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GIGGIN' IN THE 21ST CENTURY

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I. Introduction

The labor market within the United States is currently undergoing a massive transformation. Historically, the predominate labor model was that of the employer-employee work arrangement, where individuals worked long-term for only a single, or few, employers over the course of their careers. Now, however, in response to the rise in digitalism and wide-spread access to technology, the labor market is shifting away from the traditional employer-employee model to a model characterized by its flexibility, autonomy, and on-demand nature.[1] This emerging labor market is known as "the gig economy," and it is premised upon "greater efficiency, productivity, and competitiveness."[2] The gig economy currently represents "the fastest growing segment of the labor market,"[3] with "more than 45 million Americans" having at least once participated in it as a worker.[4] As one scholar put it, "th[is] move to insecure, irregular jobs represents *the most profound economic change*" since the mid-1900's.[5]

However, the rapid emergence of the gig economy carries with it a number of taxation consequences stemming from the fact that our existing labor classification framework is constructed around "the assumption of full time employment."[6] Since this emerging labor market is detached from the traditional employer-employee model of the past, gig economy workers are not classified as "employees" for income tax purposes under present definitions. Instead, gig economy workers are classified as "independent contractors," or "small-business owners."[7] This classification carries with it many

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1. Emily C. Atmore, *Killing the Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy*, 102 Minn. L. Rev. 887, 888 (2017).

2. Robert Kuttner, *The Task Rabbit Economy*, The American Prospect (Oct. 10, 2013), https://perma.cc/KN3U-8G4U.

3. Kathleen DeLaney Thomas, *Taxing the Gig Economy*, 166 U. Pa. L. Rev. 1415, 1420 (2018).

4. Caroline Bruckner, *Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy* 4 (2016).

5. Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. Rev. 51, 54 n.16 (2017) (emphasis added) (internal quotation marks omitted) (quoting Kuttner, *supra* note 2).

6. Arun Sundararajan, *Crowd-Based Capitalism, Digital Automation, and the Future of Work*, 2017 U. Chi. Legal F. 487, 488–89.

7. Thomas, *supra* note 3, at 1417–18.

legal responsibilities that do not accurately reflect the nature of gig economy employment, and as such, our tax policy "must be fundamentally reconceptualized."[8]

Against this backdrop and based upon an analysis of fairness and complexity principles, this comment argues for several tax policy changes that should be implemented immediately in order to address some of the most pressing concerns gig economy workers presently face under current labor classifications. Part II provides a background of the gig economy while explaining the legal rationale behind the present classification of gig economy workers as independent contractors. Part II then illustrates the mechanics of a standard gig economy transaction generally, concluding with a side-by-side comparison of a gig economy worker and a similarly-situated employee. Part III begins with a brief introduction of the tax policy principles of fairness and complexity within the context of the gig economy, followed by an introduction of three of the system's primary inadequacies: the payment of income taxes, difficulties associated with claiming available deductions, and added complexity due to the Tax Cuts and Jobs Act of 2017 ("TCJA").[9] Part IV presents and analyzes a series of solutions that, if implemented together, would significantly alleviate some of the most immediate issues caused by the system's primary inadequacies. Part V concludes with what the future may hold for gig economy workers.

II. The Rise of the Gig Economy

While the phrase "the gig economy" is necessarily broad, understanding its origins provides insight into its increasingly prevalent role in the labor market and assists in understanding the consequences flowing from the "independent contractor" label. Following the discussion of the gig economy's background, this comment then analyzes a typical gig economy transaction, both on its own and in comparison with an employee performing the same type of work, in order to clarify and distinguish the responsibilities of gig economy workers.

A. An Overview of the Gig Economy

The term "gig economy," also known as the "sharing economy,"[10] describes an emerging labor market that shares the characteristics of "flexible, autonomous, and short-term" employment.[11] Gig economy workers are usu-

8. Sundararajan, *supra* note 6.
9. Pub. L. No. 115-97, § 11011, 131 Stat. 2054, 2063–72.
10. *National Taxpayer Advocate 2017 Annual Report to Congress*, I.R.S. Pub. No. 2104, at 165 (2017).
11. Atmore, *supra* note 1, at 888.

ally paid by the task, instead of by the hour, and often work multiple gig-type jobs at the same time.[12] Overall, there is no singular defining characteristic of a gig economy worker, as these individuals come from a wide variety of backgrounds, with great variation in education, skills, socio-economic status, preferences, and needs.[13]

The gig economy arose within the context of the technological boom in America, coupled with societal factors such as an increasingly mobile population and a shift away from the traditional "career" employment model towards a more transitive multi-job expectation.[14] To put it in perspective, as the fastest growing segment of the labor market, the gig economy is set "to at least double by 2020."[15] Furthermore, this sector of the economy is projected to exponentially increase in revenue world-wide, from $15 billion to $335 billion between 2013 and 2025.[16] As such, the gig economy has the potential to affect all Americans—a situation for which our present tax policy framework is not prepared to handle.

Our current classification system for gig economy workers for taxation purposes is imperfect. On a spectrum with "employee" on one end (where the employer assumes responsibility over the majority of tax requirements), and "independent contractor" or "small business owner" on the other end (where the independent contractor/business owner accepts—and is prepared for—all the added responsibilities of tax compliance), the gig economy worker falls somewhere in between the two. However, given the dichotomy of our current workforce classification system, since gig economy workers do not fall under the traditional employer-employee work arrangement, by default, they are labeled as "independent contractors" for taxation purposes.[17] This classification as an "independent contractor" or "small business owner" carries many consequences for the gig economy worker.[18]

The availability of this type of contingent work arrangement provides much-needed economic support for individuals during temporary gaps in employment or when earnings dip.[19] However, with this looser work arrangement also comes the removal of many of the worker protections developed over the last century, in addition to unfavorable tax policy treatment.

12. Seth D. Harris, *Workers, Protections, and Benefits in the U.S. Gig Economy*, 2018 GLOB. L. REV. 7, 11.

13. Lobel, *supra* note 5, at 57.

14. *Id*. at 52, 56–57.

15. Thomas, *supra* note 3, at 1420 (based on 2016 figures).

16. Nina E. Olson, *Participants in the Sharing Economy Lack Adequate Guidance from the IRS*, TAXPAYER ADVOCATE SERVICE (June 20, 2018), https://perma.cc/R8DX-NV8U.

17. Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 352 (2016).

18. These consequences are discussed *infra* Part III.

19. Harris, *supra* note 12, at 31.

These worker protections, such as minimum wage and overtime laws, regulated fringe benefits, unemployment insurance, anti-discrimination rules, Social Security, collective bargaining rights, and health and safety standards, for example, "were 'layered' on top of the normal employment contract" and were "predicated on the assumption of a standard workweek."[20] Because these worker protections are tied to a traditional employer-employee work arrangement, gig economy workers—classified as "independent contractors" or "small business owners"—are left in the precarious position where they perform much of the same work as their employee counterparts, but without the protections and tax treatment conferred by "employee" status. In sum, the gig economy's novel structure circumvents the society-wide protections built into the traditional employment model, leaving an entire subset of workers in a novel and unprotected position.

B. The Mechanics of a Standard Gig Economy Transaction

A typical gig economy transaction involves coordination between three parties: (1) the service provider; (2) the service recipient; and (3) the service coordinator.[21] The service recipient contacts the service coordinator, usually a third-party platform, requesting some type of task be performed. The service coordinator then communicates that request to its service providers, the gig economy workers, who then choose whether or not to perform the service. Some service coordinators, like TaskRabbit, allow the service providers to bid on the requested service by posting rates for specific jobs (without TaskRabbit's service charge included),[22] while others, like Uber, predetermine the cost of the service.[23] Although there are many examples of service coordinators, this comment will focus primarily on TaskRabbit as an example.[24]

TaskRabbit is an online service platform providing a "convenient [and] affordable way to get things done around the home" by "instantly connect[ing] you with skilled Taskers to help with odd-jobs and errands, so you can be more productive, every day."[25] Unlike other service coordinators who retain full control over the service charge, TaskRabbit allows its service providers, known as "Taskers," to bid on each individual service re-

20. Kuttner, *supra* note 2.

21. Olson, *supra* note 16. These terms refer to the gig economy worker, the customer, and the platform, respectively, and will be used interchangeably throughout this comment. In addition, this comment interchangeably uses the terms "small business owner," "gig worker," and "self-employed" to refer to the service providers.

22. *How to Hire a Tasker*, TASKRABBIT, https://perma.cc/NL4Z-5RZL (last updated Apr. 4, 2019).

23. *Riding with Uber: Upfront Pricing*, UBER, https://perma.cc/ME2Q-BFF9.

24. However, in the vast world of service coordinators, each discrete type of platform entails a set of issues particular to that structure.

25. *Revolutionizing Everyday Work*, TASKRABBIT, https://perma.cc/DM94-WC5S.

quested, thereby permitting its service providers to individually value their work.

The basic structure of a TaskRabbit transaction begins with a service recipient (a "client") using their smart phone or computer to request any one of a variety of services offered by the platform, such as moving, packing, general handyman help, home improvement, grocery shopping, and even pet-sitting.[26] Once a request has been submitted, it is transmitted to the local Taskers who possess the specific skills fitting the client's request for service. The Taskers interested in taking the job submit bids, with the client ultimately selecting one Tasker, based on the Tasker's identified rate and profile, to perform the task.[27] The Tasker coordinates with the client, perhaps purchases supplies for the task, and completes the task as requested.[28] The client pays via the TaskRabbit app, and TaskRabbit then pays the Tasker, after taking a percentage of the income.[29] However, despite generating revenue from these transactions, TaskRabbit disclaims that it "is not an employment agency service or business" and "is not an employer of any [Tasker]."[30] By classifying its Taskers as independent contractors instead of employees, TaskRabbit sidesteps any liability "for workers' compensation or any tax payments or withholding,"[31] among other things, thus "avoiding corporate responsibilities toward, and liabilities for, workers and consumers."[32]

To illustrate the difficulties gig economy workers face compared to employees, consider the following two scenarios of a worker installing cabinets, first as a gig economy worker, and second as an employee.

The Tasker who contracts to install cabinets in a client's house bears many responsibilities in ensuring that the job is completed satisfactorily and that their work is fully compensated. This means that if the Tasker supplies the cabinets and other materials, the Tasker must coordinate with the client regarding desired materials and make sure to include all receipts of purchased materials in the invoice to ensure reimbursement.[33] Any personal tools the Tasker uses may be subject to a depreciation deduction,[34] while most business expenses are likewise deductible,[35] if the Tasker understands

26. *TaskRabbit*, TaskRabbit, https://perma.cc/2J3B-BN43.
27. *How to Hire a Tasker*, *supra* note 22.
28. *Id.*
29. *Id.*
30. *TaskRabbit Terms of Service*, TaskRabbit, https://perma.cc/F63S-2VP5 (last updated Sept. 4, 2018).
31. *Id.*
32. Lobel, *supra* note 5, at 55.
33. *TaskRabbit Terms of Service*, *supra* note 30.
34. I.R.C. § 179 (2017).
35. *Id.* § 162.

how to claim the deductions.[36] With the income earned from installing the cabinets, along with other gigs worked, the Tasker must make the requisite quarterly payments to the IRS[37] and must budget properly for any amounts owed for self-employment taxes at the year's end,[38] all of which take time and expertise to navigate.[39] The Tasker must also self-enroll in the Marketplace for health insurance and add to any retirement accounts at their own cost. However, if the Tasker gets injured on the job, they will not receive any worker compensation or unemployment benefits.[40] Similarly, the Tasker is not protected by standard harassment, discrimination, or other worker-protection laws.[41]

In contrast, an employee who works for a cabinet installing business simply shows up at the pre-coordinated jobsite, uses employer-supplied tools, and receives a paycheck with any withholding already applied. In addition, the employee possibly enjoys employer-provided health insurance and retirement contributions, and almost certainly is entitled to worker compensation and unemployment should they be injured on the job, along with the robust worker protection laws that arise from an employer-employee relationship. These two workers, the Tasker and the employee, perform identical jobs installing the cabinets, yet the cost to each is incredibly different. This disparity in tax treatment directly affects the system's fairness, as will be discussed below, while also injecting significant uncertainty into the gig economy worker's life.

III. The Challenges Facing Gig Economy Workers

The exceedingly quick proliferation of the gig economy across the United States brought with it a number of challenges that, most simply put, boil down to the fact that our tax policy has not yet caught up to the gig economy, and thus does not accurately reflect the unique status of this subset of workers. At the forefront of understanding how our present tax policy fails to address the concerns of gig economy workers are the tax policy

36. *See generally How to Depreciate Property*, I.R.S. Pub. No. 946 (2018); *Business Expenses*, I.R.S. Pub. No. 535 (2018).

37. I.R.C. § 6654(c).

38. Bruckner, *supra* note 4, at 11.

39. Kathleen DeLaney Thomas, *User-Friendly Taxpaying*, 92 Ind. L.J. 1509, 1512 (2017) [hereinafter *User-Friendly Taxpaying*].

40. However, there are several recent proposals and initiatives aimed at addressing this very issue. *E.g.*, Portable Benefits for Independent Workers Pilot Program Act, S. 1251, 115th Cong. (1st Sess. 2017); Determinations of Worker Benefits and Employer Obligations Based on a Worker's Status, H. Bill 2812, 65th Leg., 2018 Reg. Sess. (Wash. 2018); *see generally* Natalie Foster, Greg Nelson & Libby Reder, Portable Benefits Resource Guide (Aspen Inst., Future of Work Initiative, 2016).

41. Catherine Tucciarello, *The Square Peg Between Two Round Holes: Why California's Traditional Right to Control Test is Not Relevant for On-Demand Workers*, 13 Seton Hall Cir. Rev. 351, 354 (2017).

principles of fairness and complexity. While this comment primarily focuses on tax policy implications from the viewpoint of gig economy workers, as a fast-emerging market sector, the gig economy poses additional tax policy issues from the viewpoints of service coordinators and the IRS. This comment then explores three of the present taxation system's primary inadequacies with regard to gig economy workers: (1) the payment of income taxes; (2) difficulties associated with deducting business expenses; and (3) added complexity due to the TCJA.

A. Tax Policy Principles

The following addresses the tax policy principles of fairness, including both horizontal equity and vertical equity, as well as complexity, which includes a system's administrative cost and compliance cost.

1. Fairness: Horizontal & Vertical Equity

Critical to analyzing a tax policy's effects on gig economy workers is the principle of fairness. The fairness of a tax system is judged on its horizontal equity and its vertical equity, two prongs which provide distinct criterion for evaluating a tax system's treatment of taxpayers.[42] Horizontal equity demands that "similarly situated workers should be treated similarly under law, just as similarly situated businesses should be regulated similarly."[43] Horizontal equity's comparison of "similarly situated" taxpayers should not be read as comparing "identically situated" taxpayers.[44] Rather, a horizontal equity analysis involves comparison between taxpayers whose circumstances are equivalent.[45] Thus, horizontal equity requires that, after taking into account individual taxpayers' circumstances, "*equally well-off* taxpayers be taxed equally."[46]

The principle of vertical equity addresses a tax system's treatment of taxpayers with different levels of well-being.[47] Within vertical equity is the "ability to pay" principle, which provides a mechanism for evaluating well-being based on economic terms.[48] An example of vertical equity in our present taxation system is its progressive rate structure, where households

42. Joel Slemrod & Jon Bakija, Taxing Ourselves: A Citizen's Guide to the Debate Over Taxes 87–88 (5th ed. 2017).
43. Harris, *supra* note 12, at 31.
44. David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 Yale L. & Pol'y Rev. 43, 44 (2006).
45. *Id.* at 44–45.
46. *Id.* at 45 (emphasis original).
47. Slemrod & Bakija, *supra* note 42, at 88.
48. *Id.* at 91.

of increasing levels of income pay an increasing proportion of income tax.[49] In sum, vertical equity avers that taxpayers with greater ability to pay should bear more of the tax burden than those with lesser ability to pay.[50]

2. *Complexity: Administrative Cost & Compliance Cost*

Generally speaking, our tax system's increasing complexity is a necessary byproduct of Congress addressing the goals of tax policy, such as the system's fairness.[51] A system becomes more complex as provisions are added or modified in recognition of certain sets of circumstances that, in Congress' opinion, necessitate reflection in the tax code in pursuit of tax policy goals.[52] An example of this are the numerous deductions within the present code, which encourage taxpayers to partake in preferred activities by rewarding those activities through a reduction in tax burden.[53] Deductions are especially prevalent at the business level, where the tax code includes business expense deductions, which are ordinary and necessary expenses businesses incur through operation.[54] Additionally, the tax code includes more industry-specific provisions as well as depreciation deductions, which enable business taxpayers to recover the cost of new equipment over an artificially shorter timespan than it would otherwise take, in order to encourage new purchases.[55] Although these provisions add to the complexity of a taxation system, they serve an important role in addressing the discrete and unique circumstances of taxpayers.

However, increasing a system's complexity is not without its costs. Specifically, when a tax system becomes more complex, its administrative cost and compliance cost increase.[56] The administrative cost refers to the government's cost incurred in collecting taxes, meaning everything that falls within the IRS' budget.[57] The compliance cost refers to the costs incurred by taxpayers in paying taxes.[58] This includes money spent on accountants, tax software, and tax education, but it also includes the taxpayers' time spent on the taxpaying process, which could otherwise be used for

49. *Id*. at 88–89.

50. *Id*. at 88.

51. Urban Institute & Brookings Institution, *Key Elements of the U.S. Tax System*, TAX POLICY CENTER, https://perma.cc/2LCP-625Y. Note that increasing complexity is not *always* a necessary byproduct of addressing tax policy goals, but in general, this is the cause of increasing complexity.

52. SLEMROD & BAKIJA, *supra* note 42, at 241.

53. *Id*.

54. *Deducting Business Expenses*, INTERNAL REVENUE SERVICE, https://perma.cc/5TL4-833U (last updated Nov. 5, 2018).

55. SLEMROD & BAKIJA, *supra* note 42, at 61–62.

56. *Id*. at 230–31.

57. *Id*. at 230.

58. *Id*. at 230–31.

personal pursuits or work.[59] In sum, a system's complexity necessarily increases as a result of pursing a fairer system that more specifically addresses certain behaviors and situations of taxpayers.

B. A Specific Examination of the System's Primary Inadequacies

Together, the tax policy principles of fairness and complexity guide the following exploration of how our present tax system inadequately addresses the reality of gig economy workers, focusing on the payment of income taxes, difficulties associated with business expense deductions, and added complexity due to the TCJA's addition of § 199A to the tax code.

1. Understanding the Payment of Income Taxes

Presently, the classification of gig economy workers as independent contractors violates fairness principles in multiple ways. Primarily, this is seen in the lack of horizontal equity, which mandates that a "tax system should treat similarly situated taxpayers similarly" by "impos[ing] similar tax burdens on similarly situated taxpayers."[60] By classifying gig economy workers as independent contractors, which, for tax purposes, means that they are small business owners,[61] the legal incidence of tax compliance (meaning who is legally responsible for remitting a tax)[62] shifts from the employer to the gig economy worker. This means that instead of the employer bearing the compliance cost of navigating withholding laws and becoming knowledgeable about tax requirements (or paying someone with that skillset) for the employee's benefit, the gig economy worker must bear those compliance costs themselves. Further, classifying gig economy workers as independent contractors also shifts the economic incidence of taxation (meaning who bears the economic burden of a tax)[63] to the worker from what the employer, under a traditional employer-employee relationship, would have paid for Social Security and Medicare. This decreases the horizontal equity of gig economy workers compared to similarly situated employees. This disparity is in addition to gig economy workers not receiving non-taxed fringe benefits, such as health insurance, from their employer, further violating horizontal equity.

59. *Id.* at 231.

60. Elkins, *supra* note 44, at 44.

61. Thomas, *supra* note 3, at 1417.

62. Gerald Prante & Andrew Chamberlain, *Economic v. Legal Incidence: Comparing Census Bureau Figures with Tax Foundation Tax Burdens*, TAX FOUNDATION (June 9, 2006), https://perma.cc/A37R-6NQR.

63. *Id.*

These fairness issues are apparent upon a closer look at the significant hurdles gig economy workers face when it comes to paying taxes on earned income, both in terms of the mechanics of submitting payments as well as calculating tax liability. As described above in the cabinet-installer scenario, the wage-earning employee receives a paycheck with any withholding already applied, meaning that their employer has already withheld and remitted to the IRS amounts owed for quarterly payments on behalf of the employee. Additionally, this employee will receive a W-2 each year summarizing their income to be reported to the IRS. In contrast, the Tasker is responsible for keeping track of all income and making estimated payments of their income and employment taxes on a quarterly basis, subject to penalties for failure to comply.[64]

Furthermore, the process of calculating the correct tax burden for a taxable year presents an additional challenge for gig economy workers. First, the Tasker must keep detailed records of every transaction to know their total income earned each year. Some Taskers, if they make over $20,000 per year *and* complete 200 or more transactions, will receive a Form 1099-K detailing their earnings.[65] However, this form does not necessarily capture all activity, like all available deductions, and so the Tasker must still maintain their own records in order to receive the tax benefits associated with claiming the Tasker's expenses.[66] With or without a 1099-K, the Tasker will have to attach a Schedule C to their individual tax return.[67] On a Schedule C, the Tasker takes into account any deductible expenses, including cost recovery via depreciation deductions, to calculate net profits.[68] This Schedule, along with any other forms detailing income derived from other endeavors, is then attached to a Form 1040 to arrive at the

64. Thomas, *supra* note 3, at 1422 (citing I.R.C. §§ 6654(a), (c)(2) (2012)). Note that these taxation requirements are not unique to gig economy workers as any employee who fails to remit the requisite quarterly payments is also subject to penalty. However, one of the benefits of the traditional employer-employee relationship is that the employer assumes the burden of complying with these taxation requirements, thereby relieving their employees of this administrative responsibility. Since employers are generally more familiar with the withholding and remitting process, employees who permit their employer to determine the proper withholding amounts and to remit those amounts to the I.R.S. usually do not trigger any penalty.

65. *Am I a TaskRabbit Employee?*, TASKRABBIT, https://perma.cc/9FPB-TVDX (last updated Apr. 24, 2019); *Understanding Your Form 1099-K*, INTERNAL REVENUE SERVICE, https://perma.cc/78PD-GSXX (last updated Nov. 5, 2018). Although some gig economy workers qualify over this threshold, the majority do not and so generally will not receive this tax information.

66. Eileen Ambrose, *Taxes and the Gig Economy*, AARP (Mar. 13, 2017), https://perma.cc/CG36-Y9F6.

67. Or a Schedule C-EZ, if business expenses are under $5,000. *Should I File Schedule C or Schedule C-EZ?*, INTERNAL REVENUE SERVICE, https://perma.cc/WXM7-Q8VW (last updated Aug. 20, 2018) [hereinafter *Should I File*].

68. Thomas, *supra* note 3, at 1418.

Tasker's taxable income.[69] This process requires knowledge of tax requirements and budgeting foresight, since taxpayers must take into account their expected tax burden throughout the year when making financial decisions. Taskers are further burdened with the additional time spent on ensuring their compliance with the tax code's requirements. However, many gig workers, if not most, are unaware of Schedule C, quarterly estimated payments, or available deductions.[70] This complexity is highlighted by the fact that only 44% of self-employed income is reported accurately.[71]

Vertical equity is similarly affected by these burden shifts when comparing gig economy workers to service coordinators. As the service coordinators, meaning the employers, have far greater resources available, vertical equity dictates that these taxpayers should bear a proportionately greater share of the tax burden compared to the individual gig economy worker. This speaks to the ability-to-pay principle, which maintains "that the tax burden ought to be related to the taxpayer's level of economic well-being."[72] By classifying gig economy workers as independent contractors, vertical equity between the worker and the employer is decreased because the gig economy worker, who has a lesser ability to pay, bears a proportionately higher compliance cost than the employers with a greater ability to pay, or greater level of well-being.

Overall, these increased compliance costs for the Tasker create a discrepancy in horizontal equity compared to the similarly-situated employee, and in vertical equity compared to the service coordinator. Not only does the Tasker have to spend significantly more time correctly calculating their taxable income,[73] but the Tasker is also subject to penalty for noncompliance.[74] Equity principles are likewise violated in shifting the burden of record-keeping from the employer to the gig economy worker, as this results in "gig workers spend[ing] disproportionately large [amounts of] resources dealing with tax compliance obligations compared to relatively small amounts of income,"[75] thus creating inequity between two workers doing the same job,[76] as well as between the gig economy worker and employer.

69. *Should I File*, *supra* note 67.

70. Paul Caron, *WSJ: The Blind Spot in the Sharing Economy—Tax Collection?*, TaxProfBlog (May 22, 2017), https://perma.cc/3S69-SS2D.

71. *User-Friendly Taxpaying*, *supra* note 39, at 1534. Furthermore, this results in a loss of $100 billion in tax revenue per year. *Id.* at 1511 n.2 (citing *Tax Gap for Tax Year 2006: Overview* tbl.1 (2012), Internal Revenue Service (Jan. 6, 2012), https://perma.cc/GE72-2Q7Y).

72. Slemrod & Bakija, *supra* note 42, at 91.

73. Alastair Fitzpayne, Shelly Steward & Ethan Pollack, *Tax Simplification for Independent Workers* 1 (Aspen Inst., Future of Work Initiative, 2018).

74. Atmore, *supra* note 1, at 889; *see also supra* text accompanying note 64. **R**

75. Thomas, *supra* note 3, at 1434. **R**

76. *Id.* at 1418.

2. Difficulties Associated with Business Expense Deductions

Intertwined with the payment of income taxes are difficulties associated with deducting business expenses. Specifically relevant to the gig economy worker is understanding the process of claiming available deductions, both in terms of correctly identifying deductible expenses and in terms of maintaining adequate records of expenses.

Claiming available business expense deductions begins with correctly identifying deductible expenses. However, this poses a significant challenge for many gig economy workers considering that, according to a survey from the National Association for the Self-Employed, "47% [of gig workers] didn't know about *any* tax deductions, expenses or credits that could be claimed related to their on-demand platform income."[77] Since one significant benefit of being self-employed is the availability of business-associated deductions, missing out on available deductions greatly decreases gig workers' marginal earnings in comparison to similarly-situated employees, thereby creating an imbalance in horizontal equity.

For those gig economy workers who are aware of available deductions, one of the primary challenges in identifying deductible expenses is distinguishing between personal and business expenses. Considering that the typical gig worker uses their personal equipment, vehicle, or tools when completing a task, determining when an item is being used for work, versus when it is being put to personal use, can be difficult for even the savvy taxpayer.[78] As the gig worker may deduct business-related expenses, but not personal use expenses, navigating the intricacies of cost-recovery poses a particularly complicated problem for the gig economy worker.[79] Additionally, this confusion and uncertainty may cause some workers to reduce their hours or even discourage them from participating in the gig economy entirely.[80]

Maintaining adequate records of deductible business expenses poses yet another obstacle for the gig economy worker. Determining which records need to be kept adds to the gig economy worker's compliance costs, and failing to preserve appropriate expense records results in the non-reimbursement of those expenses.[81] These issues further decrease the system's

77. BRUCKNER, *supra* note 4, at 12 (emphasis added).

78. Thomas, *supra* note 3, at 1454.

79. Shu-Yi Oei & Diane M. Ring, *Tax Issues in the Sharing Economy: Implications for Workers* 6 (Bos. Coll. Law Sch.: Legal Studies Research Paper Series, Working Paper No. 480, May 14, 2018), https://perma.cc/X3MQ-UPMJ (last revised May 15, 2018) (noting that "[t]he key issue that is likely to arise for those operating in the sharing economy is the need to apportion expenses between business and personal use.").

80. Thomas, *supra* note 3, at 1441–42.

81. *Id.* at 1430.

horizontal equity regarding gig economy workers and similarly situated employees. Additionally, these issues also decrease the system's vertical equity each time a gig economy worker fails to take an available deduction that would otherwise be available to a service coordinator.

3. *Added Complexity: The TCJA's Addition of § 199A*

Enacted December 22, 2017, the TCJA threw a wildcard into the mix by adding § 199A[82] to the tax code.[83] Broadly, § 199A allows a below-the-line deduction[84] of 20% of qualified business income ("QBI"),[85] subject to a phase-out,[86] for tax years beginning after 2017.[87] As the deduction is available to independent contractors who operate as sole proprietorships and partnerships,[88] gig economy workers generally may use this provision to further reduce their tax burden.[89] Most gig economy workers will fall under the threshold for the phase-out, which begins at taxable income over $157,000 for single-filers ($315,000 for joint filers).[90] Since the more complex aspects of § 199A begin at the point where the phase-out takes effect, this comment omits a detailed discussion of those provisions.[91]

While in effect, § 199A swings the pendulum of equity in favor of the gig economy worker compared to the employee. This is because § 199A, via the 20% reduction in QBI, reduces the gig economy worker's tax liability in comparison to a similarly situated employee. However, considering

82. I.R.C. § 199A (2017).

83. Note that this deduction was created as "a corollary tax benefit to non-C corporation businesses" who received a large tax rate cut in the TCJA. William A. Bailey, *Mechanics of the New Sec. 199A Deduction for Qualified Business Income*, J. ACCT. (May 1, 2018), https://perma.cc/H383-HNW4.

84. *See* Memorandum of Legal Advice from Dan Whyte, Chief Legal Counsel, Mont. Dep't of Revenue, to Mike Kadas, Dir., Mont. Dep't of Revenue, *H.R. 1 2017 Part II, § 11011-Pass-Through Deduction* 2 (Jan. 12, 2018), https://perma.cc/WQN7-RFGH; Thomas, *supra* note 3, at 1457 (taxpayers will still be able to elect whether to take the itemized or standard deduction).

85. "Qualified business income" means "the net amount of qualified items of income, gain, deduction, and loss with respect to any qualified trade or business of the taxpayer" for any taxable year. I.R.C. § 199A(c)(1).

86. *Id.* § 199A(e)(2)(A).

87. *Id.* § 199A(i). The deduction is subject to certain limitations that are largely inapplicable to typical gig economy workers (for example, excluded from the deduction is income earned in "a trade or business involving the performance of services in the fields of health, law, [and] accounting," when the taxpayer's taxable income exceeds a specified threshold). *See Tax Cuts and Jobs Act, Provision 11011 Section 199A - Qualified Business Income Deduction FAQs*, INTERNAL REVENUE SERVICE, https://perma .cc/5EF7-QG7D (last updated Mar. 8, 2019) [hereinafter *Deduction FAQs*].

88. *Deduction FAQs*, *supra* note 87. Section 199A applies to domestic businesses operated as sole proprietorships or through partnerships, S corporations, trusts, or estates. *Id.*

89. Shu-Yi Oei & Diane Ring, *Is New Code Section 199A Really Going to Turn Us All Into Independent Contractors?* 3 (Bos. Coll. Law Sch.: Legal Studies Research Paper Series, Working Paper Jan. 12, 2018), https://perma.cc/3BYF-QDTW (last revised Mar. 27, 2019).

90. I.R.C. § 199A(e)(2)(A).

91. *See generally Deduction FAQs*, *supra* note 87.

the difficulty the majority of gig economy workers have claiming deductions and the complexity of § 199A, many gig economy workers may unintentionally forgo this benefit. In a related problem, this provision potentially distorts taxpayer behavior through incentivizing a shift from employee status to independent contractor status in order to take advantage of the deduction.[92] Exacerbating this issue is § 199A's sunset provision, which eliminates the deduction after 2025, making long-term planning more difficult.[93] Once the deduction is no longer in effect, a potentially large number of taxpayers may find themselves classified as independent contractors when they otherwise may have sought employee status, but without the benefit of § 199A's deduction.

Lastly, since taxpayers who incorrectly calculate their tax liability face a penalty for the underpayment of income tax, gig economy workers who incorrectly calculate the § 199A deduction may additionally be required to pay a penalty for any associated underpayment.[94] Due to the rather high publicity of § 199A's 20% deduction, many gig economy workers may possess sufficient awareness of the deduction in order to claim it on their returns. However, these same taxpayers may lack the equivalent knowledge of other tax provisions necessary to correctly calculate their taxable income in order to avoid any penalty.[95] Since these taxpayers are more likely to commit calculation errors, the complexity of § 199A poses a hidden threat to a subset of taxpayers generally ill-equipped to mitigate the risk.

IV. Moving Forward: A Comprehensive Approach for Addressing the System's Inadequacies

While full-scale solutions to these problems and others will likely involve a broad re-working of the tax code's treatment of "independent contractor" and "employee,[96] with no such solution on the horizon, there are a number of changes that, in the interim, can increase the protection for gig economy workers, while making the process by which gig economy workers are taxed more fair and more efficient. These changes include implementing mandatory withholding and reporting provisions applicable to service coordinators; facilitating deductions for business expenses; and clarifying and heightening awareness of the § 199A business deduction.

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92. Oei & Ring, *supra* note 89, at 2–5. However, "a mere relabeling of a previous employer/employee relationship risks rejection, unless accompanied by meaningful actual change." *Id*. at 5.

93. I.R.C. § 199A(i).

94. *Id*. § 6662(a)–(b).

95. *See supra* Part II.

96. Seth D. Harris & Alan B. Krueger, A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker" 5–8 (Brookings Inst., The Hamilton Project Discussion Paper No. 2015-10, 2015).

A. Mandatory Wage Withholding & Reporting

The first step towards a fairer system involves implementing mandatory withholding and reporting laws for service coordinators. These changes, respectively, would require service coordinators to withhold a certain amount from each payment to a service provider and would eliminate the minimum threshold of $20,000 earned income over 200 or more transactions in a taxable year for when service coordinators are required to send out 1099-K forms to their service providers. These changes would address both horizontal and vertical equity while simultaneously increasing compliance, and are an immediate way to make the system more efficient.

Requiring withholding by service coordinators and eliminating the 1099-K minimum threshold would greatly alleviate the compliance burden on service providers. Since the service coordinator already maintains receipts from all transactions throughout the year, eliminating the 1099-K minimum threshold (resulting in mandatory 1099-K mailings to all service providers) would not greatly add to the service coordinators' costs. On the service provider's end, receiving a 1099-K would signal to the worker that some action needs to be taken while also providing a necessary synopsis of income earned. Shifting the burden of withholding to the service coordinator would likewise simplify the taxation process for the service provider, while also lessening budgeting concerns. This speaks directly to horizontal equity, as the service provider, the Tasker, would spend a considerably lesser amount of time on tax preparation, making the Tasker's cost of compliance more similar to that of an employee. Shifting the burden of withholding also addresses vertical equity in that it shifts that administrative cost to the service coordinator, who, due to economies of scale, is much better situated for that role compared to the service providers.[97] In addition to making the system more fair, these changes would also increase efficiency by freeing up service providers' time that would otherwise be spent on compliance, while not significantly impacting the service coordinator who already has the basic tax compliance infrastructure in place. This would likely result in a higher rate of compliance, thereby reducing the tax gap.[98]

Determining the amount of withholding poses some difficulties, both in the actual percentage withheld and considering that service providers may work for multiple service coordinators, have other employment generally, or may have spousal income that affects withholding amounts. How-

97. *Id.* at 18.
98. *Id.*

ever, these issues are not insurmountable.[99] Take for example a Tasker who also works for Uber. Both service coordinators, TaskRabbit and Uber, could each ask whether the worker wants that platform to be considered the worker's primary platform. Whichever platform the worker chooses would then withhold a certain percentage of income, while the other, non-primary platforms would not impose any withholding, similar to how employees with multiple employers can change the amount of withholding applied by each successive employer. While this does not address the spousal income issue, it would at least err towards a larger return at year's end for joint filers, instead of a deficit, which also reduces the IRS' administrative cost.[100]

Determining the actual percentage to be withheld is more complicated. A failed provision in a 2017 bill before the Senate would have required service coordinators to withhold 5% of workers' income earned, up to $20,000.[101] Others have advocated for a sliding scale between 6% and 16%, depending on a worker's projected marginal tax rate, or a flat rate of 10%.[102] Overall, any amount of withholding would be a step in the right direction, with a flat rate being preferable at this point in order to simplify the transition. Additionally, a flat rate would serve to reduce the IRS' administrative costs by reducing possible complexity. Following the implementation of mandatory withholding at a set percentage, a tiered approach should be considered alongside the data.

B. Facilitating the Process of Claiming Business Deductions

Two changes can be made to alleviate the added costs associated with claiming available business-related deductions: implementing a standard business deduction[103] and creating a small-business owner database on the IRS' website for tracking business expenses.[104]

The standard business deduction would be available only to businesses and would operate as an alternative to the present system of compiling and

99. As an initial matter, the possibility of overcoming these issues is apparent because these withholding requirements apply to employees as well, with relatively little issue. However, the withholding calculation for employees is generally calculated by the employer, who often hires bookkeepers or accountants who possess specialized skills to determine proper withholding amounts. Since gig economy workers do not have an employer available to perform this calculation, they are responsible for determining withholding amounts on their own under the present system.

100. This is because the process of notifying taxpayers of deficiencies and then collecting those amounts overdue costs the IRS more in administrative costs than it does for the IRS to simply provide a taxpayer who has overpaid their taxes over the course of a taxable year with a tax return.

101. *See* NEW GIG Act of 2017, S. 1549, 115th Cong. § 7706(s)(2) (2017).

102. Thomas, *supra* note 3, at 1449–52. R

103. Credit for this proposal goes to Kathleen DeLaney Thomas, who first proposed the idea in *Taxing the Gig Economy*, *supra* note 3. For the details of her proposal, *see id.* at 1454–67.

104. Thomas, *supra* note 3, at 1549–50.

recording all business expenses over the taxable year.[105] This would provide business owners with the choice of either "itemizing" their business expenses, as is presently the case, or claiming the standard business deduction amount in lieu of recovering their specific business expenses.[106] In essence, this would parallel the more familiar personal income tax dichotomy of either itemizing deductions or taking the standard deduction.

Determining the amount of the standard business deduction will need to be addressed. One option is to set the deduction at a fixed amount, like the personal income tax standard deduction, while another option is to structure the deduction as a fixed percentage of the taxpayer's gross business receipts.[107] In keeping with the goal of simplifying the gig workers' tax compliance efforts, a fixed dollar amount is the preferable option at this point. A fixed dollar amount is more familiar to the average taxpayer, who likely has elected to take the standard deduction on their past personal income tax returns, and would not require any additional steps, other than making the election. This likely will result in a smaller deduction for gig workers on average, but ideally, once the IRS' business expense tracking database is established, most gig workers will choose to "itemize" their business expenses instead of claiming the standard business deduction, to better reflect their actual expenses.[108]

Overall, implementing a standard business deduction now would greatly assist gig workers who either do not know about business expense deductions or do not understand the nuances associated with business expense deductibility in general. Additionally, the standard business deduction would reduce the gig workers' compliance costs by reducing or eliminating the need to maintain receipts and records of all business expenses over the course of the taxable year. Thus, both the rate of compliance and efficiency would be increased, while also creating a system that is fairer to the unsophisticated gig worker.[109]

For a long-term solution, the IRS should develop an online database that assists business owners in tracking their expenses.[110] To utilize the database, business owners, including gig workers, would take pictures of their receipts and invoices and upload the photos to the database through an app.[111] When uploading, the taxpayer would categorize each particular ex-

105. *Id.* at 1454.

106. *Id.* at 1457.

107. *Id.*

108. This, of course, would only change the behavior of those whose deductible business expenses exceed the standard business deduction.

109. Thomas, *supra* note 3, at 1454.

110. *See User-Friendly Taxpaying*, *supra* note 39, at 1549–50.

111. *Id.* at 1550.

pense based on a drop-down list of options.[112] The database would store the uploaded information, including the picture itself, in an easily-accessible format, and could be programmed to generate an initial summary of likely deductible expenses for the taxable year.[113] This would enable gig workers to more accurately maintain their records while also providing the IRS with a direct means of oversight, assisting with the system's administrability.

Together, these two ideas provide both short-term and long-term solutions to gig workers' acute problem with claiming business expense deductions. The standard business deduction could be implemented immediately and could operate either as a temporary stop-gap measure[114] or as a permanent addition to the tax code, while the business expense database, following its development, is preferable over the long-term as it would enable more precise deduction tracking.

C. Addressing § 199A Issues

The problems created with the addition of § 199A largely center around issues with knowledge—both in awareness and in requirements—of the provision. This issue manifests in one of two ways, either: (1) gig economy workers are unaware of the provision and so will miss out on a significant benefit available to them; or (2) if they are aware of the provision, they lack holistic knowledge of the tax implications associated with claiming the 20% deduction under § 199A.[115] These tax implications concern the heightened risk posed by the associated penalty provision[116] and the Section's sunset provision.[117]

Gig economy workers who are unaware of § 199A will not claim the deduction, which increases horizontal inequity. First, the government will expect taxpayers to claim the deduction if they qualify and will base its tax policy on that assumption. For the gig workers who do not claim the deduction, this will cause a cascading effect on their economic prosperity compared to those gig economy workers who do claim the deduction. Second, since this deduction was created as "a corollary tax benefit to non-C corporation businesses" who received a large tax rate cut in the TCJA, gig economy workers who do not claim the deduction will be reducing their relative

112. *Id.*
113. *Id.*
114. As a temporary stop-gap measure, this would potentially pose the same issue for long-term planning as does the § 199A sunset provision. Accordingly, if the standard business deduction is designed to only be a temporary addition to the tax code, then the IRS should focus its efforts on raising public awareness, similar to the proposals presented in *infra* Part IV(C).
115. *See* Thomas, *supra* note 3, at 1452–55.
116. I.R.C. § 6662 (2017).
117. *Id.* § 199A(i).

well-being compared to that of the corporate world.[118] To combat the negative implications for those taxpayers who are unaware of § 199A, the IRS should strive to increase public knowledge of the deduction through easily understood and easily accessible publications, characterizing it as a *temporary relief measure* for small business owners. By highlighting the fact that § 199A is a temporary measure, this will help increase the public's awareness that it is not a permanent provision. Each state's Secretary of State website should also include easily-accessible information on this provision.

With this increase in awareness of § 199A comes an increase in potential negative repercussions associated with incomplete knowledge of the provision. By lowering the threshold for triggering a penalty attributable to the understatement of income, the provision essentially sets a trap for the unwary independent contractor. Since the § 199A deduction is designed to be applied *after* any other below-the-line deductions are applied,[119] it is far too likely that the unsavvy taxpayer overlooks this nuance and applies § 199A prior to applying other applicable below-the-line deductions, thus triggering the penalty provision. For example, take the following hypothetical:

> A gig economy worker earns $20,000 after taking any applicable above-the-line deductions. The taxpayer also has $1,000 of below-the-line deductions available. Now, the unsavvy taxpayer knows that they may claim a 20% deduction under § 199A, but they are not aware of the importance of the order of operations:
>
> - If the taxpayer incorrectly applies the 20% deduction at this point to their $20,000 of income, this will result in a $4,000 deduction from their taxable income to equal $16,000. Then, subtracting out their below-the-line deduction of $1,000 equals a total taxable income amount of $15,000.
> - However, the correct way to claim the deduction is to *first* apply any applicable below-the-line deductions, and *then* apply the 20% § 199A deduction: $20,000 minus the below-the-line deduction of $1,000 equals $19,000. Then applying § 199A, a 20% deduction from $19,000 equals a total taxable income amount of $15,200.

Since the incorrect order of operations results in a $15,000 taxable income amount, while the correct order of operations results in a taxable income amount of $15,200, the unsavvy taxpayer in this scenario would trigger the understatement of income provision[120] and be subject to the corresponding

118. Bailey, *supra* note 83.
119. I.R.C. §§ 199A(c)(1), (3).
120. *Id.* § 6662(a).

penalty.[121] Note that the taxpayer here would trigger the penalty provision for understating their taxable income by only $200, and only for mistakenly applying § 199A (a below-the-line deduction) prior to all other below-the-line deductions. To address this issue, in disseminating information regarding § 199A, the IRS should be sure to include instructions on *how* to apply § 199A to arrive at the correct tax liability, similar to the above hypothetical.

Additionally, debate exists over whether the penalty provision applies only to understatements of income *directly due to claiming the § 199A deduction*, or if the penalty provision applies more broadly to *any understatement of income*, whether or not attributable to claiming a deduction under § 199A.[122] This is important because under the latter reading, all a gig economy worker needs to do to potentially subject themselves to a penalty is claim a deduction under § 199A, thereby greatly increasing their financial exposure. Due to the complexities associated with correctly calculating all business expense deductions, it is extremely likely that the average gig economy worker will unintentionally trigger the applicability of the penalty provision. This essentially creates a "roll the dice" scenario where gig economy workers will simply have to hope that the IRS does not choose to audit their returns. Thus, as an initial matter, the IRS needs to clarify which interpretation is the correct reading of the provision in order to determine the scope of the potential for liability.

As a secondary matter, to address the issue of incomplete knowledge of § 199A, any governmental publication discussing the availability of § 199A's deduction should include a warning alerting taxpayers to the possibility of a penalty for miscalculating their taxable income, as mentioned above. Since the penalty provision is tucked away in an entirely different section of the tax code, with no mention of any applicable penalty within the text of § 199A, the chances of a typical gig economy worker knowing about the slim margin of error for triggering a penalty are extremely low. The government created § 199A expecting to incentivize small business owners to claim the deduction, and so should proactively seek to educate

121. While the penalty provision itself will not result in a massive monetary penalty for the gig economy worker, it will still result in the taxpayer having to pay the IRS additional sums for the incorrect calculation. Additionally, the IRS' administrability costs will rise due to taxpayers not understanding how to correctly apply the § 199A deduction, resulting in the government spending valuable resources to recoup relatively small amounts of money.

122. Memorandum Accompanying Presentation from Samuel A. Donaldson, Professor of Law, Ga. State Univ., Senior Counsel, Perkins Coie LLP, to 66th Annual Mont. Tax Inst., Alexander Blewett III Sch. Of Law, Univ. of Mont., *Annual Income Tax Update* 17 (Oct. 19, 2018); *but see* Tony Nitti, *Understanding the New Sec. 199A Business Income Deduction*, THE TAX ADVISER (Apr. 1, 2018), https://perma.cc/ZTB5-EW6X.

this subset of taxpayers about the possible consequences associated with the provision.

Lastly, § 199A's sunset provision creates the potential for issues in the near-future, when the provision expires in 2025.[123] Gig economy workers who have begun to include the deduction's benefit in their budgeting after a few years of successfully claiming it on their returns will be faced with a significant and unexpected financial burden upon the deduction's expiration. The short-lived nature of the provision only adds to the uncertainty gig economy workers already face, and disproportionately affects a subset of workers who lack the means and the knowledge to stay informed about changes to the tax code. The key to alleviating some of these issues again comes down to increasing the availability of information detailing the lesser-known aspects of this deduction, focusing on using language that alerts taxpayers of potential changes, like calling § 199A a "temporary" provision. Additionally, the IRS should disseminate an alert to all taxpayers who claimed a § 199A deduction in the year prior to the provision's expiration warning them of the need to adjust expectations. In this way, gig economy workers (and all other taxpayers who claim a § 199A deduction) will have an opportunity to adjust their budgeting while also reducing the IRS' administrative costs the following year.

V. Conclusion: Future Outlook

Implementing the suggestions described in this comment, including mandatory wage withholding and reporting for service coordinators; implementation of the standard business deduction and an expense-tracking database on the IRS website; and increased taxpayer knowledge through easily-accessible publications, warnings as to possible penalties, and alerts regarding the sunset provision, would result in a significant improvement in the average gig economy worker's economic well-being.

These steps would benefit the gig economy worker by increasing the system's equity while also reducing compliance costs associated with paying taxes. In turn, by reducing compliance costs for this large sector of the economy, overall compliance would increase. Along with gig economy workers, the IRS also would see a significant benefit from changing withholding and reporting laws, as this would result in a more administrable system. This would decrease the tax gap by decreasing the IRS' administrative costs while simultaneously increasing its revenue. Finally, although these changes would somewhat increase compliance costs for service coordinators, these taxpayers are better equipped to handle wage withholding and reporting than gig economy workers. Accordingly, the compliance cost

123. I.R.C. § 199A(i).

across taxpayers as a whole would be reduced, thereby allowing more opportunity for economic growth instead of time spent on compliance. Thus, these changes would have the net effect of improving the economic status of all affected parties, while simultaneously addressing the issues caused by our traditional employment classification model.

Going forward, large-scale changes will need to occur for our tax policy to catch up to our society's quickly-changing economic reality. Until then, the proposals contained within this comment deserve a critical look, with the potential benefits derived therefrom having the ability to increase everyone's well-being.