majority of New York City's taxi, Uber, and Lyft drivers, the NYTWA organized a ride-hail work stoppage at the John F. Kennedy Airport. Shortly thereafter, confronted with the falling supply of rides, Uber's surge pricing directed drivers to the JFK airport, resulting in algorithmically-enabled strike busting.[4] This, in turn, outraged the protestors who amplified the NYTWA's call to #DeleteUber in the name of racial and economic justice.[5] Uber, the NYTWA pointed out, had decimated the incomes of the

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[1] Bo Young Lee (@jboyounglee), TWITTER (Aug. 27, 2020, 11:14AM), https://twitter.com/jboyolee/status/1299047636234833925?lang=en [https://perma.cc/3YHQ-Q9JD].

[2] Ian Zelaya, *Uber Urges Those Who Tolerate Racism to Delete the App*, ADWEEK (Aug. 28, 2020), https://www.adweek.com/brand-marketing/uber-urges-those-who-tolerate-racism-to-delete-the-app/ [https://perma.cc/8KVN-CDJH].

[3] NYTWA Statement on Muslim Ban, N. Y. TAXI WORKERS ALL., https://www.nytwa.org/solidarity [https://perma.cc/CPF6-C7T9].

[4] Elena Cresci, *#Delete Uber: How Social Media Turned on Uber*, GUARDIAN (Jan. 30, 2017), https://www.theguardian.com/technology/2017/jan/30/deleteuber-how-social-media-turned-on-uber [https://perma.cc/4LMX-6SHZ].

[5] In a statement, the New York Taxi Workers Alliance wrote, "Now is the time for all those who value justice and equality to join together in holding Uber accountable, not only for its complicity with Trump's hateful policies but also for impoverishing workers. Uber's greed and disregard for social values was evident before the company's CEO Travis Kalanick became an advisor to Donald Trump. And Uber drivers along with other professional drivers bear the brunt of that greed. . .Even as these corporations make million-dollar pledges today [Lyft donated $1 million dollars to the ACLU Immigrants' Rights Project to show opposition to the Muslim Ban], they still refuse to abide by Minimum Wage laws . . . .We are a workforce that is predominantly Muslim and Sikh, a workforce that is predominantly black and brown, and a

city's majority immigrant taxi workforce and refused to provide minimum wages or overtime to its own drivers. The hashtag trended for some time, and hundreds of thousands of people deleted the app from their phone.[6]

Four years later, Uber's new marketing slogan—"If you tolerate racism, *delete Uber*" —was unintelligible to many of its drivers. The morning after the first billboard was erected, an Uber driver snapped a photo of the sign on his smartphone and shared it with other drivers in a group text. "*What does this even mean?*" the driver asked. "*Where is that?*" another responded, *"What does being racist have to do with boycotting Uber?"*

For roughly seven months, members of California's ride hail and food delivery platform workforces—comprised primarily of immigrants and people of color—had been organizing to prevent Proposition 22 (Prop 22) from passing. The initiative threatened to take away the employment rights granted to California platform workers and to codify a third, substandard category of work for delivery and transportation "network workers." Many of these drivers had been laboring for Uber—and its competitor Lyft—for over half a decade. They had experienced the real-life impacts of continual wage cuts, black box algorithmic control, and (mis)classification as independent contractors. As the coronavirus pandemic ravaged their communities[7] and drastically reduced ride-hail demand, many drivers—despite their years of loyalty and hard work—were denied access to basic safety-net protections like health insurance and state unemployment benefits. Some were forced to choose between risking exposure to the virus and going hungry.[8]

In response to Uber's billboard, a coalition of ride-hail workers and groups organized a protest on September 9, 2020. Workers held up a banner, mirroring the font and aesthetic of Uber's billboard, which read, "If you

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workforce that is increasingly impoverished . . . That's why we are so incredibly proud of our members, including Uber drivers, who stood up to the injustice of the Muslim ban on Saturday." New York Taxi Workers' Alliance, Statement on #DeleteUber, FACEBOOK (Jan. 30, 2017), https://www.facebook.com/nytwa/posts/nytwa-statement-on-deleteuber-seeing-thousands-of-you-stand-up-in-defense-of-our/1565406936806813/ [https://perma.cc/D7K7-MLLJ].

[6] Paige Leskin, *Uber Says the #DeleteUber Movement Led to 'Hundreds of Thousands' of People Quitting the App*, BUS. INSIDER (April 11, 2019), https://www.businessinsider.com/uber-deleteuber-protest-hundreds-of-thousands-quit-app-2019-4 [https://perma.cc/AND9-D2W5].

[7] Transportation workers suffered disproportionate death rates in California as a result of the Covid-19 pandemic.Yea-Hung Chen, Maria Glymour, Alicia Riley, John Balmes, Kate Duchowny, Robert Harrison, Ellicott Matthay, Kirsten Bibbins-Domingo. *Excess mortality associated with the COVID-19 pandemic among Californians 18–65 years of age, by occupational sector and occupation: March through October 2020* 16(6) PLoS ONE (2021), https://www.medrxiv.org/content/10.1101/2021.01.21.21250266v1.full.pdf [https://perma.cc/F8ZB-6TEU].

[8] See, e.g., Veena Dubal & Meredith Whittaker, *Uber drivers are being forced to choose between risking Covid-19 or starvation*, GUARDIAN. (Mar. 25, 2020, 10:00 AM), https://www.theguardian.com/technology/2020/mar/25/uber-lyft-gig-economy-coronavirus [https://perma.cc/ATJ9-EWZL].

support racial justice, *Vote No on Prop 22*."[9] Prop 22, the workers explained to the crowd that gathered, would strip workers of the basic economic rights that the California legislature and courts affirmed they were owed—including an hourly minimum wage floor, overtime protections, and reimbursements for expenses. Indeed, the initiative entirely delegated to the companies the power to set individualized, non-standard labor prices. In sponsoring Prop 22, Uber, Lyft, DoorDash, Postmates, and Instacart invested a record $205 million dollars to campaign for, among other things, a differential wage code for the sector which would effectively legalize unpredictable piece-payment.[10] Drivers, under the terms of the proposition, would be paid by task, rather than by the time they spent laboring.[11] Incensed by what she called "Uber's hypocrisy," African American driver and Prop 22-protestor Mekela Edwards denounced the company for having "the gall to exploit the emotions of Black people with this billboard. While I am disappointed, I am not surprised because gig companies like Uber have been exploiting drivers for years now."[12]

Uber's billboard and the workers' protest made race visible as a central component of the fight over Prop 22 and the third category of worker, as well as what is colloquially referred to as "gig work" or "platform work": app-deployed, in-person service work that operates outside the boundaries of work law protections.[13] In the United States, such work is conducted primarily by immigrants and subordinated minorities. Although available statistics are limited, Lyft estimates that 69% of their U.S. workforce identifies as racial minorities. In California, which is both the most diverse and most unequal state in the U.S., this percentage is likely much higher.[14] Indeed,

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[9] Garret Leahy, *Uber Drivers Protest Billboard Campaign*, 48HILLS (Sept. 10, 2020), https://48hills.org/2020/09/uber-drivers-protest-billboard-campaign/ [https://perma.cc/Z46F-88XR].

[10] As discussed in Part II, *infra*, Proposition 22 applied to "transportation network company" workers and "delivery network company" workers. This is the first time in any US statute that delivery companies that deploy their workers via an app have been defined as such.

[11] Under Prop 22, drivers are not paid for the time that they spend waiting for a task. According to drivers in my research, this unpaid time ranges from 40-60% of all the time they spend working. See *infra* Part II for details. For more on digital piecework, see Veena Dubal, *The Time Politics of Home-Based Digital Piecework*, 2020 ETHICS IN CONTEXT 50 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3649270 [https://perma.cc/ESX8-Z49H].

[12] Leahy, *supra* note 9.

[13] Notably, the terms "gig work" and "platform work" do not describe a coherent sector of work. I use the terms in this article as a convenient shorthand. Work that requires shopping for and delivering food is a qualitatively different sector of work than ride-hail driving. Colloquially, however, these terms are generally used to describe work produced by companies that ascribe to a particular business model, one that disseminates assignments through a digital platform, pays by assignment, and maintains that workers are not legally entitled to employment protections, including the minimum wage, overtime, workers' compensation, unemployment insurance, and the right to collectively organize and bargain.

[14] In conversations with media representatives, Yes on Proposition 22 campaign representatives confirmed that people of color and immigrants make up the vast majority of drivers who labor for Uber and Lyft in California. In addition to the nationwide Lyft data, we know that in New York City, 9 out of 10 ride-hail drivers are immigrants, and in Seattle 72% are immigrants and 50% Black. Gina Bellafante, *Uber and the False Hopes of the Sharing Economy*, N.Y.

one study estimates that in the San Francisco Bay Area in 2019, immigrants and people of color comprised 78% of Uber and Lyft drivers, most of whom relied on these jobs as their primary source of income.[15] In this highly racialized labor market, wages are low, unpredictable, and frequently fall below the minimum wage.[16] Through the use of opaque data collection and hidden algorithms, companies personalize wages for each worker, which allows the companies to practice first degree labor price discrimination.[17] As a result of this unpredictable and inconsistent wage calculation system, workers sometimes make no money—or even lose money—after considering vehicle expenses.

Rather than addressing racial inequalities by improving the precarious working conditions of their primarily people-of-color workforce, the ride-hail companies Uber and Lyft have used the existence of such inequalities as a resource to justify and legalize their business model. During their record-breaking campaign to pass Prop 22, the companies deployed the rhetoric of social justice and sought support from and alliances with a number of identity-based groups.[18] In addition to erecting "delete Uber" billboards, Uber announced in an open letter penned by the CEO that they were an "anti-racist" company and donated to criminal justice non-profits—identifying ra-

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TIMES (Aug. 9, 2018), https://www.nytimes.com/2018/08/09/nyregion/uber-nyc-vote-drivers-ride-sharing.html [https://perma.cc/26R9-FF4H]; James A. Parrot & Michael Reich, *A Minimum Compensation Standard for Seattle TNC Drivers* (July 2020), https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf [https://perma.cc/NW6K-QV6N].

[15] Chris Benner, Erin Johansson, Kung Feng & Hays Witt, *On-Demand and on-the-Edge: Ride-Hailing and Delivery Workers in San Francisco*, UC SANTA CRUZ INST. FOR SOC. TRANSFORMATION, https://transform.ucsc.edu/on-demand-and-on-the-edge/ [https://perma.cc/N6CJ-U9Z6].

[16] Uber and Lyft have resisted efforts by the California Public Utilities Commission to share trip and earnings data for drivers. *See* Sarah McBride, *Uber's Fight of California Data-Sharing Rule Highlights its Bumpy Road*, REUTERS (Dec. 18, 2024), https://www.reuters.com/article/us-uber-california-data/ubers-fight-of-california-data-sharing-rule-highlights-its-bumpy-road-idUSKBN0JX01320141219 [https://perma.cc/5X25-9L3S]. Debates over the wages of these ride-hail workers are often not about the data, but about the assumptions made in analysis over expenses. Typically, industry-funded research studies do not adequately calculate and include either waiting time or expenses. *See, e.g.* Dara Kerr, *How Uber and Lyft Battled Seattle over Minimum Wage For Drivers*, CNET (Jul. 14, 2020), https://www.cnet.com/news/heres-how-uber-and-lyft-battled-seattle-over-minimum-wage-for-drivers/ [https://perma.cc/4EXS-2BS5].

[17] First degree price discrimination is most frequently discussed in the context of personalized prices for consumers. Personalized prices can reflect how much a consumer can pay or would be willing to pay for services or products. But this personalization is increasingly happening in the workplace as well. Firms like Uber and Lyft practice first degree *labor* price discrimination to personalize income for workers: collecting individualized data on workers and using that data to algorithmically determine income through a personalized allocation of bonuses and tasks. Together, these systems are used to invisibly control worker behavior. For more on personalized wages, see Zephyr Teachout, "Personalized Wages, Experimentation, and Labor Monopsony Law." Working paper (2021). On file with author.

[18] According to the Yes on Prop 22 campaign, groups that supported Prop 22 included California-Hawaii State Conference of the NAACP, California National Action Network, Sacramento National Action Network, Los Angeles National Action Network, Black Women Organized for Political Action, Compton Branch NAACP, National Asian American Coalition, and the Sí Se Puede Foundation of Fresno, Tulare, Kern and Kings Counties. *Our Coalition*, YES22, https://yeson22.com/coalition/ [https://perma.cc/W7M3-4WLR].

cial inequality in the carceral state while ignoring its presence in the economy.[19] Lyft, for its part, published blogposts condemning "systemic racism," joined forces with the National Action Network, and unveiled LyftUp, an initiative to provide donated rides to underserved communities.[20] Drivers in my research disavowed these gestures by the companies as a "smokescreen." Their lives and racial identities, they insisted, were being instrumentalized for profit.

Many drivers critical of Prop 22 identified their exclusion as reminiscent of earlier moments in U.S. history, in which racial minority workforces were denied the same rights as other workers and, in particular, were excluded from minimum wage protections. For instance, in one of my conversations with her, Nicole Moore, a Lyft driver and organizer with Rideshare Drivers United, a statewide group of self-organized ride-hail drivers, described Prop 22 as part of a lineage of racial exclusion from state work protections:

> Prop 22 plain and simple puts all of us app-based workers in a second-class worker status. Permanently. Historically, who else hasn't been covered by the minimum wage? Domestic Workers. Farm Workers. And now App-Based workers. And just like domestic and farm workers, we're a majority people of color and immigrant workforce – and somehow people make up lies that it's OK for us to not have access to the same protections and wage floors as everyone else.[21]

As Nicole and other workers in my research indicated, this was not the first-time workers of color had been carved out of the protection of employment laws. Like Uber and Lyft, early twentieth century industrialists campaigned for differential wage regulations and even sectoral carveouts for majority Black workforces, denying these workers access to minimum wage protections, unemployment insurance, workers' compensation, and the protected rights to organize and collectively bargain. Over the protest of many African American workers, civil society leaders, and organizations, they succeeded.

This Article takes seriously the drivers' comparison between Prop 22 and this earlier historical moment, when subordinated racial minorities were first carved out of employment and labor law protections. Following Charles Mills' call to engage in knowledge production through a color-conscious genealogy,[22] I use legal and ethnographic research conducted before, during

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[19] Dara Khosrowshahi, *Being an Anti-Racist Company*, UBER NEWSROOM (Jul. 17, 2020), https://www.uber.com/newsroom/being-an-anti-racist-company/ [https://perma.cc/AJ56-XGFX]. In response to this campaign, one ride-hail driver responded sarcastically, "Good Lord. War is peace. Equality is for some people, but not all." Veena Dubal, Fieldnotes (on file with author).

[20] *Introducing LyftUp: Transportation Access for All*, LYFT BLOG (Jan. 21, 2020), https://www.lyft.com/blog/posts/lyftup-bikes [https://perma.cc/KY4E-SQYV].

[21] Interview with Nicole Moore, Rideshare Drivers United (Dec. 2020).

[22] Mills writes that in the sociology of knowledge (referring to philosophy), we "need to highlight the role of historical amnesia (the suppression, or the downplaying of the signifi-

and after the campaign to pass Prop 22 to reframe "the third category of worker" and Prop 22 against the backdrop of the racial wage codes and sectoral carveouts that were proffered, debated, and passed during the First and Second New Deals.[23] In Part I, I show the central role that race and white supremacy played in the formation and implementation of this early 20th century regulation. Drawing on an economic logic rooted in classical racism (e.g., the alleged racial inferiority of African Americans as workers), industrial and agricultural representatives lobbied for lower wage floors for African American workers and advanced facially neutral exclusions from employment and labor laws for sectors in which African Americans constituted the majority of the workforce.

Workers in my ethnographic research insisted that Prop 22 builds upon and tracks this torrid history. In Part II, I argue that Uber, Lyft, DoorDash, Instacart, and Postmates, like early twentieth century industrialists, used race as a resource to eliminate access to minimum wage and overtime protections (among other employment rights) and justified their actions through the mirage of racial benevolence. The companies leveraged the discursive power of liberalism to make their case, while rendering invisible the racialized economic structures and injustices experienced in the everyday lives of many workers. Rather than overtly discuss Prop 22 as a differential wage code or carveout for a workforce of color, the companies munificently framed the initiative as an economic opportunity for struggling immigrants and minorities. I challenge this benevolent framing in Part III by centering "voices from below." Drawing on my embedded ethnographic research of self-organizing Uber and Lyft drivers in California, I show that these ride-hail workers rejected a sub-worker status. These workers fought to oppose a law that would maintain their subjugation and organized to stem the tide of racialized mis-

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cance, of certain facts), [and] the group interests . . . of the privileged race . . . ." in order to address the fact our contemporary, mainstream understandings of the world evade the reality that the U.S. was built on expropriation, slavery, and political, economic, and social segregation. CHARLES W. MILLS, BLACK RIGHTS/WHITE WRONGS: THE CRITIQUE OF RACIAL LIBERALISM 116 (2017). In response to this call, this article is an intervention in the literature on labor platform work.

[23] The ethnographic research that informs this article reflects six years of embedded research amongst self-organizing Uber and Lyft drivers in the San Francisco Bay Area, beginning in 2014 after the first protest in front of Uber headquarters. This research includes thousands of hours of participant observation and action at drivers' meetings, protests, in meetings with regulators, on group phone calls and texts, in government hearings, on social media, and one-on-one conversations. With some drivers, who I came to know over a period of time, my ethnography continued into social spaces. All the workers in the drivers' groups I studied were Uber or Lyft drivers, and many worked for other gig platforms as well, including Wonolo, Doordash, Instacart, UberEats, and Postmates. In the course of my ethnographic research, I interacted with hundreds of drivers of many backgrounds. The findings from my in-depth interviews reflected and were reinforced by the realities I observed through participant observation and everyday conversations with workers. Alongside and at the behest of drivers who were organizing against Prop 22, I attended protests, spoke at townhalls, wrote public essays, and spoke to newspaper editorial boards about the potential impacts of the proposed law on the intended workforce. In this Article, to protect the identity of most workers in my research, I have used first name pseudonyms. For workers who assumed a public role by speaking publicly or writing opinion pieces, I use their real first and last name.

ery by supporting one another through mutual aid and by demanding material justice. In doing so, the workers laid out an alternative framework to address the precarities of platform work: social justice unionism built through the fight for racial equality and basic employment rights.

Based on these research findings, I conclude that facially neutral employment and labor law carve-outs for the highly racialized gig workforce—whether achieved through legislation or agreements with labor representatives—(re)produce and are made possible by racial subjugation.[24] As the labor platform capitalists attempt to spread the third category of worker to other states, countries, and sectors, this Article makes clear the ways in which a third category of work that lowers baseline employment standards is constituted by racial inequalities and how—even in the face of collective worker resistance—it can perpetuate them. Lawmakers and labor representatives seeking to re-define basic work protections in the context of platform work must consider the racialized consequences of this formative reality.

I. RAW DEAL-ERA WAGE LAWS: HOW LEGAL CORRECTIVES TO ECONOMIC INEQUALITY ENTRENCHED RACIAL INEQUALITY

"We are becoming convinced that it is because we are poor and voiceless. . .that we are able to accomplish so little [as a civil liberties organization]. . .we believe that what the Negro needs primarily is a definite economic program."

–NAACP in Address to a Century, 1932[25]

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[24] A few months after Prop 22 passed, two proposed state bills circulated, one in Connecticut and one in New York state, both of which reflected the basic principles of Prop 22. Both were supported by the Independent Drivers Guild, an organization that emerged in 2016 from a private contract between Uber and a branch of the Machinists Union in New York City. The specific terms of the private contract are secret, but IDG received funding from Uber in exchange for agreeing not to strike or challenge the employee status of workers. Since then, the IDG has received funding from both Uber and Lyft. *See* Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, BLOOMBERG BUSINESSWEEK (Feb. 17, 2021), https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote [https://perma.cc/U8JX-96ZH]; Veena Dubal, *Gig Worker Organizing For Solidarity Unions*, LPE PROJECT (Jun. 2019) (reviewing the IDG's origins and problematics), https://lpeproject.org/blog/gig-worker-organizing-for-solidarity-unions/ [https://perma.cc/FJX8-4EAM]. In these draft bills, platform workers are stripped of basic employment protections in exchange for a sectoral bargaining agreement. But the terms of the sectoral bargaining agreement create a funding mechanism for a union that represents platform workers, while depriving the workers of many rights, including, most relevant for this article, the right to be paid for all time spent laboring. Kate Andrias, Mike Firestone & Benjamin Sachs, *Lawmakers Should Oppose New York's Uber Bill: Workers Need Real Sectoral Bargaining Not Company Unionism*, ONLABOR (May 26, 2021), https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/ [https://perma.cc/3PGT-73U5]. Had they been introduced and passed, these proposals would have enshrined Prop 22's racial wage code by legalizing the workers' independent contractor status and guaranteeing payment only for "engaged time."

[25] RAYMOND WOLTERS, NEGROES AND THE GREAT DEPRESSION: THE PROBLEM OF ECONOMIC RECOVERY 40 (1970).

The first federal minimum wage regulations were promulgated during the Great Depression, initially through the National Industrial Relations Act (NIRA) and later the Fair Labor Standards Act (FLSA). The federal wage and hour regulations embedded in these laws were bold legal re-imaginings of U.S. capitalism. The goal, in part, was to address the devastating precarity and bolster the consumptive capacities of millions of workers who, if they had work, suffered from unpredictable, too-low earnings.[26] But while raising the wages of many U.S. workers to reignite the economy, both the NIRA (1933) and the FLSA (1938) also conspicuously created differential wages and wholescale legal exclusions for majority African American workforces, building racial inequality into the structure of the economy and undermining the economic stability of Black communities for decades to come.[27]

In response to the racist demands of industrialists and a southern bloc of Congressmen who represented the interests of plantation owners, these Depression-era laws maintained the economic subjugation of African Americans.[28] While uplifting white workers and "providing the most hospitable climate ever fashioned in American history. . .for decent enforceable conditions of employment,"[29] these first wage laws entrenched the existing boundaries of racial hierarchy through the legalization of lower wages for Black workforces and wholescale work law exclusions for racialized sectors.[30] For Black America, these carveouts were, in historian Harvard Sitkoff terms, "an old deal, a raw deal."[31]

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[26] These laws consolidated the relationship between labor, consumption, fair competition, and democracy, instituting national work norms and cultures that endure a century later. LAWRENCE GLICKMAN, A LIVING WAGE 67 (2015).

[27] Historian Keona Ervin calls the New Deal's carveouts for Black workers—and Black women workers, in particular—the creation of a welfare state was "negligent and antagonistic." KEONA K. ERVIN, BREAKING THE 'HARNESS OF HOUSEHOLD SLAVERY': DOMESTIC WORKERS, THE WOMEN'S DIVISION OF THE ST. LOUIS URBAN LEAGUE, AND THE POLITICS OF LABOR REFORM DURING THE GREAT DEPRESSION 49–66, 88 (2015).

[28] *See* Ira Katznelson, FEAR ITSELF: THE NEW DEAL AND THE ORIGIN OF OUR TIME 179 (2013).

[29] Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 2 (2005).

[30] *See* PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA (2015).

[31] HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 26 (2009). According to the 1930 census, about 40% of African American wage earners were in engaged in some form of agricultural work, and of these about 70% worked as wage hands, sharecroppers, and share tenants and another 10% as cash tenants. Of African Americans who lived in urban areas, almost 25% worked as domestic workers. Wolters, *supra* note 25, at 92. Despite these racialized carveouts, historians and economists generally agree that racial inequality narrowed after the New Deal and through the civil rights movement, in no small part because of the growth of unions and the Democratic political alliances that grew in the New Deal's aftermath. *See e.g.*, Eric Schickler, *Racial Realignment*: The Transformation of American Liberalism, 1932-1965, at 5 (2016); Henry S. Farber, Daniel Herbst, Ilyana Kuziemko, and Suresh Naidu, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data* (NBER Working Paper No. 24587 Apr. 2021), https://www.nber.org/system/files/working_papers/w24587/w24587.pdf [https://perma.cc/A5AL-Q9AB].

Labor platform companies today distance themselves from this racialized history through a rhetoric of racial benevolence. However, by returning to these earlier debates, I reveal the ways in which these companies today rely upon analogous arguments to justify a substandard wage code for their predominantly immigrant and racial minority workforce. I also argue that, as African American civil society organizations feared, such facially-neutral wage codes placed severe restrictions on economic mobility for African American families and exacerbated racial disparities.

A. The National Industrial Recovery Act and Racial Wage Differentials

"One may safely give long odds that when the Economic Fathers set out to establish the present machinery for industrial recovery they had not the slightest idea that they would meet such a problem as that of a wage differential based on race."

—Ira De Augustine Reid[32]

While the Civil War formally ended the institution of slavery, it did not "end the southern plantation owner's need for a cheap supply of labor or the regime of white supremacy. . ."[33] By 1930, more than one half of African Americans still lived in Southern states and were disproportionately employed in agricultural and domestic labor.[34] Black workers who migrated North had made some economic strides, but many were unemployed, and those who labored in industry systematically earned lower wages than white workers—often for the same work.

African American civil society organizations and workers initially hoped that the NIRA would be a first step in a larger economic reckoning to come for their communities. The NAACP, for its part, supported the 1933 passage of the NIRA to relieve economic distress and despair, especially in African American communities. Black workers enthusiastically joined the parades and demonstrations organized in support of the National Recovery Administration (NRA) after the agency was established to negotiate and set wage codes and price controls.[35] Industry-wide minimum wages, together with the NIRA protection of the right to organize would, the civil society organizations believed, raise the standard of living for all workers laboring in both industry and agriculture.[36]

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[32] Ira De Augustine Reid, *Black Wages for Black Men* OPPORTUNITY, Mar. 1934, at 73–76. Reid was a prominent African American sociologist who wrote extensively on the lives of Black communities in the United States. He was also active in the National Urban League and served as editor of the NUL's newsletter, *Opportunity*.

[33] Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335–48 (1986).

[34] SITKOFF, *supra* note 31, at 27; Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion From the National Labor Relations Act*, 72 OHIO ST. L.J. 95–100 (2011).

[35] WOLTERS, *supra* note 25, at 92.

[36] *See* SULLIVAN, *supra* note 30.

These hopes were soon extinguished. Lacking an explicit anti-discrimination provision, the NIRA did little to address the economic plight of Black workforces. Agricultural workers, two-thirds of whom were Black, were largely excluded (though not unequivocally, as with later New Deal laws),[37] and wage discrimination against Black workers in industry pervaded both the establishment of wage codes and their enforcement.[38] Domestic workers, many of them Black, were explicitly excluded.[39]

In industries where codes were established by the NIRA, Black workers faced, in the words of historian Dona Hamilton, "the battle of their lives."[40] Industrialists submitted wage codes "which shamelessly included grossly discriminatory provisions with reference to Negro labor. Most of the codes. . .provided. . .for a *differential wage rate of twenty to forty percent.*"[41] (emphasis added). The situation was particularly dire in cotton-dependent states where industrialists argued for the lowest wage scales. Using statistics to prove "it was 'both necessary and expedient to permit a differential wage for Negro workers,'"[42] employers relied heavily upon classical racist stereotypes to substantiate their arguments. Black workers, they claimed, were inefficient and Black families able to subsist on much less than white families.[43] Paying Black and white workers equally, then, was both unnecessary and economically untenable. The industrialists also maintained that to require them to pay their workers equally would mean the displacement of Black workers from their jobs.[44]

African American civil society organizations vociferously opposed these industrialists' contentions, drawing attention to the long-term consequences of differential wages for African American workers.[45] By 1933, in response to the lack of representation of Black worker interests in the NRA code hearings, the NAACP, National Urban League, Negro Industrial League, and thirteen other civil society organizations formed the Joint Committee on National Recovery (Joint Committee) which monitored the establishment of codes in industries where a substantial number of African American workers

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[37] *See* Linder, *supra* note 33, at 1355–64 (discussing how agricultural workers were administratively excluded during NRA debates); Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416, 416–17 (1995).

[38] *See* Linder, *supra* note 33, at 1354.

[39] In describing the NIRA carveout for domestic workers and its logics, Keona Ervin writes, "Reformers understood industrial work as logical, rational, and thus naturally subjected to 'scientific" processes.' By contrast, household work appeared to be individualistic, decentralized, and 'personal' . . . 'Should the problem of household employment be approached as many employers insist as one of right personal relations or of right economic relations?' advocates questioned." This imagined division between home and work undermined efforts to reform working conditions for domestic workers. ERVIN, *supra* note 27, at 59.

[40] Dona Cooper Hamilton, *The National Association for the Advancement of Colored People and New Deal Reform Legislation: A Dual Agenda*, 68 SOC. SCI. REV. 488, 490 (1994).

[41] *Id.*

[42] *Id.*

[43] WOLTERS, *supra* note 25, at 102.

[44] *Id.* at 102–03.

[45] *See generally id.*; Sullivan, *supra* note 36; Hamilton, *supra* note 40, at 490.

labored.[46] Responding to the dual impact of the Great Depression and exclusionary federal initiatives of the New Deal on African American workers, the Joint Committee submitted briefs arguing against differential wage rates during NRA hearings.[47]

The Joint Committee's positions, however, were not embraced by all African American leaders. Some believed that labor market racism was inevitable and accepted the industrialist's argument that a differential wage code for Black workers would mean that those workers could keep their already tenuously held jobs and livelihoods. This concern led to the ambivalent silence of some people,[48] but a few leaders took affirmative steps to endorse the industrialist position. Robert Moton, the second President of Tuskegee Institute, for example, (in)famously joined an NRA petition by Southland Manufacturing Company, which employed Black workers in Alabama, requesting an exemption from code regulations.[49] Southland's petition was made on the grounds that Black workers were "inefficient" and that, accordingly, the company needed time to bring the workers up to the standards of the industry.[50]

Moton believed that a policy of differential wage codes for an African American workforce was necessary to ensure their continued employment. Black workers were experiencing rates of unemployment 30-60 percent higher than that of white workers, and in this context, Moton argued that some work, however poorly paid, was better than none.[51] The Joint Committee, however, vehemently opposed this petition, maintaining that the long-term fight for socioeconomic equality would be crippled by a differential wage rate in which African Americans, by law, made less than their white counterparts.[52]

George Weaver, an influential African American economist who later became the first Secretary of Housing and Urban Development, laid out the Joint Committee's position on differential wage codes for Black workers in a 1934 Issue of the NAACP newsletter, *Crisis*. He argued that lower wages for Black workforces would not only destroy the economic advances that African Americans had made since the Civil War, but that, importantly, it would

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[46] Sullivan, *supra* note 36, at 43–44.

[47] Hamilton, *supra* note 40, at 491.

[48] George Weaver, *A Wage Differential Based on Race*, CRISIS, Aug. 1, 1934, at 236, 238.

[49] Hamilton, *supra* note 40, at 491.

[50] *Id.* at 491–92. Other southern advocates made similar arguments. J.F. Ames of Montgomery, Alabama," for example, "prepared a study [called] 'The Subnormal Negro and the Subnormal Code,' in which he maintained that [Black] labor was 30 percent less efficient than white." WOLTERS *supra* note 25, at 101.

[51] Prior to the Supreme Court finding NIRA to be unconstitutional and the subsequent passage of the FLSA, Roosevelt issues an order specifying maximum work and minimum wages across industries for voluntary compliance. This "blue eagle agreement" ended up, spurred a debate about the potential of Black worker displacement, particularly in the South. WOLTERS *supra* note 25, at 91.

[52] The NRA ultimately denied the petition after finding that the "inefficiency" of the plant was due to outdated machinery and not slow Black workers. Hamilton, *supra* note 40, at 492.

also impede the strength and effectiveness of the larger labor movement. According to Weaver,

> "[T]here is more involved in this question than the arresting of Negro displacement. . .The establishment of a lower minimum wage for Negroes. . .would destroy any possibility of ever forming a strong and effective labor movement in the nation. *The ultimate effect would be to relegate Negroes into a low wage caste and place the federal stamp of approval upon their being in such a position.*"[53] (emphasis added)

The NAACP and Joint Committee were successful in campaigning against differential wage rates based *explicitly* on race, but wage discrimination against Black workers under the NRA-promulgated codes nonetheless persisted via facially neutral mechanisms. Work that received lower protections was defined by industry and location, but inevitably, like with platform work today, the workers most affected by these lower standards were workers of color. Racial discrimination permeated the NRA codes; for instance, the codes often allowed lower wage classifications in the South, where African American workers were concentrated, as well as in industries with a majority African American workforce, while maintaining code coverage for primarily white sectors of work.[54] Of the first 275 wage codes established, 114 contained regional differences, which the Joint Committee argued, created racial wage differentials *in practice.* States, like Delaware, were even inconsistently labeled "southern" to pay lower minimum wages if the employees in the industry within that state were majority African American.[55] As Gustav Peck, Executive Director of the NRA's Labor Advisory Board,[56] wrote in 1934, "to the degree the southern rate is a rate for Negroes, it is a relic of slavery and should be eliminated."[57]

While the reign of the NRA was short-lived—it would cease operations in 1935, shortly after the Supreme Court ruled Title I of the NIRA to be unconstitutional— the wage cultures to which it gave rise endured.[58] The

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[53] Weaver, *supra* note 48, at 238.

[54] Linder, *supra* note 33, at 1354.

[55] Linder, *supra* note 33, at 1355. As Wolters points out, John Davis, an African American leader argued that the Mason and Dixon line shifted widely between codes, and "these shifts were related to the proportion of Negroes in each industry." WOLTERS *supra* note 25, at 129. In the case of most industrial wage codes, for example, Delaware was placed in the North and given the higher wage applicable to the North. But in the case the fertilizer industry which was occupied primarily by African American workers, Delaware was defined as being in the South and fertilizer workers given the lower wage rate. *Id.*

[56] *Dr. Gustav Peck Gets NRA Post*, N.Y. TIMES, Nov. 15, 1934, at 2.

[57] Gustav Peck, *The Negro Worker and the NRA*, THE CRISIS, Sept. 1, 1934, at 262, 262–63.

[58] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Supreme Court invalidated NIRA on grounds that Congress had improperly abdicated its legislative function to the Executive branch to establish fair prices and wage codes. Labor and antitrust law scholar Sanjukta Paul writes on this judicial invalidation of NIRA, "[W]e can ask if the outcome would have been different if Congress had articulated the principles that define "fair competition," delegating only their application to particular sectors. In practical terms it would

New Deal legislation that followed—including the National Labor Relations Act (1935), Social Security Act (1935), and the Fair Labor Standards Act (FLSA, 1938)—recreated many of the racially explicit carveouts and differentials that became de facto realities for African American workers under the agency governance of the NRA.

B. Facially Neutral New Deal Carveouts and Wage Differentials as Racialized Work Laws

"The truth of the matter is that the southern wants a lower wage scale because they do not wish Negroes to have wages equal to whites."[59]
—Roy Wilkins (1938)

Unlike the NIRA, the carveouts for agricultural workers and domestic workers in the FLSA, SSA, and NLRA were not the product of insidious maneuvering at the agency level. Rather, the exclusion of these majority African American workforces was made explicit in the text of the legislative bills.[60] Charles Houston, a board member of the NAACP, testified that the more he studied the proposed laws, "the more it began to look 'like a sieve with holes just big enough for the majority of Negroes to fall through.'"[61]

The aim of the FLSA, the final piece of New Deal legislation, was to "eliminate conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers."[62] Influenced by their experiences with the NRA wage-code promulgation, the NAACP and other African American civil society organizations supported universal coverage of the minimum wage and opposed both the geographic wage rate differential and the exclusion of agricultural and domestic workers. The wage exclusion for agricultural and domestic workers left the racialized hierarchies of the plantation system in place and sparked

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have not, because the Court also held that the statute exceeded Congress' commerce clause power—but that ruling, unlike the nondelegation holding, has been superseded." Sanjukta Paul, *Reconsidering Judicial Supremacy in Antitrust*, 131 YALE L.J. (forthcoming 2021).

[59] WOLTERS *supra* note 25, at 106. Roy Wilkins was a prominent civil rights activist, NAACP leader, and editor of the NAACP's the *Crisis* after W.E.B. DuBois.

[60] Disabled workers were also formally exempted from the FLSA, as they were from the NRA through an exemption for "sheltered workshops." Since then, as Samuel Bagentos writes, "The FLSA's requirements for workers with disabilities have changed through the years, with Congress going back and forth on whether to impose a floor on the wages of those workers who were not entitled to be paid minimum wage." Samuel R. Bagenstos, *The Case Against the Section 14(c) Subminimum Wage Program*, NAT'L FED'N OF THE BLIND http://thegao.org/wp-content/uploads/2012/03/Bagenstos.pdf [https://perma.cc/8S8M-SS5B]. In 1986, Congress through Section 14(c) amended this exemption to create what scholars have called the subminimum wage by authorizing employers to pay disabled workers who are not entitled to the minimum wage, an amount "commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work," and "related to the individual's productivity." 29 U.S.C. § 214(c).

[61] Hamilton, *supra* note 40, at 495.

[62] 29 U.S.C. § 202(a).

protests from workers, NAACP leaders, and union organizers.[63] The geographic wage rate differential for labor that was ultimately included within the FLSA, these advocates correctly feared, mapped onto a racial wage rate differential, just as it had under the NRA codes.

In their 1937 Annual Report, the NAACP argued that creating another geographic wage differential as a concession to southern states, based ostensibly on the cost of living in those places, "would result in a special wage level for Negroes; and that if such a measure should be passed, lower standard wages for Negroes will be fixed with government sanction for years."[64] Black organizations and community members sent letters to Congress in which they argued that the purpose of federal minimum wage was to raise the living standards of *all* and that creating a differential wage rate based on geography or industry would defeat this aim.

Upon the insistence of southern members of Congress, white supremacy was officially upheld through these work law carveouts. Southern political support for any remedial legislation hinged on the preservation of the plantation system and the subjugation of Black agricultural and domestic workers upon whom the social, political, and economic culture of the South depended.[65] Even the definition of an agricultural worker became a racialized endeavor. Were tobacco workers defined as agricultural workers, excluded from the law? How about those workers involved in canning and processing of agricultural products? Answers to these questions, which invariably disfavored Black workers, had both immediate and long-term impacts on African American communities.[66]

The FLSA's agricultural and domestic worker carveouts persisted for several decades until, in the late 1960s and early 1970s, Congress amended the law in response to robust social and labor movements and, in particular, the "persistent actions of excluded groups to reconstruct cultural ideas of work."[67] In 1966, a labor alliance between the American Federation of Labor, Congress of Industrial Organizations, and the NAACP successfully convinced Congress that agricultural work was sufficiently "industrial" in nature to be included in the FLSA, but agricultural workers remained exempt from overtime protections.[68] Eight years later, after a decade of organized agitation by African American women, domestic workers also gained FLSA protections.[69] Nevertheless, the legacy of the New Deal carveouts alongside

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[63] William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 700 (1999).

[64] Hamilton, *supra* note 40, at 497.

[65] Linder, *supra* note 33, at 1351–53. Domestic workers were ostensibly excluded on the grounds that their coverage fell outside the bounds of interstate commerce. At the time of the FLSA's passage, domestic workers, "had the lowest annual wages and the highest concentrations of nonwhite workers." Palmer, *supra* note 37, at 419.

[66] Even though agricultural workers were extended minimum wage protections under the FLSA in 1966, they remain ineligible for overtime. Linder, *supra* note 33, at 1337.

[67] Palmer, *supra* note 37, at 418.

[68] *Id.*

[69] *See generally* Premilla Nadasen, *Citizenship Rights, Domestic Work, and the Fair Labor Standards Act*, 24 J. OF POL'Y HIST. 1, 74–94 (2012).

sustained racial inequalities in the labor and housing markets and in public expenditures is found today in the stark racial gaps in wages and wealth.[70]

This history of early 20th century differential wage codes for Black workers is an enlightening prelude to current debates over minimum wage codes for platform workers. Understanding how those earlier laws served as the legal tools of sustained racial oppression helps make evident what Prop 22 and the third category of work portends—exacerbated racialized economic immiseration.

As was (and remains) true in the agricultural and domestic work sectors, racial minorities make up a disproportionate majority of the in-person platform workforce not incidentally, but *because of* the predacious practices central to the business models. While companies claim to offer marginalized workers ease of entry to the labor market, my research suggests that for workers who labor fulltime at these jobs, their "inclusion" often jeopardizes the benefits of the work itself.[71] Without the guardrails of minimum wage and overtime laws, for example, their incomes often fall short of expectations and needs. In contrast to this early 20th century era in which legislators and businesses openly advocated white supremacy, in today's color-coded configuration of poverty, racial hierarchy is often subtextual. As I argue in the following section, however, now as then, racial hierarchy was written into the business models of dominant industries and enshrined in law.

II. "REPRESENT AND DESTROY"[72]: CALIFORNIA'S PROPOSITION 22 AS THE NEW RACIAL WAGE CODE

"It is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime."

—James Baldwin (1963)[73]

"It should not be possible to be anti-racist without being against oppression. Yet race-liberal hegemony has been so effective that today. . .everyone is an antiracist, and yet oppression is banal and ubiquitous."

—Jodi Melamed (2011)[74]

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[70] *See* Elise Gould, *Racial Gaps in Wages, Wealth, and More*: A Quick Recap, WORKING ECON. BLOG (Jan. 26, 2017), https://www.epi.org/blog/racial-gaps-in-wages-wealth-and-more-a-quick-recap/ [https://perma.cc/SXA5-CFY]; David Leonhardt, *The Black-White Wage Gap Is as Big as It Was in 1950*, N.Y. TIMES (Jun. 25, 2020), https://www.nytimes.com/2020/06/25/opinion/sunday/race-wage-gap.html [https://perma.cc/4HCD-5DSZ]. Both domestic and agricultural workers remain uncovered by the National Labor Relations Act.

[71] Here, I draw on the work of Louise Seamster and Raphaël Charron-Chénier in their conceptualization and theorizing of the phrase "predatory inclusion." Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOC. CURRENTS 199, 199 (2017).

[72] JODI MELAMED, REPRESENT AND DESTROY: RATIONALIZING VIOLENCE IN THE NEW RACIAL CAPITALISM (2011).

[73] JAMES BALDWIN, THE FIRE NEXT TIME 16 (1963).

[74] MELAMED, *supra* note 72, at 49.

In this section, I survey the history and context of Prop 22 in order to demonstrate the ways in which the law is reminiscent of earlier racial wage codes, as well as to examine how companies succeeded in undoing judicial, legislative, and regulatory efforts to enforce the minimum wage, overtime protections, workers' compensation, and unemployment insurance for a low-income California workforce constituted primarily of subordinated racial minorities. I argue that the Prop 22 campaign relied upon an obfuscation of what the proposed law would actually do. In contrast to industrialists during the First and Second New Deals, the gig companies did not deploy racist arguments about the inefficiencies of their workforce as a justification for low and unpredictable earnings. Instead, they instrumentalized benevolent discourses of race reform and alliances with civil rights organizations to generate support for the initiative. Acknowledging that their workforce was made up of primarily immigrants and racial minorities, the gig companies also deceptively claimed knowledge of these workers' struggles, needs, and desires. By highlighting particular forms of racial subjugation, while ignoring and profiting from others, the corporate sponsors of Prop 22 successfully concealed the very structures of racial oppression that the initiative entrenched and from which companies benefit.

A. Proposition 22 as the New Racial Wage Code

Unlike the lower wage codes for African American workers that were promulgated during the NRA hearings, Prop 22's creation of a new, lower wage code was obscured—by design. In my research with Uber and Lyft drivers and conversations with journalists, including the editorial boards of major newspapers in California,[75] prior to the November 2020 election, I found that neither workers nor sophisticated media analysts understood the basic terms of the law. The proposition summary, rated at a readability of level of grade 18,[76] stated, in part, that "independent-contractor drivers would be entitled to . . . compensation—including minimum earnings, healthcare subsidies, and vehicle insurance."[77] In both advertisements and public statements, the Yes on Prop 22 campaign and corporate representa-

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[75] At the request of the No on Prop 22 campaign, I attended almost every editorial board meeting with prominent media organizations in California to explain the terms and potential impacts of the initiative as the boards were making decisions about whether to endorse Prop 22.

[76] *Ballot Measure Readability Scores*, BALLOTPEDIA (2021) ("The FKGL formula produces a score equivalent to the estimated number of years of U.S. education required to understand a text. A score of five estimates that a U.S. 5th grade student would be able to read and comprehend a text, while a score of 20 estimates that a person with 20 years of U.S. formal education would be able to read and comprehend a text."), https://ballotpedia.org/Ballot_measure_readability_scores,_2021 [https://perma.cc/NE7V-38PP].

[77] *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative*, BALLOTPEDIA (2020), https://ballotpedia.org/California_Proposition_22,App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)#Readability_score [https://perma.cc/L2VJ-MSCF].

tives emphasized that the proposition would give workers "120% of the minimum earnings" and "new benefits."[78] Though this *sounded* even better than existing minimum wage protections, these guaranteed earnings and benefits were determined by the time that followed the algorithmic allocation of work, rather than the actual amount of time the workers spent laboring. In reality, the law *took away* all basic employment rights—including the minimum wage and overtime protections and in a few instances, replaced them lesser versions (see Figure 1).

To understand the ways in which this proposition creates a racial wage differential reminiscent of the NRA wage codes and New Deal sectoral carveouts, I situate Prop 22 within the recent chronology of California employment laws and unpack its terms. Prop 22 was a referendum on Assembly Bill 5 (AB5) passed by the California legislature in 2019, which extended and codified a recent California Supreme Court decision. The previous year, in *Dynamex Operations West v. Superior Court of Los Angeles*, a case alleging the misclassification of an offline delivery driver, the Court unanimously expanded the reach of California wage orders.[79] The *Dynamex* decision created a presumption of employment status for all California workers and put forth the ABC test to determine who is *not* an employee and therefore uncovered by the wage code.[80] "These fundamental obligations of the IWC wage orders are," the Court wrote, "for the benefit of workers . . . intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and respect."[81] In justifying this claim, the Court cited scholarship affirming the importance of the minimum wage for minority communities to "undo historical patterns of injustice."[82]

AB5, authored and sponsored by Assemblywoman Lorena Gonzalez the following year, broadened the Court's holding to the entirety of the California labor code (including workers' compensation laws), as well as to its unemployment insurance code.[83] In support of the legislation, Assemblywoman Gonzalez cited both the growing problem of misclassification in service industries and the fact that California is the most diverse *and* most

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[78] For example, Anthony Foxx, the former Obama Transportation Secretary articulated to NPR that Prop 22 creates a wage floor "So whereas before Prop 22, there was no floor below which driver earnings could go, Prop 22 establishes a minimum standard that is actually 20% over the current prevailing minimum wage anywhere in California." He, like other representatives, failed to explain that this fell far below the hourly minimum wage since workers would not be paid for time they spent awaiting work. Interview by Alisa Chang with Anthony Foxx, Chief Pol'y Off., Uber (Dec. 9, 2020), https://www.npr.org/2020/12/09/944739738/lyft-exec-on-debate-over-classifying-drivers-as-employees-or-contractors [https://perma.cc/4AWB-KSTC].

[79] 416 P.3d 1 (Cal. 2018).

[80] The ABC test has been traced back to 1935 and is used to define eligibility for state workers' compensation coverage. It was brought to California law via *Dynamex*, 416 P.3d at 34, and uses a 3-part conjunctive test to define who is in illegible for state employment protections. *Id.*

[81] *Id.* at 32.

[82] Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1595 (2013).

[83] Assemb. B. 5, 2019 Leg. Sess. (Cal. 2019).

unequal state in the country.[84] While AB5 applied to nearly all California workers, it was commonly referred to as "the Gig Worker Law" because of its potential to undermine Uber and Lyft's legal position that their drivers are not owed basic employment protections.[85] Speaking in favor of the bill, Assemblywomen Gonzalez, like the NAACP and NUL leaders during the New Deal, argued that all workers—including the subordinated racial minorities and immigrant workers doing app-deployed work—needed access to work law protections like the minimum wage. In conversation with me, she framed the law and the problem in explicitly racial terms,

> The gig companies strategically recruit drivers who are from working class, communities of color. They [seek] out vulnerable workers who would be caught in a continual cycle of desperation and need for immediate cash. [They try to] ensure that these drivers—who are overwhelmingly Black and brown—are relegated to a permanent underclass of workers who make less than minimum wage without any actual benefits.[86]

As AB5 was being considered and debated in the California legislature, the bill was robustly supported by organized gig workers and their allies. Thousands of low-income ride-hail drivers went on a historic global strike against Uber and Lyft in May 2019,[87] protested in front of the companies' headquarters on numerous occasions, and participated in a late-summer caravan to the California capital to urge the state legislature to vote in favor of the law. At one protest in Sacramento, Assembly Speaker Anthony Rendon, surrounded by workers of color, accused platform companies' of "oppressed[ing] workers" through their misclassification and described labor platform work as "fucking feudalism all over again."[88]

Despite months of aggressive lobbying by the companies and attempts to draw labor unions into a negotiation,[89] AB5 passed and was signed by Governor Newsom in September 2019. Uber and Lyft drivers in my research believed that the passage of the law meant that they would have immediate access to minimum wage protections, overtime, expense reimbursements,

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[84] Erica Hellerstein, *It's Official: Bay Area Has Highest Income Inequality in California*, KQED (Jan. 31, 2020) https://www.kqed.org/news/11799308/bay-area-has-highest-income-inequality-in-california [https://perma.cc/6H25-FDSZ].

[85] In fact, Uber and Lyft drivers were considered employees under the previous test—the *Borello* test—by the California Labor Commissioner in at least one public case, and by the EDD in distributing unemployment insurance benefits. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989).

[86] Interview with Lorena Gonzalez, Cal. Assemb. (Dec. 2020).

[87] This strike was first called for by the Rideshare Drivers United in California.

[88] Assemb. Speaker Anthony Rendon, Address to Sacramento Protest (July 10, 2019).

[89] Uber, Lyft, DoorDash, Postmates, and Instacart were reportedly in conversation with at least two unions to discuss the introduction of legislation that would undermine the employment rights of drivers in exchange for "sectoral bargaining" defined as potential sector-wide union representation on certain, but not all, issues. Noam Scheiber, *Debate Over Uber and Lyft Drivers' Rights in California Has Split Labor*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/business/economy/uber-lyft-drivers-unions.html [https://perma.cc/Z9KN-9XWK].

workers' compensation, and unemployment insurance. But even after the law went into effect, many California ride-hail drivers reported that their net earnings fell below the minimum wage. In one of the most dangerous jobs in the country[90], these workers also continued to labor without workers' compensation.

Rather than complying with *Dynamex* and AB5, the companies' representatives publicly insisted that the law did not apply to them.[91] In addition to their refusal to comply with existing law, Uber, Lyft, DoorDash, Instacart, and Postmates wrote and sponsored Prop 22, a referendum initiative that would carve the companies out of state employment laws and legalize their business model.[92] Prop 22 created a third category of California worker—defined as transportation or delivery "network worker"—who was ineligible for protection under state work laws.[93] Though the language of the proposition states that workers who meet this definition are "independent contractors" and not "employees" for purposes of the state's labor code and unemployment insurance code, the proposition also restricted workers' individual right to contractually bargain to different terms, a hallmark of true independent contractors.[94] Instead of setting their own prices, for example, the workers for Transportation Network Companies (TNC) and Delivery Network Companies (DNC) are ascribed a set of pay rules that applies only to them.[95] Similarly, rather than building a clientele, TNC and DNC workers are prohibited by contract from cultivating clients.[96]

As the campaign to pass Prop 22 surged, efforts to enforce AB5 were bolstered both by organized drivers and by the exigencies of the Covid-19 pandemic. Beginning in February 2020, thousands of drivers tired of waiting for the enforcement of their employment rights filed individual wage claims

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[90] Samuel Stebbins, Evan Comen & Charles Stockdale, *Workplace Fatalities: 25 Most Dangerous Jobs in America*, USA TODAY (Jan. 9, 2018), https://www.usatoday.com/story/money/careers/2018/01/09/workplace-fatalities-25-most-dangerous-jobs-america/1002500001/ [https://perma.cc/57YZ-PXHV].

[91] Andrew J. Hawkins, *Uber Argues Its Drivers Aren't Core to Its Business, Won't Reclassify Them as Employees*, VERGE (Sept. 11, 2019), https://www.theverge.com/2019/9/11/20861362/uber-ab5-tony-west-drivers-core-ride-share-business-california [https://perma.cc/B2GG-HQV3].

[92] Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html [https://perma.cc/W33Y-QHVW]. Uber and Postmates also filed an action in federal court to enjoin the enforcement of AB5 against them. Uber's Chief Legal Officer Tony West said that while AB5 "certainly sets a higher bar for companies to demonstrate that independent workers are indeed independent," Uber can satisfy the test. Rey Fuentes, Rebecca Smith and Brian Chen, *Rigging the Gig*, FOR WORKING FAMS. 7 (July 2020) https://www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig_Final%2007.07.2020.pdf [https://perma.cc/QF5D-YXCD].

[93] Proposition 22 (Cal. 2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf [https://perma.cc/GU9U-8HW5].

[94] *Id.*

[95] *Id.*

[96] Lawrence Mishel and Celine McNicholas, *Uber Drivers are Not entrepreneurs: NLRB General Counsel ignores the Realities of Driving for Uber*, ECON. POL'Y INST. (Sept. 20, 2019) https://www.epi.org/publication/uber-drivers-are-not-entrepreneurs-nlrb-general-counsel-ignores-the-realities-of-driving-for-uber/ [https://perma.cc/M4KQ-B54J].

against their employers with the California Labor Commissioner's Office, under the auspices of Rideshare Drivers United's "People's Enforcement Campaign." Rideshare Drivers United (RDU), an advocacy group made of up of Uber and Lyft drivers, was launched two years earlier by drivers who sought to improve their working conditions through self-advocacy and collective action. By January 2020, the organization's membership included over 20,000 ride-hail drivers from across the state.[97]

By the third week of March 2020, as the Covid-19 pandemic began to spread throughout California,[98] many RDU members and ride-hail drivers across the country fell ill, and some died from occupational exposure to the virus.[99] The Governor of California issued lock-down orders across the state, sanctioning "essential" workers to continue to labor. Under Executive Order N-33-20, food delivery and ride-hail drivers were deemed "essential," but with demand for ride-hail work at an all-time low,[100] drivers who risked exposing themselves to the virus nevertheless lost money on shifts.[101] As tens of thousands of drivers filed for unemployment insurance, they faced a bureaucratic nightmare created through their misclassification.[102] The California Employment Development Department, the agency responsible for administering unemployment insurance benefits, had no record of the drivers' employment or their wages. Their employers, Uber and Lyft, were exhorting drivers to apply for Pandemic Unemployment Assistance, a federal temporary emergency measure for independent contractors that calculated benefits based on net rather than gross income, providing significantly lower weekly payments.[103]

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[97] RDU leaders often call themselves an "undocumented union" because they conceptualize themselves as a union of workers, but for a variety of reasons, including the ambiguities behind their legal status under the NLRA, they have not sought formal recognition.

[98] *Governor Gavin Newsom Issues Stay at Home Order*, OFF. OF GOVERNOR GAVIN NEWSOM (Mar. 19, 2020), https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/ [https://perma.cc/FH5U-SPZ4].

[99] *See, e.g.*, Suhauna Hussain, *This Uber Driver Died of Covid-19. Proposition 22 Will Sway His Family's Fate*, L.A. TIMES (Nov. 1, 2020), https://www.latimes.com/business/technology/story/2020-11-01/prop-22-uber-driver-covid-19-death-benefits-workers-comp [https://perma.cc/P9VY-NV3Q]; New York Taxi Workers' Alliance, *supra* note 5.

[100] Kate Conger & Erin Griffith, *The Results Are in for the Sharing Economy. They Are Ugly*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/technology/the-results-are-in-for-the-sharing-economy-they-are-ugly.html [https://perma.cc/KM8B-ZF8C].

[101] Because drivers have to bring capital to their work—investing in cars, phones, and other instrumentalities of business—their net profit is often dramatically different than their gross profit. When demand is extremely low, a driver can make so little during a shift that once they subtract expenses, they net nothing—or even find that they have lost money.

[102] Sam Harnett, *Uber and Lyft Officially Owe California Unemployment Money. Will the State Get It Back?*, KQED (May 5, 2020), https://www.kqed.org/news/11816091/uber-and-lyft-officially-owe-california-unemployment-money-will-the-state-get-it-back [https://perma.cc/KX93-AF5V].

[103] *See, e.g.*, *Maryland Government Relief Guide*, UBER (Jan. 19, 2021), https://www.uber.com/us/en/coronavirus/government-relief/ [https://perma.cc/6H9U-JEE4]. Pandemic Unemployment Insurance (PUA) was emergency federal assistance created through the CARES Act that provided temporary income to independent contractors who had lost work as a result of the Covid-19 pandemic. PUA was calculated according to net income and not gross income, as state unemployment insurance is calculated. In California, ride-hail drivers who

Catalyzed by RDU's People's Enforcement Campaign and the exigencies of the Covid19 pandemic, the California Attorney General Xavier Becerra, alongside the city attorneys of California's largest cities, brought suit against Uber and Lyft in early May 2020 to enforce AB5, alleging that the companies were in violation of the state's labor code and unemployment insurance code.[104] A few weeks later, they also filed for a preliminary injunction to force the companies to immediately comply with state employment laws.[105] In a judicial opinion released in early August, the state's request was granted, and the court found unequivocally that Uber and Lyft drivers were employees for purposes of state law.[106] The companies appealed, but on October 22, 2020, an appellate court upheld the lower court's finding and the injunction.[107]

A mere fifteen days later, however, Prop 22 passed. The law rolls back decades of court decisions, California agency policy, and state statutory law on workers' rights. It grants TNC and DNC complete control over their relationship to their California workers through contracts, meaning that TNC and DNC workers are vulnerable to constant changes in their contractual terms and conditions and to the vicissitudes of algorithmic control. Reminiscent of the impact of differential wage codes and New Deal carveouts on largely African American agricultural and domestic workforces, Prop 22 ensures that a majority racial minority workforce no longer has access to any of the protections in California employment laws—present or future. Although these workers continue to bear the expenses of business and many work full-time hours, they have no right to appropriate vehicle reimbursements (calculated in 2020 at 57.5 cents per mile), workers' compensation, unemployment insurance, sick leave, paid family leave, employer-provided health insurance, or protection from discrimination based on immigration status, among other things.[108] Prop 22 also effectively prevents

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filed for PUA and not state unemployment insurance often got their checks much more quickly, but they sometimes received hundreds left per week. Nationally, Uber and Lyft drivers filed for $80 million of this emergency funding. Faiz Siddiqui & Andrew Van Dam, *As Uber Avoided Paying Into Unemployment, the Federal Government Helped Thousands of its Drivers Weather the Pandemic*, WASH. POST (Mar. 16, 2021), https://www.washingtonpost.com/technology/2021/03/16/uber-lyft-unemployment-benefits/ [https://perma.cc/33AR-FSYX].

[104] *Attorney General Becerra and City Attorneys of Los Angeles, San Diego, and San Francisco Sue Uber and Lyft Alleging Worker Misclassification*, STATE OF CAL. DEP'T OF JUST. (May 5, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-city-attorneys-los-angeles-san-diego-and-san [https://perma.cc/8E8W-TBF8].

[105] *Attorney General Becerra and City Attorneys of Los Angeles, San Diego, and San Francisco to Seek Court Order to Immediately Halt Worker Misclassification by Uber and Lyft*, STATE OF CAL. DEP'T OF JUST. (June 24, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-city-attorneys-los-angeles-san-diego-and-san-0 [https://perma.cc/667H-Q4SN].

[106] People v. Uber Techs., Inc., No. CGC-20-584402, 2020 WL 5440308, at *9–10 (Cal. Super. Ct. Aug. 10, 2020).

[107] People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 311 (Ct. App. 2020).

[108] Proposition 22 (Cal. 2020).

local and state governments from legislating further in the arena of TNC and DNC workers' rights.[109]

Prop 22 creates, for the first time in U.S. work law, an entirely new wage code for people defined as "transportation or delivery network workers." In one important respect, the method legalized by Prop 22 to calculate the wage floor licenses even greater inequality than the lower wages guaranteed to African American workers by the NRA: critically, this method *does not guarantee any net earnings*. Instead of being paid for the time they spend laboring, workers are paid by the piece or task. Their piece pay is not based on a predictable rate, but instead calculated according to how much work they are algorithmically allocated, a personalized determination over which they have no control. On paper, TNC and DNC workers are entitled to 120% of the applicable minimum wage and 30 cents per mile reimbursement.[110] But these wages and reimbursements are tied to "engaged time" and "engaged miles"—that is, time and miles after they have been allocated a fare—instead of all time spent working and miles driven. Most importantly, workers are not paid for the time that they spend anxiously waiting for rides or delivery requests. Industry-funded studies put the amount of unpaid waiting time at about 37% of total time worked.[111] Workers in my research calculate that, typically, unpaid waiting time comprises between 40-60% of their total working hours each week. Based on the industry-sponsored studies' estimation of non-engaged time, in San Francisco, I calculate that TNC drivers working a 50-hour week earn at least $634.29 *less* under Prop 22 than under local and state employment laws, based on wage calculations and the loss in mileage reimbursements.

Even the percentage of downtime, however, is unpredictable and subject to changes in demand (caused by a pandemic, for example) and the whims of the algorithms that allocate personalized work for each driver. The algorithms serve as a node for extreme employer control. Drivers, for example, have reported that they feel the app "punishes" them for not taking certain fares or for getting too close to their bonus threshold.[112] The substandard benefits provided by the law are also easily evadable. The black box in which this algorithmic control operates makes it impossible to know exactly what workers are experiencing, but some workers have said post-Prop 22

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[109] Specifically, Prop 22 prohibits local legislation, and it states that any statewide legislation broadly pertaining to the rights and benefits of RNC and TNC workers must pass by a 7/8 majority vote (which is a near impossibility). *Id.*

[110] *Id.*

[111] Melissa Balding, Teresa Whinery, Eleanor Leshner and Eric Womeldorff, *Estimated TNC Share of VMT in Six U.S. Metropolitan Regions*, FEHR & PETERS 7 (2019), https://issuu.com/fehrandpeers/docs/tnc_vmt_findings_memo_08.06.2019 [https://perma.cc/WRA5-J8BW].

[112] Uber and Lyft both send out weekly personalized bonus offers to drivers to encourage them to drive during certain hours, for certain lengths of time, and in certain places. Drivers in my research told me that the only way to earn a living was to attempt to meet the conditions of these bonuses.

that as they approach the "engaged time" threshold for the health insurance stipend, for example, they stop receiving work.

For these reasons, the gig companies' wage code amounts to a much-lower, differential wage code for a workforce of color. And unlike the wage code differentials endured by African American workers in the New Deal era, these wages are neither certain nor predictable.

FIGURE 1: SUMMARY OF CENTRAL RIGHTS OWED TO TRANSPORTATION AND DELIVERY NETWORK WORKERS IN CALIFORNIA, BEFORE AND AFTER PROPOSITION 22

Pre-Proposition 22	Post Proposition 22
Minimum Wage	Payment for "engaged time"* only at 120% of minimum wage **engaged time does not include time with app on, awaiting work*
Overtime at 150% of minimum wage for work over 8 hrs/day and 40 hrs/week	None
Reimbursement at $.575/mile for all miles driven when working	Reimbursement at $.30/mile for miles driven during "engaged time"*
Health Insurance through Affordable Care Act	Healthcare "subsidies" for workers who have health insurance and who labor for fifteen or more hours of "engaged time"*
Paid Sick Leave of at least 3 days	None
Paid Family Leave for 8 weeks	None
Workers' Compensation – no fault coverage for on-the-job injuries	Limited accident insurance to cover injuries (not no fault)
Unemployment Insurance – up to 26 weeks of benefits for no-fault job loss	None
Disability Insurance – life coverage	Disability payments for up to two years

B. Branding Racial Injustice as Racial Benevolence

While the third sub-worker category created by Prop 22 is best understood as a new form of legalized racial subordination—lower wages and benefits for a people of color and immigrant workforce—this fact was obscured in the proposition's campaign. Unlike the industrialists of the early 20th century, the Yes on Prop 22 campaign cloaked the purpose and effect of the proposed law in the language of benefits, minimum earnings, and, perhaps most ironically, racial benevolence. Nevertheless, echoing the arguments made by early 20th century business representatives and their allies, the Yes on 22 campaign alleged that if the law did not pass, workers of color would suffer from disemployment.[113] This racialized threat, combined with the law's opacity and the companies' support from some prominent Black civil rights organizations, likely influenced the African American electorate, 44% of whom voted in favor of the initiative.[114]

Amidst the historic national Black Lives Matters uprisings of 2020, both Uber and Lyft developed strategic alliances with select civil rights organizations and made public statements in condemning police violence against people of color. Moreover, despite advocating for a law that would entrench the economic precarity experienced by many low-wage workers of color, the companies benefited from "racializing" their workers in campaign imagery and marketing, claiming knowledge of and compassion towards these workers' struggles.[115] In their campaign materials, the gig companies strategically activated tropes endemic to neoliberal racialization by presenting "freedom narratives" of workers and arguing that gig work facilitated economic independence for racial minorities. Via text, email, television, radio and internet ads, California voters were bombarded with what one journalist described as "ads featuring smiling Black and brown faces championing Proposition 22."[116] These visual codes differed dramatically from those used in the companies' earliest marketing campaigns in 2013 and 2014, which were aimed at drawing consumers to their services. Those ads featured smiling, hip white men and women who were driving for "fun." By contrast, the Yes on Prop

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[113] Caroline O'Donovan, *Prop 22 May Hurt Drivers, But Uber Wants it to Pass*, BUZZFEEDNEWS (Oct. 31, 2020), https://www.buzzfeednews.com/article/carolineodonovan/proposition-22-uber-gig-economy [https://perma.cc/UM8R-AKX3].

[114] Only 35% of California's African American electorate voted against Prop 22. In other communities, which were less targeted by the Yes on 22 campaign, the outcome was different. Latinx and Asian American voters were more evenly split, while they supported Prop 22 at lower rates than white voters. Data on File with Author.

[115] Here, I draw in part of the theoretical work of sociologists Michael Omi and Howard Winant whose mode of racial formation helped scholars understand that "race is a fundamental axis of organization" in the United States, and yet race does not have stable social meaning. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 109 (2015).

[116] Levi Sumagaysay, *Race Has Played a Large Role in Uber and Lyft's Fight to Preserve Their Business Models*, MARKETWATCH (Oct 24, 2020), https://www.marketwatch.com/story/race-has-played-a-large-role-in-uber-and-lyfts-fight-to-preserve-their-business-models-11603143399 [https://perma.cc/SXA5-CFYU].

22 campaign frequently featured single moms of color who needed gig work to make ends meet and immigrant men who relied on this "side hustle" to support their families. More broadly, advertisements and representations from the Yes on Prop 22 campaign relied heavily on the logic and the purported need for flexible work and desire to "hustle" without a boss. The campaign provided a narrative that allowed its audience to ignore the fact that Prop 22 would entrench these racial inequalities by downsizing corporate and state responsibility, increasing the power of concentrated capital, and evading legal accountability.

The flip side of the companies' claims that gig work facilitated economic freedom was the threat of disemployment if Prop 22 failed to pass. Like New Deal era industrialists, the companies pointed to this possibility in order to make the logic of their business model appear racially just. An Uber email campaign, for example, featured Alice Huffman, the head of the California NAACP and a political consultant paid by the campaign, titled, "Why communities of color support Prop 22." The email quoted Huffman as saying, "It's a win-win that will save hundreds of thousands of jobs for Black and Brown workers and for all Californians who are choosing independent app-based work, while setting up job protections for the modern economy."[117] The mailing even analogized the present moment to the Great Depression, alleging, as industrialists then did, that minimum wage protections would take away "work and income from the communities already hardest hit by the pandemic and the worst economy since the Great Depression."[118]

The allegation that Prop 22 was necessary to stave off potential disemployment, while politically compelling, was easily shown to present a misleading picture of the platform workforce. The companies' own data indicated that 68% of drivers stop working for the platform after six months,[119] suggesting both that most people found the work untenable and that the companies relied on the most vulnerable workers in the labor market. This statistic casts doubt upon the percentage of workers who the companies alleged would lose their jobs if the sector was forced to calibrate supply and demand under an employment model. Independent research also found that, in contrast to the companies' representation that most of their workforce was casual, the majority of work done for Uber and Lyft was performed by drivers laboring for more than 30 hours a week.[120] By obscuring or

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[117] Email from Uber (Sept. 10, 2020), https://calmatters.org/wp-content/uploads/2020/09/Gmail-Prop-22.pdf [https://perma.cc/8MYA-AMGM].

[118] *Id.*

[119] This national data is from 2016, when driver wages were much higher Eliot Brown, *Uber and Lyft Face Hurdle of Finding and Keeping Drivers*, WALL ST. J. (May 12, 2019), https://www.wsj.com/articles/uber-and-lyft-face-tough-test-of-finding-and-keeping-drivers-11557673863 [https://perma.cc/CNB7-P8DQ].

[120] *See* Michael Reich, *Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers*, INST. FOR RSCH. ON LABOR AND EMP. 6 (Oct. 2020), https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf?fbclid=IWAR3zp0s2VQIRCvbAQBfLBw_h9F0phDN1_zDgNbYrvUg9XK2XclbpYPbKrNk [https://perma.cc/23B6-PBFB]. "[P]atterns suggest the companies' references to the typical driver as very part-time significantly understate the centrality of full-time and regular part-time drivers in their business

ignoring these realities, the corporate advertisements and mailers aimed to internalize in voters and consumers a form of sentimental compassion for workers while externalizing the structural causes of racialized insecurity. The labor platform worker became identifiable as an economically struggling person of color, but the structures that created and sustained the economic struggle and racialized marginality disappeared in the process. Gig work, in this depiction, became a solution, rather than a source of the problem.

Uber and Lyft also signaled their racial benevolence through strategic alliances with African American civil rights and immigrant rights organizations. Uber, for instance, committed $1 million dollars to the Equal Justice Initiative and the Center for Policing Equality to support criminal justice reform,[121] while investing (but not donating) $60 million dollars in loans to support Black-owned businesses.[122] Lyft, meanwhile, launched LyftUp on Martin Luther King Day, partnering with the National Urban League and the National Action Network, to provide "affordable" rides in underserved communities.[123] "Everyone," Lyft unironically announced, "should have access to safe, reliable, and affordable transportation,"[124] a narrative meant to cast the company as bolstering access to transportation in minority communities, as well as overshadow the empirical evidence that ride-hail companies *reduce* funding for and therefore access to public transportation most relied upon by communities of color.[125]

Among African American and immigrants' rights organizations, the proposition sparked a contentious debate analogous to the exchanges among African American leaders during the NRA code promulgation. A few prominent organizations took the side of industry, often publicly defending the proposition as providing jobs for workers of color, while privately embracing the financial perks that came along with their endorsement. Both the National Action Network (NAN) of Sacramento and the California NAACP, whose parent organizations received donations from one or both companies,

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model. The majority of these drivers rely on their earnings from Uber and Lyft as their sole or main source of income. Many acquired a vehicle primarily to drive for Uber and Lyft. *Id.* Most of these workers are driving 30,000 miles per year for the companies." *Id.*

[121] Alex Nicoll, *Uber CEO Tweets That the Company Will Donate $1 Million to Groups 'Making Criminal Justice in America More Just for All'*, INSIDER (May 31, 2020), https://www.businessinsider.com/uber-ceo-company-to-donate-1-million-to-police-reform-2020-5# [https://perma.cc/KBY6-9G3Z].

[122] Jeff Green and Lizette Chapman, *Uber's $50 Million Pledge Adds to Push for Minority Lending*, BLOOMBERG (Nov. 17, 2020), https://www.bloomberg.com/news/articles/2020-11-17/uber-s-50-million-pledge-adds-to-push-for-minority-lending [https://perma.cc/5MB9-K5SX].

[123] *Supporting Communities of Color During the Covid-19 Crisis*, LYFT BLOG (Apr. 16, 2020), https://www.lyft.com/blog/posts/supporting-communities-of-color [https://perma.cc/WP5L-6XYV].

[124] *Introducing LyftUp: Transportation Access For All*, LYFT BLOG (Jan 21, 2020), https://www.lyft.com/blog/posts/lyftup-bikes [https://perma.cc/PLH9-8LGZ].

[125] Michael Graehler, Jr., Richard Alexander Mucci & Gregory D. Erhardt, *Understanding the Recent Transit Ridership Decline in Major US Cities: Service Cuts or Emerging Modes?*, 98TH ANNUAL MEETING OF THE TRANSP. RSCH. BOARD 15 (2019), https://usa.streetsblog.org/wp-content/uploads/sites/5/2019/01/19-04931-Transit-Trends.pdf [https://perma.cc/M5NU-TWL2].

endorsed the passage of Prop 22.[126] They argued, as Robert Moton did in the early 1930s, that differential wage codes ensured that workers at the margins of the labor market—like formerly incarcerated people—had access to some form of work.[127] Tecoy Porter, Chair of NAN of Sacramento, said that opponents of Prop 22, "are willing to sacrifice hundreds of thousands of jobs held by drivers of color."[128] This support, however, was contested within prominent civil rights organizations.[129] Other NAN organizational representatives, like NAN Western Regional Director Jonathan Mosely, took issue with this characterization and argued that the proposition "did not benefit Black workers."[130] Dissent within the CA NAACP over Prop 22 and two other 2020 propositions ultimately resulted in the resignation of longtime president Alice Huffman, who critics within the organization said "did not support . . . propositions that were made to help Black people."[131] Following her resignation, the national NAACP signed a letter to Congress, insisting that app-based workers *are* employees and that they deserve the same wages and protections as other workers.[132]

Despite openly campaigning to strip their primarily people of color workforce of wage and other employment protections, Uber and Lyft sought to position themselves as champions of anti-racism through acts of racial justice symbolism. By focusing on particular liberal discursive forms of antiracism, the companies obscured the material conditions in which the work-

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[126] Sofie Kodner, *Tech is Writing Checks to Anti-Racism Groups. Here's Who's Giving, and How Much*, PROTOCOL (June 4, 2020), https://www.protocol.com/tech-companies-donations-racial-injustice?rebelltitem=57#rebelltitem57 [https://perma.cc/8RAG-86YN].

[127] *Leading CA Social Justice Groups Endorse Prop 22; Urge Elected Leaders to Follow*, YES22 (July 20, 2020), https://drivers.yeson22.com/leading-ca-social-justice-groups-endorse-prop-22-urge-elected-leaders-to-follow/ [https://perma.cc/KQX6-6HEB].

[128] Matthew Rozsa, *Rideshare Drivers Say Uber is Co-Opting Anti-Racist Rhetoric*, SALON (Sept. 10, 2020), https://www.salon.com/2020/09/10/uber-drivers-protest-oakland-black-lives-matter-co-optation/ [https://perma.cc/JAB2-9B43].

[129] Caroll Fife, an officer within the Oakland Chapter of the NAACP, said she felt that Huffman's endorsements of Prop 22 and other campaigns was "a conflict of interest and. . .misleading to the public." Laurel Rosenhall, *California NAACP President Aids Corporate Prop Campaigns—Collects $1.2 Million and Counting*, CAL MATTERS (Oct. 23, 2020), https://calmatters.org/politics/2020/09/california-naacp-president-helps-corporate-ballot-measure-campaigns/ [https://perma.cc/4BH3-SRLX]. Fife attended the protest in front of the Oakland Delete Uber billboard and said of Prop 22, "[t]hey are exploiting our labor for their wealth." Levi Sumagaysay, *Protesters Call Uber's Antiracism Billboards 'Hypocritical and* Offensive', MARKET WATCH (Sept. 9, 2020, 5:20 P.M.), https://www.marketwatch.com/story/protesters-call-ubers-antiracism-billboards-hypocritical-and-offensive-11599686425 [https://perma.cc/F3BH-44ZK]. Notably the Yes on Prop 22 also relied on other forms of misinformation to signal support from the African American community. The Black Lives Matter President in Sacramento, for example, stated publicly that while her organization's name was listed by the companies in support, this listing was done without the organizations permission and that the group did not support Prop 22. *See* Sumagaysay, *supra* note 116.

[130] Email from Jonathan Mosely to Emilia (June 23, 2020).

[131] *Longtime Head of NAACP's California-Hawaii Chapter Resigns*, ASSOCIATED PRESS (Nov. 22, 2020), https://apnews.com/article/sacramento-california-hawaii-a25b0c0c80f05a22257fc704eff5ed2f [https://perma.cc/8A5E-7Q8K].

[132] *Letter to Congress on Labor Protections for App-Based Workers*, NAT. EMP. L. PROJECT (Jan. 25, 2021), https://www.nelp.org/publication/letter-congress-labor-protections-app-based-workers/ [https://perma.cc/FE6W-NURS].

ers labored and instead claimed to be promoting economic independence for racial minorities. In some instances, the companies even appropriated the emancipatory language of "systemic racism."[133] Many ride-hail workers, however, resisted this appropriation, and like African American workers and civil society leaders of the early 20th century, fought against the legalization of racial subordination and towards racially just democratic unionism, while simultaneously fighting for their lives.

III. Workers on the Third Category: "You Can't Divide Our Bodies"

"Ultimately, the only check upon oppression is the strength and effectiveness of resistance to it. . . [Freedoms] emerged from centuries of day-to-day contest, overt and covert, armed and unarmed, peaceable and forcible."[134]

—Barbara Fields (1990)

Ride-hail and food delivery companies attempted to mobilize grassroots support for Prop 22 by instrumentalizing their unprecedented in-app access to both consumers and their workforce. While a century before, industrialists depended upon corporate representatives to make the argument that paying a minimum wage to African American workers would result in job loss and business closure, Uber and Lyft cultivated and relied upon their own drivers to make this argument.[135] In the months leading up to the November 2020 election, drivers received text messages, emails, and in-app messages on a near-daily basis threatening that if Prop 22 did not pass, they could lose their jobs and scheduling flexibility.[136] Grocery shoppers and food delivery drivers were even ordered to include Prop 22 propaganda in shopping bags.[137] These workers, however, were not passive recipients of these messages from the companies and the Yes on Prop 22 campaign. Remarkably, in the face of this

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[133] *Environmental, Social & Corporate Governance Annual Report*, Lyft 37 (2020), https://s27.q4cdn.com/263799617/files/doc_downloads/esg/Lyft_ESG_Report_2020.pdf [https://perma.cc/9KRA-N6FR].

[134] Barbara Jeanne Fields, Slavery, Race and Ideology in the United States of America, 181 New Left Rev. 95, 103 (1990).

[135] Edward Walker's carefully examines in *Grassroots for Hire* the mobilizational efforts by corporations' since at least the 1980s to generate policy change. He writes, "elite political consultants target key public audiences for mobilization on behalf of their paying clients." Edward T. Walker, Grassroots For Hire: Public Affairs Consultants in American Democracy 155 (2014). The additional point here is that in campaigning to pass Prop 22, the employers marshalled not only key members of the public, but also their own workforces.

[136] Marie Edinger, *Prop 22 Explained: Should Rideshare Drivers Be Employees or Independent Contractors?*, Fox26 News (Oct. 15, 2020), https://kmph.com/news/local/prop-22-explained-should-rideshare-drivers-be-employees-or-independent-contractors [https://perma.cc/96QN-EAQ3].

[137] Lauren Kaori Gurley, *Instacart Asked Its Gig Workers to Distribute Propaganda That Would Hurt Them*, Vice (Oct. 14, 2020), https://www.vice.com/en/article/7kp5yq/instacart-asked-its-gig-workers-to-distribute-propaganda-that-would-hurt-them [https://perma.cc/C9WT-XMJN].

intimidation and coercion, thousands of ride-hail and food-delivery workers and their allies—many of them immigrants and people of color—opposed their employers and mobilized against the law, building coalitions and systems of emancipatory mutual aid to support and care for one another. Their collective opposition to the law became an important site of powerful independent labor organizing in which rank-and-file control prevailed.

In this section, I center "voices from below" to frame how organizing workers understood Prop 22 and to examine how they shaped their resistance in terms of racial and economic justice.[138] In my embedded ethnographic research on self-organizing ride-hail workers, I found that in the course of their fight, the workers' resistance evolved into social movement unionism, coalescing around the idea that Prop 22 was a threat not just to their wages and working conditions, but also to issues of racial justice, immigrants' rights, dignity, and safety.[139] California ride-hail workers organizing against Prop 22 understood that their industry was defined by racialized subjugation and connected their exploitation to earlier history. They did this work because of their economic marginalization, and they believed that their racial identities were instrumentalized to ensure their continued economic subjugation. Drivers and drivers' groups in California, like the Rideshare Drivers United (RDU) which I studied, explicitly rejected the benevolent racial discourse of their employers. In doing so, their protest challenged not just their conditions but also the existing liberal order. The way forward, they demonstrated through their actions, was robust rank-and-file unionism that centered racial justice and economic equality.

In the context of the global coronavirus pandemic and historic Black Lives Matter uprisings, these workers became acutely aware of their disproportionate exposure to extreme economic insecurity and premature death. They were fighting for their lives on at least three different fronts: against the police brutality that many experienced on and off the job, against their legal categorization as "essential workers" without access to worker-protections in the context of a pandemic, and against a proposition that would carve them out of basic employment protections, including the minimum wage. In all of these contexts, the workers' susceptibility to poverty, violence and disease was exacerbated by the fact that they are a highly racialized workforce.

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[138] As other scholars have noted and I have highlighted above, many of these platform workers had inherited racialized (and feminized) labors through the legacy of New Deal labor exclusions. *See* Niels Van Doorn, *Platform Labor: On the Gendered and Racialized Exploitation of Low-Income Service Work in the 'On Demand' Economy*, 20 INFO., COMMC'N & SOC'Y 898, 909 (2017). This history of legalized racial and gender inequality explained, in part, their participation in and dependence upon labor markets with low wages and few protections

[139] Social movement unionism is often juxtaposed with "bread and butter unionism." Social justice unionism centers social equity, and not just economic equity. It also favors "rank and file control and activism, participatory democracy, broad alliances, innovate tactics, and a focus on the far-reaching goals such as justice and equality." VANESSA TAIT, POOR WORKER'S UNIONS: REBUILDING LABOR FROM BELOW 9 (2016).

The organizing workers articulated their racialized vulnerability and precarity by exposing the ways in which their lives and racialized bodies were instrumentalized to grow the profits of the ride-hail industry. In their understanding, the benevolent racial discourse of their employers served to rationalize the violence the workers experienced in their everyday lives. Juan, an RDU organizer and ride-hail driver said in a meeting, alluded to the ways the companies attempted to bifurcate the injustices experienced by subordinated racial minority workers, "They're talking about helping our communities while they're hurting our communities."[140] On the one hand, the companies attested to knowing about and even working to address "systemic racism." On the other hand, they created what drivers called a "caste system" of work in which a primarily immigrant and people of color workforce were not afforded the same protection as other low-income workers—sometimes not even the same protections as other workers in the same sector.[141] According to my driver interlocutors, the conditions that created institutional racism could not be transformed in one arena of life while being ignored in others.

As African American organizations during the New Deal era formed the Joint Committee to fight differential wage codes, drivers and driver advocacy groups joined together to form the No on Prop 22 Coalition (Coalition).[142] Workers in the Coalition challenged their second-class status, demanding equal treatment and respect. They engaged in one-on-one organizing and political education about the dangers of the proposition and built power alongside and with other workers through a politics of mutual aid. Though not legally recognized as a union or a bargaining unit, these workers engaged in militant social justice-based unionism, committed both to claiming employment rights and to collective empowerment. While the companies that sponsored Prop 22 paid lip service to racial justice goals, the drivers organized socially distanced protests, personal protective equipment (PPE) distributions, and unemployment insurance assistance campaigns. They also organized online townhalls with other workers across the state to discuss what Prop 22 really meant for them and their lives, as well as to recognize and address their struggles on and off the job. The workers who constituted the No on Prop 22 Coalition consistently rooted the campaign

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[140] Veena Dubal, Fieldnotes (on file with author).

[141] For example, some grocery store delivery workers in California are unionized and members of UFCW. Others labor for Instacart as "delivery network workers" under Prop 22. Sam Harnett, *'Coming for You and Your Job': With Prop. 22, Are Grocery Staff layoffs Just the Beginning?*, KQED (Jan 20, 2021), https://www.kqed.org/news/11855985/coming-for-you-and-your-job-with-prop-22-are-grocery-staff-layoffs-just-the-beginning [https://perma.cc/P3WB-SHPZ].

[142] This Coalition included the Rideshare Drivers United (the independent self-organized drivers' group that I studied), Gig Workers Collective (an independent self-organized group of delivery workers), Gig Workers Rising (a program of Working Partnerships USA), We Drive Progress (an initiative of SEIU 1021), and Mobile Workers Alliance (an initiative of SEIU 721).

in material anti-racism, as many drivers stressed to me in our conversations that, "economic justice is racial justice." They also grounded their campaign in care for one another. Mutual aid actions, in this context, opened up space for dispossessed workers to interrogate why it was that their colleagues—and not the state and not their employers—provided resources and support.

As the labor platform companies attempt to spread their Prop 22 model and racial wage code via both legislation and compromises with labor unions, the rank-and-file organizing and social justice-centered unionism that emerged from the fight against Prop 22 serves as a powerful example of how to advance the wages and working conditions of platform workers.

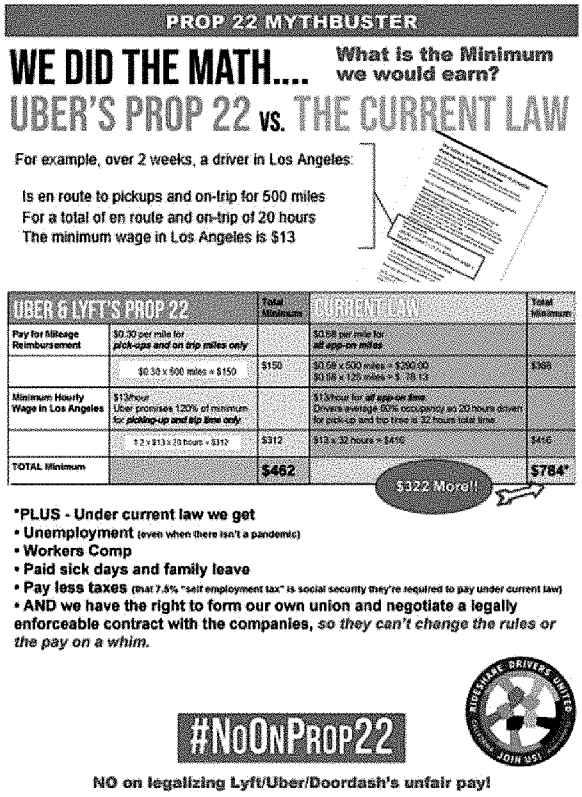

Image 1: Rideshare Drivers United flier created by workers for workers to demystify the confusing proposition.

A. Black Lives Matters & California Labor Platform Workers

The events that catalyzed the Black Lives Matter (BLM) uprisings in the summer of 2020 dramatically shaped how ride-hail workers in the No on Prop 22 Coalition understood the relationship between economic justice and

racial violence—and how to center these issues in their organizing. California ride-hail drivers, like people across the world, were horrified by the video of George Floyd, an African American man, asphyxiated by the police. While the ride-hail workers in my research had up until this point persistently referred to Prop 22 as an initiative that disproportionately impacted people of color, the BLM movement influenced a political shift in the drivers' conversations and narratives. When protestors took to the streets, many California ride-hail and food delivery workers fighting against Prop 22 joined their ranks. Drivers' groups issued statements and workers penned powerful essays supporting the uprisings, arguing that material inequities were central to state violence against racial minorities. The violence that many of them experienced at the hands of the state, drivers explained, was intertwined with the slow violence they endured as workers at the margins of the labor market. One driver wrote, "The conditions that make police killings of Black People possible and inevitable are the same conditions that make the exploitation of Black and Brown workers possible and inevitable."[143]

As the BLM uprisings continued to spread throughout the nation, conversations about the relationship between economic violence and police violence became more commonplace among self-organizing worker leaders in both worker meetings and text chats. Drivers of color who had thus far only spoken of their shared complaints about wages and working conditions began to open up about their experiences with racialized police harassment and brutality. Connecting corporate and state violence, workers expressed indignation and anger at their experiences as low-income, people of color workers in the U.S. After one particularly emotional meeting, Inmer, an El Salvadorean immigrant driver and organizer, texted the group, "We get beat on the job, and we get beat by the police."[144]

In response to these conversations, RDU worker leaders from across California organized a statewide meeting to discuss how police violence impacted their everyday lives. Workers shared their encounters with both local police and border police, making the connection between the racialized criminalization of both African American and Latinx workers. Though some expressed anxieties about alienating fellow workers with public support of the Black Lives Matter movement, the group ultimately decided that they had to issue a statement. "If we don't," Chris, a young African American driver, said, "we have no moral authority."[145] Together, RDU worker leaders democratically agreed on principles that related their everyday experiences to the death of George Floyd, underscoring how their fight, too, was against the structural oppression of racism. In a collective statement, they wrote, in part,

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[143] Cherri Murphy. *The Shameful "Black Lives" Hypocrisy of Gig Companies.* PRECINCT REPORTER NEWS, July 16, 2020, https://www.precinctreporter.com/2020/07/16/shameful-black-lives-hypocrisy-of-gig-companies/ [https://perma.cc/DES9-B4MD].

[144] Veena Dubal, Fieldnotes (on file with author).

[145] *Id.*

> As Uber and Lyft drivers we are one of the largest Black workforces and we are majority people of color and immigrants. Mr. Floyd could have been our brother. Many of us have also experienced violence and harassment at the hands of police and ICE. As labor organizers and unionists, we organize not just for fair wages, but against racism and structural oppression in any form. These injustices are closely interwoven.[146]

These self-organized ride-hail workers and groups, similar to the African American leaders and organizations that fought for inclusion in the New Deal, understood clearly that the material conditions of their lives and the safety of their racialized bodies were inextricably linked in the fight for both labor protections and civil rights. But perhaps more importantly, they used this insight to center racial justice in their organizing.

B. Coronavirus Pandemic and Formalized Essentiality

Another way in which the social justice-oriented rank-and-file organizing against Prop 22 took shape and blossomed was in response to the dangers of the Covid-19 pandemic. For the Rideshare Drivers United workers who organized to oppose Prop 22, the coronavirus pandemic also highlighted the ways in which the state—and not just the corporations—instrumentalized their bodies, rather than caring for them. These workers were deemed legally "essential," yet they were also treated as largely disposable. Akin to domestic workers and agricultural workers upon whose labor the U.S. economy has long subsisted, ride-hail workers conducted dangerous, essential services without any safety net or wage guarantees. The state's response to the pandemic immediately shaped how these workers thought about their precarity and Prop 22 organizing. As Abdul, an East African immigrant driver and Bay Area RDU leader, relayed the first week of the lockdown, "Wh[y] we have to risk yourself when the government declared state of emergency? Do we have any human right at all? For company that not even cover my expenses, we have to give our life? For what? I don't get it."

Within the No on Prop 22 Coalition, many drivers transformed the oppositional consciousness that followed the declaration of their "essentiality" into active resistance. For example, Jerome Gage, an African American man in his mid-twenties and member of Mobile Workers' Alliance who became active in the No on Prop 22 coalition, said,

> "It wasn't really until the pandemic hit that I realized how much I was being exploited. . .can you imagine how many drivers felt that 'oh no, I think I might have Covid' but because they have no alternative. . .have no access to sick leave, they have to force themselves

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[146] *RDU Statement on the Murder of George Floyd*, RIDESHARE DRIVERS UNITED https://www.drivers-united.org/p/george-floyd-statement [https://perma.cc/3FTZ-ZXM9].

> out on the road to take care of their families? . . .That's why I'm fighting for my rights."

For Jerome and others, organizing against Prop 22 was intertwined with the everyday difficulties of just staying safe and alive. As a result, their resistance often took the form of mutual support and uplift.

Mutual aid efforts, which became more common during the Covid-19 pandemic,[147] have long existed among dispossessed groups in the U.S. to fill gaps in insurance, support, education, and relief. Complementing the advocacy of the Joint Committee in political fora, for example, African American civil society groups during the Great Depression responded to plight on the ground through "benevolent societies," countering poverty with community.[148] In this sense, the No on Prop 22 coalition and Rideshare Drivers United, in particular, did the work both of the Joint Committee and the mutual aid groups, investing in a politics of care and reciprocal uplift, while concurrently fighting to maintain basic employment safeguards.

One of the most profound ways in which worker-to-worker care took place involved navigating the bureaucratic morass of the unemployment insurance system, which people across the U.S. relied upon to survive during the pandemic as work dried up or they were laid off.[149] Alongside and with the oversight of legal aid attorneys, drivers with Rideshare Drivers United put together a toolkit explaining to other drivers how to apply for unemployment insurance benefits and how to appeal when they were inevitably denied.[150] They held townhalls, walked workers through the appeals process, and created a script for people to follow when they called the EDD. Drivers who were fighting to oppose Prop 22 spent hours every day helping others receive the unemployment they needed to feed and house their families. In at

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[147] *See, e.g.*, Orlando Mayorquin, *Mutual Aid: When Neighbors Look to Each Other for Pandemic Relief*, CAL MATTERS (Oct. 20, 2020), https://calmatters.org/california-divide/2020/10/california-mutual-aid-networks-pandemic-relief/ [https://perma.cc/JD2P-FTZY].

[148] For a discussion of these mutual aid organizations in New York, for example, *see* CHERYL GREENBERG, OR DOES IT EXPLODE?": BLACK HARLEM IN THE GREAT DEPRESSION (1997).

[149] Because ride-hail demand plummeted dramatically in response to the proliferation of Covid-19, in the weeks following the lockdown, drivers were bombarded with emails from Lyft and Uber, urging them to file for Pandemic Unemployment Assistance (PUA) and telling them that if they did work, they should do so with the appropriate personal protective equipment (PPE). One's benefits under PUA, which emerged from the CARES Act as a federal measure to provide some form of emergency temporary income replacement for independent contractors, were, however, calculated based on net income, not gross income. Thus, drivers who filed for PUA received far fewer benefits than workers who filed for standard unemployment insurance (UI); often, the amount provided by PUA was not enough to keep them and their families afloat. One driver who had decided to file for state UI, instead of PUA, despite the long wait took me through his calculations. His gross earnings after a year of driving for Lyft were $45,750. Under state unemployment insurance, he would receive the full amount of possible benefits at $440 per week. However, after accounting for expenses, his net income was $21,437. His weekly benefits under PUA would have been $207 per week.

[150] The California Employment Development Department (EDD) had long taken the position that Uber and Lyft drivers were employees, but in the flood of UI claims, this position was applied rarely and inconsistently.

least one instance, an older African American ride-hail worker and RDU organizer from Los Angeles split his unemployment insurance check with his fellow organizing workers who were ineligible for their own because of their status as undocumented workers.[151]

The No on Prop 22 coalition drivers also supported and uplifted their fellow workers by providing free personal protective equipment (PPE). Though Lyft donated money to racial justice organizations, it *sold* PPE to their own majority racial minority workforce.[152] In response, the No on Prop 22 coalition held several PPE actions throughout the Bay Area, including in front of Lyft headquarters, advertising them as "We Got Your Back" actions (*see* images 2 and 3). During these distributions, the driver leaders provided fellow workers with donated masks and other equipment and alerted them to the dangers of Prop 22. Providing resources that neither the state nor their employers would, the workers shared stories about how negligent the companies had been in the context of the pandemic and developed social-justice oriented solidarity, growing their membership and the movement. "This proposition," one driver told another who had come to pick up masks and cleaning equipment, "It is like a slap in the face to us workers of color. . .We are worth more than what they are giving us."[153] Another driver organizer reminded the group, "Together, we have the power."[154]

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[151] California later created a separate program to provide income replacement support for undocumented immigrants. *See* Kim Bojórquez, *Which State Is Doing More for Undocumented Residents in COVID Era? California or New York?*, SACRAMENTO BEE (Apr. 14, 2021), https://www.sacbee.com/news/politics-government/capitol-alert/article250608884.html [https://perma.cc/D8US-7FHM].

[152] Sarah Emerson, *Lyft Is Selling — But Not Providing — Masks and Sanitizer to Drivers*, ONEZERO (July 17, 2020), https://onezero.medium.com/lyft-is-selling-but-not-providing-ppe-to-drivers-71bd95c43104#:~:text=%E2%80%9CAll%20cleaning%20supplies%20and%20safety,told%20OneZero%20in%20an%20email.&text=%E2%80%9CTo%20date%2C%20we%20have%20distributed,them%2C%E2%80%9D%20Lyft's%20spokesperson%20said [https://perma.cc/2UBS-AM54].

[153] Veena Dubal, Fieldnotes (on file with author).

[154] *Id.*

Image 2: This photo was taken at an August 2020 PPE Action in the South Bay. Rideshare Drivers United organizers were distributing food, personal protective equipment, and talking to other drivers about Prop 22. Photo Credit: Rideshare Drivers United

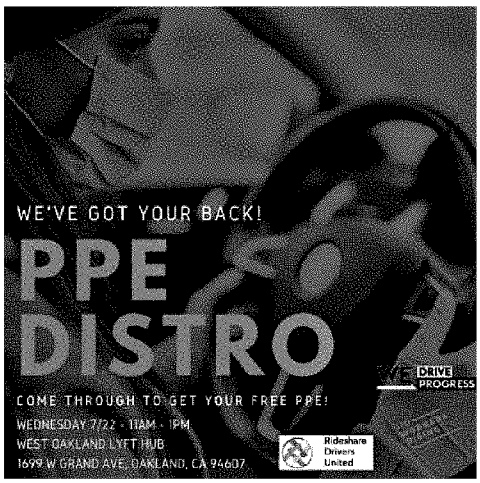

Image 3: Rideshare Drivers United driver organizers circulated this digital flier to advertise a July 2020 PPE event that they held alongside partners of the No on Prop 22 Coalition.

CONCLUSION

"Despite progress toward social and political equality, the Negro worker finds that his relative economic position is deteriorating or stagnating. . .. Long ago, during Reconstruction, the Negro learned the cruel lesson that social and political freedom cannot be sustained in the midst of economic insecurity and exploitation. He learned that freedom requires a material foundation."[155]

—Philip Randolph (1968)

"The essence of collective bargaining is an impersonal and standard wage. Unionism rests upon the cooperation of all workers. A racial wage differential prevents both of these developments. It would, therefore, destroy the possibility a real labor movement in this country."[156]

—George Weaver (1934)

In the throes of the Yes on Prop 22 campaign, Lyft advertised its effort to "uplift" communities of color in a one-minute YouTube ad set to the powerful voice of Maya Angelou, African American poet and former public transportation worker, as she recited her much-loved poem "On the Pulse of Morning." Angelou's poem, written for and recited at Bill Clinton's 1993 presidential inauguration,[157] is about the possibilities of a new day and hope in the face of devastation. In the Lyft ad, Maya Angelou's voice serves as the backdrop to scenes of workers of color, masked and happy—in a café, their ride-hail car, a commercial kitchen. As the advertisement ends, the following words are displayed, "LyftUp provides free rides to communities who lack access to food, jobs, and essential services."[158] Using Angelou's words and voice to convey racial sensitivity, the company strategically excluded the next few lines in which the famed poet details the violence of racial capitalism, "*Your armed struggles for profit/Have left collars of waste upon/My shore, currents of debris upon my breast.*"[159]

In this Article, I have metaphorically revived Angelou's excised lines by making racial domination visible as a centrifugal force in the legalization of partitioned, substandard protections for workforces of color. Specifically, I have situated Prop 22 and the third category of worker within a longer history of racialized wage codes in the U.S. Although white supremacy was clearly visible as a structuring force during the first promulgation of federal

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[155] ?Philip Randolph, *Foreword* to NEGROES AND JOBS: A BOOK OF READINGS v. (Louis A. Ferman, Joyce L. Kornbluh & J.A. Miller 1968).

[156] Weaver, *supra* note 48 at, 236.

[157] Brian Resnick & National Journal, *What Maya Angelou's Reading at Bill Clinton's Inauguration in 1993 Meant to Her* (May 28, 2014), https://www.theatlantic.com/politics/archive/2014/05/what-maya-angelous-reading-at-bill-clintons-inauguration-in-1993-meant-to-her/454389/ [https://perma.cc/ET78-BSRF].

[158] Lyft, *Lyft Up — Maya Angelou — Good Morning — Transportation Access — Lifting Up Communities of Color*, YOUTUBE (Feb. 17, 2021), https://www.youtube.com/watch?v=RBNkvDsmmpc [https://perma.cc/B22M-RJWT].

[159] *Id.*

minimum wage laws in the early 20th century, the role of racial subordination in lowering labor standards has become less obvious to many observers a century later. This, I have argued here, is by design. In writing and passing Prop 22, platform companies like Uber and Lyft obscured the ways in which the law created a new racial wage code, claiming instead to offer economic opportunities for people of color and concealing the exploitative conditions endemic to those "opportunities." To accomplish this, the companies and the Yes on Prop 22 Campaign created confusion about the terms of the initiative and relied heavily on a discourse of racial benevolence.

My research traces how immigrant and subordinated racial minority workers organized to contest these corporate representations of racial justice, and in the process, made discernable the intertwining ways in which their bodies and lives were dangerously instrumentalized for profit. Through rank-and-file unionism that centered social equity, these workers grew their coalition and compellingly argued that their economic exploitation via labor platform business models was intimately linked to other forms of racialized violence in their lives. The example that they set for organizing around racial justice and mutual aid—and not just wages and benefits—has the potential to radically restructure how we think about mobilizing to address the exploitation of low-wage platform workers.

The lesson of the research embodied in this Article is that promulgated through agency law, legislation, the initiative system, or private conciliation with labor representatives, a decreased wage code for platform work will have unjust racialized ramifications. The lowering of wage and benefits regulations for workers at the margins of the labor market through a third category—whether that category reflects the specific terms of Prop 22 or is framed more benevolently through legislation or a private business-labor compromise—will necessarily entrench racialized hierarchies and be understood historically as a form of abandonment of dispossessed workers.[160]

As platform companies and their funders attempt to spread this model of work to other sectors and the third category to other states, we must conceptualize these corporate efforts not only as broad attacks on economic security, but also as the insidious development of empires of capital upon the bodies of subordinated racial minorities. We may turn to the visions, actions, and articulations of the rank-and-file platform workers who fought racialized economic subordination in the context of Prop 22 for inspiration on how to mobilize against dispossession and towards justice.

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[160] For more on the way in which labor platform companies have turned to the idea of "sectoral bargaining" to cement their business models while appeasing some unions, see these principles for reform that I co-drafted and signed: *Sectoral Bargaining: Principles for Reform*, PRINCIPLES FOR SECTORAL BARGAINING (Mar. 1, 2021), https://concerned-sectoral-bargaining.medium.com/sectoral-bargaining-principles-for-reform-7b7f2c945624 [https://perma.cc/SUP6-Z2QK].