BRIDGING THE COASEAN DIVIDE: THE NEED FOR A SHARED ECONOMIC LEXICON FOR ANTITRUST AND WORKER PROTECTION LAW

BY CONOR J. MAY*

Uber, the most prolific of a new breed of transportation network companies, has in recent years been the target of two distinct strands of litigation that expose a question at the heart of the company's business model. On one hand, drivers have sued Uber for intentionally misclassifying them as contractors to dodge employer obligations. On the other, passengers have taken Uber to court for violating antitrust laws by fixing prices among millions of independent competitors. Uber's situation seems legally untenable; either drivers are independent businesspeople and Uber is running a massive price fixing conspiracy, or drivers are employees and the company owes millions in worker benefits and payroll taxes.

However, antitrust and worker protection laws have both evolved over the last half-century to be far more permissive of innovative (some would say exploitative) business models like Uber's. This leaves a regulatory void in which some companies get all the benefits of a coordinated, top-down command structure without incurring either antitrust liability or employer obligations. This void poses both a competition problem and a labor problem.

This note argues for a common set of definitions across antitrust and labor law to close the oversight gap and prevent regulatory arbitrage. These definitions should be nuanced, and might include intermediate categories like "dependent contractors." These definitions should be guided by evidence of drivers' genuine ability or inability to make market decisions, particularly whether they can set their own prices. But most importantly, they must be uniformly recognized by labor and antitrust authorities, to ensure a level playing field in the "gig" economy.

* Conor J. May is a J.D. Candidate at the University of Colorado Law School. Special thanks to Charlotte Slaiman, Jeff Blattner, Ahmed White, and Harry Surden for their insights and instruction.

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INTRODUCTION

In 2015, lawyers for the ride-hailing giant Uber went to court in California to defend the company against its own drivers.[1] The drivers claimed that Uber had misclassified them as independent contractors and shirked the company's obligations under the California Labor Code.[2] Uber's lawyers argued fervently that their drivers were independent contractors, each running their own business, and that Uber merely provided the digital platform on which they conducted their operations.[3] However, this argument begs another question. Uber's app uses an algorithm to connect drivers to passengers and set the price of a given ride.[4] This same algorithm is used by thousands of Uber drivers nationwide.[5] If

1. O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015).
2. *Id.* at 1135.
3. *Id.* at 1137.
4. Tim Simonite, *When Your Boss Is an Uber Algorithm*, MIT TECH. REV. (Dec. 1, 2015), https://www.technologyreview.com/2015/12/01/247388/when-your-boss-is-an-uber-algorithm/ [https://perma.cc/GY74-HDGB].
5. Melissa Berry, *How Many Uber Drivers are There?*, THE RIDESHARE GUY (June 1, 2019), https://theridesshareguy.com/how-many-uber-drivers-are-there/ [https://perma.cc/RH6C-U56D].

these drivers are not Uber's employees, is Uber then engaged in a massive price fixing ring, coordinating prices amongst thousands of supposed competitors? Within a year of being sued by their drivers, Uber found themselves in federal court in New York, sued by passengers for price fixing in violation of federal antitrust laws.[6] Uber eventually avoided litigation on the merits in both cases, but it remains an open question as to how long they can skirt the borders of labor and antitrust law.[7]

Modern economic regulation relies on line-drawing between different kinds of economic relationships, and allocating rights and protections on the basis of those distinctions. The definitive distinction—common across antitrust law, employment law, and labor law—draws a line between the relationship of a firm to their employees and the relationships of independent actors in a competitive market.[8] Antitrust and labor enforcers use the distinction between firm relationships and market relationships to decide who gets the right to coordinate economic activity, and employment law enforcers use it to grant worker protections and benefits.[9]

Digital technology enables countless new forms of economic organization and transaction.[10] These new forms can bring greater efficiency, make transactions easier, and reduce market friction.[11] However, they can also blur the lines between economic categories: consumers and producers, firm relationships and market relationships, employees and independent contractors.[12] This creates room for companies to harness the benefits of coordination while at the same time dodging obligations to workers.[13] This sort

6. Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016).

7. Jonathan Stempel, *Uber wins halt to N.Y. price-fixing lawsuit during appeal*, REUTERS (Aug. 26, 2016, 10:47 AM), https://www.reuters.com/article/us-uber-lawsuit-pricefixing/uber-wins-halt-to-n-y-price-fixing-lawsuit-during-appeal-idUSKCN11121H [https://perma.cc/CTE7-NBVR].

8. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 387–88 (1937).

9. V.B. Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 71 (Feb. 2017) [hereinafter Dubal, *Wage Slave or Entrepreneur*]; Sanjukta Paul, *Fissuring & the Firm Exemption*, 82 L. & CONTEMP. PROBLEMS 65, 65–66 (2019) [hereinafter Paul, *Fissuring & the Firm Exemption*]; *see also* Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBLEMS 45 (2019).

10. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 107–13 (Nov. 2016).

11. *Id.*

12. Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 150 (2016); Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something In Between?*, 2017 COLUM. BUS. L. REV. 859, 883–85 (2017); Paul, *Fissuring & the Firm Exemption*, *supra* note 9, at 66.

13. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 78–81; Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to the Basics*, 10 HARV. L. & POL'Y REV. 479, 485, 490–91 (2016); Avi Asher-Schapiro, *Against Sharing*, JACOBIN (Sep.

of regulatory arbitrage can harm not only workers, but also competition.[14]

No firms represent this shift in workplace organization as well as transportation network companies (TNCs). Since the emergence of TNCs like Uber and Lyft more than a decade ago, their critics have pointed out the role that regulatory evasion played in their rapid rise to prominence.[15] Competitors, consumers, and drivers have raised challenges to TNCs under both antitrust and worker protection law.[16]

The two different types of claims against TNCs described above represent different lenses on the same question: are TNCs using a technological smokescreen to evade law and harm other players in the economy? This question feeds into a larger debate about whether the undeniable consumer benefits provided by TNCs result from technology-driven efficiency, or whether these benefits come from risk-shifting and regulatory arbitrage, which destabilize labor and create an algorithm-controlled underclass. The answer is likely a combination of the two. The point of this paper is not to champion platform-enabled efficiencies and rebut claims of worker exploitation, or vice versa.

Rather, this paper draws four conclusions from the Uber debate. First and foremost, enforcement agencies and courts need to arrive at a consistent set of definitions, shared between antitrust and worker protection law. As new technologies blur the lines, antitrust and labor law need to agree on where the firm ends and the market begins to avoid arbitrarily condemning some forms of coordination while permitting others.[17] Second, this paper contends that the best basis for defining these borders is usually a hiring entity's ability to control pricing. The ability to negotiate prices is the strongest distinction between market relationships and firm/employee relationships.[18] Third, this paper grants that antitrust and labor law's shared set of definitions need not be binary, and discusses the potential for intermediate categories between "employee" and "independent contractor." However, whether enforcers recognize two categories or more than two, the same categorical boundaries must be reflected across doctrinal

19, 2014), https://www.jacobinmag.com/2014/09/against-sharing/ [https://perma.cc/45YR-9XAY].

14. *E.g.*, Micah Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker by Worker Approach,* 68 WASH. & LEE L. REV. 311, 315 (2011); *see also* Lobel, *supra* note 10, at 105.

15. *See*, *e.g.*, Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 78–81; Sanjukta Paul, *Uber as a For-Profit Hiring Hall*, 38 BERKELEY J. EMP. & LAB. L. 233, 258 (2017) [hereinafter Paul, *Uber as a For-Profit Hiring Hall*]; Asher-Schapiro, *supra* note 13.

16. *See*, *e.g.*, O'Connor v. Uber Techs. Inc., 904 F.3d 1087 (9th Cir. 2018); Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016).

17. Paul, *Uber as a For-Profit Hiring Hall*, *supra* note 15, at 258.

18. Coase, *supra* note 8, at 387–89.

fields. Finally, on the basis of these conclusions, this paper argues that TNCs need to either treat drivers as employees or make significant changes to their business model to grant drivers more genuine economic independence.

Part II will examine the antitrust perspective. It will discuss the failure of antitrust suits against TNCs, and explain how modern antitrust doctrine has become more accommodating of innovative business models that engage in price coordination outside of the traditional firm structure. Part III will focus on the labor perspective. It will describe how modern labor law has enabled the shift from employee to independent contractor classification, ending with the National Labor Relations Board (NLRB) decision to recommend classifying Uber drivers as independent contractors. Part IV will conclude by exploring how antitrust law on the one hand, and employment and labor law on the other, can remain true to their respective purposes while coming together to achieve economic justice. By preventing firms from exploiting the fault lines between these different fields of law, policymakers can capture the economic benefits of the platform economy while addressing the economic harms.

I. BACKGROUND

Economic and legal analysis typically relies on the ability to define laborers as either employees working within a firm or as contractors selling their labor in a market.[19] Traditional transportation-as-a-service businesses, typically called chauffeur services, have all conformed to one of these models.[20] TNCs, however, challenge our understanding of the traditional models.[21] The practical effects of this challenge differ depending on whether one is in the driver's seat or the passenger's.

A. Distinguishing Employee-Firm and Contractor-Market Relationships

Ronald Coase's famous work *The Nature of the Firm* transformed law and economics by pointing out that the economy is structured by relationships within firms (of managers to their employees) and relationships between independent market actors.[22] The former relationship is characterized by control, while

19. *See* Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 67; *see generally* Coase, *supra* note 8.

20. V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies*, 38 BERKLEY J. EMP. & LAB. L. 73, 78–79 (2017) [hereinafter Dubal, *The Drive to Precarity*].

21. Miller, *supra* note 12, at 150; Anderson & Huffman, *supra* note 12, at 883–85.

22. Coase, *supra* note 8, at 387–88.

the latter is characterized by "the price mechanism:" Coase's shorthand for competition subject to the laws of supply and demand.[23] Coase argues that firms form in order to build stable relationships that do not require the constant reassessment and renegotiation of price between members.[24] This provides predictability and greatly reduces Coase's famous "transaction costs."[25] Coase points out that transaction costs may also be reduced by "the emergence of specialists who will sell this [price] information."[26] This last insight is particularly relevant in the context of TNCs, whose competitive edge relies largely on their ability to efficiently collect price information and thereby reduce transaction costs between drivers and riders.[27]

Antitrust law's defense of competition is grounded in the distinction between firm and market relationships. Courts have long held that antitrust law does not condemn coordinated behavior within firms, merely coordination between independent economic actors.[28] This is what labor and antitrust scholar Sanjukta Paul calls the "firm exemption" to antitrust liability.[29]

Employment and labor law reflect this Coasean divide by categorizing workers as either employees or independent contractors.[30] Early Supreme Court cases litigating the National Labor Relations Act (NLRA) sought to define which workers were employees and which were contractors in order to determine whether the workers could unionize.[31] Like firms, labor unions enjoy an exception from antitrust law's prohibition on coordination.[32] Today, these classifications are crucial in determining not only workers' rights to organize but also eligibility for employment benefits, firm liability for the conduct of workers, and more.[33]

Thus, entrepreneurs theoretically face a choice. They can organize a stable workforce at set wages under the umbrella of a

23. *Id.*
24. *Id.* at 391.
25. *Id.*
26. *Id.* at 390.
27. *See* Lobel, *supra* note 10, at 106–07.
28. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984); *see also* A. DOUGLAS MELAMED, RANDAL C. PICKER, PHILIP J. WEISER & DIANE P. WOOD, ANTITRUST LAW & TRADE REGULATION 170 (7th ed., 2018).
29. Paul, *Fissuring & the Firm Exemption*, *supra* note 9, at 66–67. Sanjukta Paul, a law professor at Wayne State University and the University of Minnesota, has written extensively on the interplay between antitrust law and labor. *See generally, e.g., Fissuring & the Firm Exception, supra* note 9; Sanjukta Paul, *Antitrust as an Allocator of Coordination Rights*, 67 UCLA. L. REV. 378 (2020).
30. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 71.
31. NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).
32. 15 U.S.C. § 17 (1914).
33. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at fig.1; Jost, *supra* note 14, at 313–16.

firm, but they then have to provide benefits and allow workers to unionize. Alternatively, they can avoid providing benefits and dealing with unions if they were willing to negotiate with contractors as truly independent agents in an open market, subject to the price whims of supply and demand.

B. Existing Approaches to Cars-for-Hire

Historically, both firm (employee) and market (contractor) relationships have appeared in the car-for-hire industry.[34] Before the deregulatory era of the 1970s, most taxi drivers were classified as employees, and entitled to worker protections.[35] Since 1979, taxi drivers have increasingly become independent contractors.[36]

But the modern taxi industry is far from a pure competitive market. The supply of taxi cabs is typically subject to local regulation in the form of taxi medallions (a form of permit to operate), and the prices they charge are typically subject to local rate regulation.[37] Government regulation can serve as a substitute for competition when it comes to setting prices in market transactions outside the firm.[38] While economists and antitrust enforcers typically prefer competition to regulation because of its adaptability and efficiency, they also recognize that certain industries are by nature resistant to competition.[39] Government can fill the role of free market competition by setting prices at rates that are equitable for consumers and suppliers.[40] Modern taxicabs operate in just such a regulated market. Their prices are not coordinated by a central firm or platform, but are subject to regulatory caps created by local governments.

However, the history of the traditional taxicab industry, and its shift from unionized firms to a heavily regulated contractor market, produced less-than-optimal results for both riders and drivers. Economists have documented how artificial restriction of supply in the taxicab industry can lead to higher fares and lower-quality service.[41] Meanwhile, Vina Dubal's history of taxi labor in San Francisco sums up the result as "a workable balance between

34. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 81–82.

35. *Id.* at 81–83.

36. *Id.* at 90–91.

37. Jesse Garnier, *SF Taxi Medallions Now Up For Sale*, SFBAY.CA (Aug. 23, 2012), https://sfbay.ca/2012/08/23/san-francisco-taxi-medallions-now-up-for-sale/ [https://perma.cc/CMZ2-Z8KZ]; F.T.C. BUREAU OF ECON., AN ECONOMIC ANALYSIS OF TAXICAB REGULATION, 15–23 (1984).

38. *See* Makan Delrahim, Assistant Attorney Gen., Dep't of Justice, *Remarks as Prepared for Delivery at A.B.A. Antitrust Sec. Fall Forum*, DEP'T OF JUSTICE 5–6 (Nov. 16, 2017); *see generally* Richard Posner, *Natural Monopoly & Its Regulation*, 21 STAN. L. REV. 548 (1969).

39. Posner, *supra* note 38, at 548, 636.

40. *Id.* at 551–53.

41. F.T.C. BUREAU OF ECON., *supra* note 37, at 83–93.

fare rate, the gate cap, and the number of taxicab medallions" that produced for drivers a "fragile and far from ideal" situation. [42]

C. The Impact of TNCs: Good for Consumers, Bad for Workers

In her article *The Law of the Platform*, Orly Lobel lays out how platforms like Uber can make markets more efficient by reviving dead capital, lowering transaction costs, and providing real-time matching of supply to demand.[43] Indeed, many economic thinkers see TNCs as improving the transportation sector through technological innovation and enhanced competition.[44] A 2014 study found that what consumer pay for Ubers ranges from about the same as taxis to less than half the price, depending on time and place.[45] In addition to lowering price, TNCs increase convenience for riders, allowing them to summon a car to their location in a matter of minutes.[46]

However, TNCs' impact on professional drivers of all kinds has been anything but beneficial.

In the taxi industry, the cost of medallions, which drivers purchase in order to operate cabs, has plummeted as taxis face aggressive competition from TNCs. [47] This has been devastating for cabbies who had worked or incurred debt to purchase them.[48]

Meanwhile, in the TNC industry, a 2018 study from MIT concluded that median driver profits were "$3.37/hour, and 74% of drivers earn less than the minimum wage in their state."[49] The study concluded that after taxes and expenses, up to thirty percent of drivers actually lost money on ride-hailing. [50] The authors concluded that one possible explanation was that TNC drivers "failed to do a full accounting of the costs associated with driving."[51] This type of behavior might be relevant for policymakers trying to

42. Dubal, *The Drive to Precarity*, *supra* note 20, at 119.

43. Lobel, *supra* note 10, at 107–12.

44. *See generally* Judd Cramer & Alan B. Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, 106 AM. ECON. REV. 177, 178 (2016).

45. Sara Silverstein, *Uber vs. Taxi*, BUSINESS INSIDER (Oct. 16, 2014 10:47 AM), https://www.businessinsider.com/uber-vs-taxi-pricing-by-city-2014-10 [https://perma.cc/J6KU-VPRQ].

46. Georgios Petropoulos, *Uber and the economic impact of sharing economy platforms*, BRUEGEL (Feb. 22, 2016), https://bruegel.org/2016/02/uber-and-the-economic-impact-of-sharing-economy-platforms/#_ftn3 [https://perma.cc/3H28-6ZGW].

47. Dubal, *The Drive to Precarity*, *supra* note 20, at 125–26.

48. *Id.*

49. Stephen Zoepf, Stella Chen, Paa Adu & Gonzalo Pozo, *The Economics of Ride-Hailing: Driver Revenue, Expenses and Taxes* 16 (M.I.T. Ctr. for Energy & Envtl. Pol'y Res. Working Paper Series, No. 2018-005, 2018).

50. *Id.* at 18.

51. *Id.*

decide whether TNC drivers bear more resemblance to underpaid laborers or entrepreneurial businesspeople.

II. ANTITRUST & HARMS TO COMPETITION

Antitrust claims brought by competitors and consumers against TNCs (predominately Uber) generally fall into three categories: predatory pricing, unfair competition by way of regulatory evasion, and price fixing.[52] All of these claims are evaluated under different models. However, in general, modern antitrust doctrine requires a showing that TNC behavior does not just harm competitors, but also has the potential to harm consumers by reducing output or increasing prices.[53] This paper will focus on price fixing, as this offense is most fundamental to TNCs' business model and the employee–independent contractor distinction. Price fixing has historically been subject to *per se* antitrust liability, which means that where a court finds price fixing has occurred, the price fixer is automatically liable, regardless of any justifications they might offer.[54] However, courts have steadily narrowed the *per se* antitrust rules that would have condemned Uber in a prior era.[55] Uber's behavior may seem like a *prima facie* case of price fixing, but in light of the benefits TNCs have brought to consumers, courts may look for reasons to avoid imposing *per se* liability.[56]

A. Price Fixing Under the Per Se Rule

Section 1 of the Sherman Act famously forbids "every contract, combination . . . or conspiracy, in restraint of trade."[57] Although the Act prohibits *every* restraint of trade, courts quickly realized that all contracts and economic relationships rely on some sort of agreement that imposes restraints on the agreeing parties.[58] Therefore, courts typically divide agreements into two types: those that are *per se* illegal and those that are evaluated under the Rule

52. Nick Passaro, *Uber Has an Antitrust Litigation Problem, Not an Antitrust Problem*, ANTITRUST CHRONICLE, COMPETITION POL'Y INT'L 38, 39–42 (May 2018); *see also*, *e.g.*, Phila. Taxi Ass'n v. Uber Techs., Inc., 866 F.3d 332 (3d Cir. 2018); MacCausland v. Uber Techs., Inc., 312 F. Supp. 3d 209 (D. Mass 2018).

53. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221–23 (1993); Sullivan v. NFL, 34 F.3d 1091, 1096–97 (1st Cir. 1994); Paul H. Brietzke, *Robert Bork, The Antitrust Paradox: A Policy at War with Itself*, 13 VAL. U. L. REV. 403, 406 (1979).

54. MELAMED ET AL., *supra* note 28, at 145.

55. *E.g.,* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?* 42 U.C. DAVIS L. REV. 1375, 1379 (2009).

56. Lobel, *supra* note 10, at 107–13; Cramer & Krueger, *supra* note 44, at 179–80; Silverstein, *supra* note 45.

57. 15 U.S.C. § 1 (1891).

58. Bd. of Trade Chicago v. United States, 246 U.S. 231, 238 (1918).

of Reason. Some types of agreements are *per se* unlawful, meaning that they are almost always harmful to competition.[59] Other types of agreements can be evaluated under the Rule of Reason (which is to say, on a case-by-case basis) if they are not inherently anticompetitive and sometimes provide efficiencies that benefit consumers.[60]

Price fixing, one of the most quintessential restraints on competition, involves a conspiracy to set prices among competitors.[61] Historically, courts have treated all forms of price fixing as *per se* antitrust violations, because "[t]he aim and result of every price fixing agreement, if effective, is the elimination of one form of competition."[62] In the early days of antitrust enforcement, judges and justices were unmoved by arguments that price fixing was necessary for the viability of a particular industry, or that the prices that resulted were a reasonable reflection of cost.[63] This is because price, as Justice Douglas noted in *United States v. Socony-Vacuum Oil Co.*, is "the central nervous system of the economy,"[64] delivering efficiency and consumer benefit by translating supply and demand. Courts have recognized that "[t]he power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."[65] Thus, a reasonable price today could become the "unreasonable price of tomorrow."[66]

The Supreme Court's 1940 analysis in *Socony-Vacuum* would certainly cause heartburn for TNCs if not for the intervening half-century of change in antitrust thinking. The *Socony* Court laid out two succinct principles which, if applied to TNCs, might mean the death of the industry. It did not matter "that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible."[67] Justice Douglas wrote that price fixing applied even if "by various formulae [the prices] are related to the market prices."[68] He went on to make clear that agreements to fix prices by

59. *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); F.T.C. & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS § 1.2, at 3 (2000).

60. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (1978); ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS, *supra* note 59.

61. United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

62. *Id.*; *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing . . .").

63. United States v. Trans-Missouri Freight Assoc., 166 U.S. 290, 340–42 (1897); *Trenton Potteries*, 273 U.S. at 396; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

64. *Socony-Vacuum*, 310 U.S. at 224 n.59.

65. *Trenton Potteries*, 273 U.S. at 397.

66. *Id.*

67. *Socony-Vacuum*, 310 U.S. at 222.

68. *Id.*

manipulating supply and demand were still *per se* illegal: "the machinery employed by a combination for price fixing is immaterial."[69]

This machinery can include coordination of competitors by a third party who operates at a different level of the vertical supply chain.[70] This kind of offense is typically referred to as a "hub-and-spoke" conspiracy.[71] In such a conspiracy, the "hub"—either a buyer or supplier—uses vertical agreements with each of the "spoke" firms to affect a horizontal agreement (the "rim") that restrains competition among the spokes.[72] Today, vertical price restraints are typically subject to Rule of Reason analysis, rather than *per se* liability, as they do not restrain competition between direct competitors.[73] However, antitrust law still applies *per se* liability to hub-and-spoke agreements, because they represent more than just vertical agreements. Hub-and-spoke agreements are also a "horizontal agreement among the spokes 'to adhere to the [hub's] terms'"—typically because "the spokes 'would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing.'"[74] Therefore, where such an agreement exists with the purpose of fixing prices among direct competitors, it is still considered *per se* illegal.[75]

Most observers agree that TNCs would likely be investigated as a form of hub-and-spoke conspiracy, with the platform as the hub and drivers as the spokes.[76] But although hub-and-spoke conspiracies are theoretically subject to *per se* liability, courts may be able to avoid such a conclusion.

B. New Economic Models Under the Rule of Reason

Although earlier precedents indicate that TNCs are *per se* illegal, the latter part of the 20th century saw a turn away from such automatic liability.[77] For example, the prohibitions on vertical price

69. *Id.* at 223.

70. United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015).

71. *Id.*

72. Barak Orbach, *Hub-and-Spoke Conspiracies*, 15 ANTITRUST SOURCE 1, 1 (2016); *see also Apple, Inc.*, 791 F.3d at 314.

73. *Apple, Inc.*, 791 F.3d at 313–14.

74. *Id.* at 314 (citations omitted); *see also* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939).

75. *Apple, Inc.*, 791 F.3d at 322–23.

76. *E.g.,* Meyer v. Kalanick, 174 F. Supp. 3d 817, 824 (S.D.N.Y. 2016); *see also* Anderson & Huffman, *supra* note 12, at 899; *see also* Kathleen Guilfoyle, *Uber's Efficiencies: A Modest Proposal for Limiting Uber's Liability Under the Per Se Rule*, 91 U. COLO. L. REV. 314, 324 (2020).

77. Anderson & Huffman, *supra* note 12, at 893; Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The Near Triumph of the Chicago School*, 1983 CASE W. RES. U. 319, 320–22 (1983); Joshua Wright, *Overshot the Mark? A Simple Explanation of*

restraints were lifted during this era.[78] *Per se* liability is still generally imposed for horizontal price fixing violations, including hub-and-spoke conspiracies, as described above.[79] But even this most direct of threats to competition can be subject to more lenient analysis when a new technological model is in play.[80]

To illustrate this evolution's implications for TNCs, it is helpful to consider the Supreme Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System*. This case reached the Court in 1979, during a shift away from rigid application of antitrust laws, and dealt with blanket music licensing.[81] This innovation lowered transaction costs and greatly simplified licensing in a market with "thousands of users, thousands of copyright owners, and millions of compositions."[82] The nature of broadcasting meant that "most users want unplanned, rapid, and indemnified access to any and all of the repertoire of compositions, and the owners want a reliable method of collecting for the use of their copyrights."[83] Technically, blanket licenses fixed prices among thousands of competing composers, but the Court, acknowledging the "substantial lowering of costs," neglected to turn to the *per se* liability rule.[84]

Justice White acknowledged that this was literally price fixing, noting that "the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells." [85] But he clarified that *per se* price fixing liability does not hinge on "whether two or more potential competitors have literally 'fixed' a 'price,'" but rather on whether the conduct is of a type that is "plainly anticompetitive" and without "redeeming virtue." [86] He instructed future judges to consider the effects of a given scheme, not just its *prima facie* appearance.[87]

Justice White was unconvinced that the blanket license reduced competition among individual composers; it did not, he said (quoting *Socony-Vacuum*) threaten the "central nervous system of the economy."[88] In many ways, BMI offered an entirely new product, for which individual compositions were merely the "raw

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the Chicago School's Influence on Antitrust, 5 COMPETITION POL'Y INT'L 1, 8 (2009); *see also*, *e.g.*, Broadcast Music, Inc. et al. v. Columbia Broadcasting System, Inc. et al., 441 U.S. 1, 8–10 (1979).

78. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 880, 881 (2007).

79. *Id.* at 886.

80. *E.g.*, *Broadcast Music, Inc. et al.*, 441 U.S. 1, at 8–10; United States v. Microsoft Corp., 253 F.3d 34, 89–90 (D.C. Cir. 2001).

81. *See generally Broadcast Music, Inc. et al.*, 441 U.S. 1.

82. *Id.* at 20.

83. *Id.*

84. *See id.* at 21.

85. *Id.* at 8.

86. *Id.* at 9.

87. *See id.* at 19–20.

88. *Id.* at 23 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940)).

material," creating a new market out of a situation "in which individual composers are inherently unable to compete effectively."[89] TNCs could argue this description applies to their companies as well.

Finally, Justice White quoted a holding that has been invoked more and more frequently in reference to technology and antitrust: "it is only after considerable experience with certain business relationships that courts classify them as *per se* violations."[90] Although technically BMI's innovative blanket license was not a new form of technology, courts in the U.S. have been increasingly reluctant to strictly apply antitrust liability to new technologies or disruptive business models out of fear of stifling innovation.[91]

If courts apply this more lenient reasoning to TNCs, they may try to avoid condemning a model that has lowered consumer prices and increased output. They could decline to apply *per se* liability to TNCs by finding that the responsive pricing algorithm, even though it literally sets a price, responds to supply and demand and thus does not disrupt the "central nervous system of the economy."[92]

However, Mark Anderson and Max Huffman point out that this reasoning relies on the Ancillarity Doctrine.[93] The Ancillarity Doctrine protects agreements that would normally be *per se* illegal if they are ancillary to an otherwise lawful agreement.[94] So, an otherwise illegal agreement between multiple firms may be allowed if it is ancillary to achieving a greater efficiency or procompetitive benefit. This protection, which long predates the relaxation of *per se* analysis, requires the restraint of trade to be essential, reasonably necessary, or at least helpful in achieving the benefits of an otherwise procompetitive arrangement.[95]

Anderson, Huffman, and other commentators have questioned whether setting the price of rides is really necessary for TNCs to provide their purported efficiencies.[96] The efficiencies Lobel describes could theoretically be achieved without setting fare prices, by instead supplying the digital infrastructure for drivers and riders to connect in real-time and bid on fare prices.[97] If a viable model emerges that harnesses the benefits of TNCs without

89. *Id.* at 22–23.

90. *Id.* at 2 (quoting United States v. Topco & Assocs., Inc., 405 U.S. 596, 607–08 (1972)).

91. *E.g.*, Telex Corp. v. Int'l Bus. Mach. Corp., 510 F.2d 894, 927 (10 Cir. 1975), (disapproved of by Memorex Corp. v. Int'l Bus. Mach. Corp., 555 F.2d 1379 (9th Cir. 1977)); United States v. Microsoft Corp., 253 F.3d 34, at 89–90.

92. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, at 224 n.59 (1940).

93. *See* Anderson & Huffman, *supra* note 12, at 911.

94. United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).

95. *See* MELAMED ET AL., *supra* note 28, at 166.

96. *See* Anderson & Huffman, *supra* note 12, at 914; *see also* Paul, *Fissuring & the Firm Exemption*, *supra* note 9, at 75.

97. *See generally* Anderson & Huffman, *supra* note 12, at 914.

resorting to price-setting, antitrust enforcers would likely be far more sanguine about condemning the prevailing approach used by companies like Uber and Lyft.[98]

C. TNCs in the Shadow of Meyer v. Kalanick

Competitors and customers have tried unsuccessfully to bring antitrust challenges against the upstart TNC platforms.[99] Uber, in particular, has faced several antitrust allegations,[100] including the charge that it is coordinating a price fixing ring among a wide network of independent competitors (their drivers).[101] Thus far these antitrust suits have not met with success.[102]

Uber first faced price fixing claims in federal court in 2015 in *Meyer v. Kalanick*.[103] This seminal suit survived a motion to dismiss in federal district court[104] but Uber avoided trial by invoking an arbitration clause in their end user contract.[105] However, even though arbitration clauses may save TNCs from lawsuits brought by consumers, they do nothing to block complaints from competitors, state attorneys general, or federal agencies.[106] Therefore, given that Uber and their fellow platforms coordinate pricing amongst thousands of theoretically independent businesspeople, price fixing liability remains a potential Sword of Damocles hanging over TNCs.

However, courts have expressed a broad skepticism that Uber is violating the spirit of antitrust laws, and this skepticism may

98. *Id.*

99. *See generally*, *e.g.*, Phila. Taxi Ass'n v. Uber Techs., 866 F.3d 332 (3rd Cir. 2018); McCausland v. Uber Techs., Inc., 312 F. Supp. 3d 209 (D. Mass 2018); DeSoto Cab Co., Inc. v. Uber Techs., Inc., No. 16-CV-06385-JSW, 2018 U.S. Dist. LEXIS 226261 (N.D. Cal. Sept. 24, 2018).

100. *See McCausland*, 312 F. Supp. 3d at 212; *DeSoto Cab Co.*, 2018 U.S. Dist. LEXIS 226261 at 24–25; Malden Transp., Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264, 268 (D. Mass. 2017); *Phila. Taxi Ass'n*, 866 F.3d 332.

101. Meyer v. Kalanick, 174 F. Supp. 3d 817, 819 (S.D.N.Y. 2016).

102. *See, e.g.*, *Phila. Taxi Ass'n*, 866 F.3d at 346; *DeSoto Cab Co.*, 2018 U.S. Dist. LEXIS 226261, at *42. *See also* Passaro, *supra* note 52, at 39–42 (documenting plaintiffs' failed antitrust suits against Uber).

103. *See Kalanick*, 174 F. Supp. 3d at 819.

104. *Id.* at 829.

105. *See* Meyer v. Uber Techs, Inc. 868 F. Supp. 3d 66, 80 (2nd Cir. 2017) (holding that the arbitration clause in Uber's Terms of Service was enforceable and vacating the district court's decision in Meyer v. Kalanick, 200 F. Supp. 3d 408 (S.D.N.Y. 2016)).

106. *See* 15 U.S.C. § 1 (2014) (declaring restraints on trade illegal); 15 U.S.C. § 15c(a)(1) (authorizing state attorneys general to bring suit on behalf of citizens); 15 U.S.C. § 26 (Westlaw through P.L. 116-259) (Allowing "any person, firm, corporation, or association" to bring suit for injunctive relief for violations of antitrust laws); 15 U.S.C. § 45(a)(2) (Westlaw through P.L. 116-259) (authorizing the Federal Trade Commission to bring actions against parties who violate trade regulations).

prove more important for TNCs than any arbitration clause.[107] Modern antitrust doctrine focuses on harm to consumers, and in general Uber has "caused the supply in the ride-hailing market to increase and the price to diminish."[108] Because modern antitrust law is used to protect consumers—not competitors or workers—it may look favorably on innovations that lower prices and increase supply, despite complaints of unfair competition.[109]

All of this amounts to an uncertain future for TNCs under antitrust law. TNCs have revolutionized ride-hailing, violating the letter of price fixing prohibitions while benefiting consumers in keeping with the spirit of modern antitrust doctrine. And as the next section will discuss, the same technology-driven breakdown of the firm–market distinction that so muddied the waters in *BMI* has had a major impact on U.S. workers.

III. EMPLOYMENT & HARMS TO WORKERS

Although TNCs are violating the letter of antitrust law while obeying the spirit, the reverse is true when it comes to labor and employment law. Driving for Uber or Lyft seems on its face to be a form of employment, rather than a form of entrepreneurship, and a multitude of commentators have argued that drivers deserve greater protections than those afforded by their independent contractor status.[110]

However, like the seminal Uber price fixing case, the most famous worker misclassification case brought by Uber drivers was eventually shunted into arbitration due to a clause in the driver's

107. *See, e.g.*, *Phila. Taxi Ass'n*, 866 F.3d at 332, 344 (noting that Uber's presence in the Philadelphia market actually increased competition); McCausland v. Uber Tech., Inc., 312 F. Supp. 3d 209, 214 (D. Mass 2018) (finding competition in the Boston market increased with Uber's entry).

108. *McCausland*, 312 F. Supp. 3d at 214.

109. *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3rd Cir. 2007) ("Conduct that merely harms competitors . . . while not harming the competitive process itself, is not anticompetitive.").

110. *See generally* Dubal, *Wage Slave or Entrepreneur*, *supra* note 9 (arguing that drivers are, in actuality, closer to employees than independent contractors); Paul, *Fissuring & the Firm Exemption*, *supra* note 9 (positing that the concentration of coordination power weighs against firms like Uber being able to designate drivers as independent contractors); Rogers, *supra* note 13, at 481 ("platform economy workers should typically be classified as employees"); Steinbaum, *supra* note 9 (suggesting that the gross imbalance of power warrants classification of gig workers as employees); Asher-Schapiro, *supra* note 13 (claiming that the sharing economy merely exploits workers who deserve better); Matthew De Silva & Alison Griswold, *The California senate has voted to end the gig economy as we know it*, QUARTZ (Sept. 11, 2019), https://qz.com/1706754/california-senate-passes-ab5-to-turn-independent-contractors-into-employees/ [https://perma.cc/URW9-6D8A] (discussing California's efforts to thwart ride-sharing companies from misclassifying workers).

contract.[111] So just as the best chance for antitrust relief against Uber is in the hands of state and federal enforcers, the best chance for labor relief lies with the NLRB and state governments.

The worker classification debate is not new. Ever since the New Deal, when Congress and state governments created an broad worker protection laws, companies have sought to avoid these laws.[112] TNCs represent the latest front in a decades-long effort to shift more work to independent contractors, resulting in what economist David Weil refers to as "the fissured workplace."[113] The D.C. Circuit's famous (or infamous) decision in *FedEx Home Deliveries* was a particularly hard blow to fissuring's opponents.[114] This decision made it much easier for many firms to classify their workforce as contractors.[115] So while courts may look for ways to avoid subjecting TNCs to *per se* antitrust scrutiny, labor advocates are calling on those courts to apply stricter standards to companies' classification of workers.[116]

Courts and commentators have always recognized that worker classification is "an inherently imprecise inquiry."[117] The vast range of economic relationships governing workers have led to broad criticism of both the requirement that these relationships be sorted into two distinct categories and the individual legal tests that are used to do the sorting.[118] However, this sorting provides a link to the Coasean economic model and to antitrust law, because the distinction between employees and contractors theoretically

111. *See* O'Connor v. Uber Techs., 904 F.3d 1087, 1095 (9th Cir. 2018); *see also* Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 69 (stating that the O'Connor case is a "highly publicized misclassification battle.").

112. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 81–82, 85.

113. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 7 (2017); V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 17 WIS. L. REV. 739, 749–50 (2017).

114. *See* FedEx Home Deliveries v. NLRB, 563 F.3d 492, 503 (D.C. Circ. 2009) (identifying that FedEx drivers have a "significant entrepreneurial opportunity for gain or loss" and thus must be independent contractors); *see also* Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 106, 130 (2018) (noting that the D.C. court emphasized the entrepreneurial aspects of the work while discounting others); Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 89 (documenting a shift in reasoning with regard to independent contractors due to the FedEx case).

115. By emphasizing workers' ability to take entrepreneurial risks, companies can shift workers' classifications from employees to independent contractors. *See FedEx Home Deliveries*, 563 F.3d at 503–04.

116. *See, e.g.*, Rogers, *supra* note 13, at 481; Steinbaum, *supra* note 9, at 46.

117. Jost, *supra* note 14, at 318; *see also* NLRB v. Hearst Publ'ns, 322 U.S. 111, 126–27 (1944) (noting that various factors can cause the "legal pendulum" to swing); Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 72 ("As a result of the various tests and the myriad factors used to determine employee status, the current regime of employee status and rights is piecemeal and inconsistent.").

118. *See* NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968); Rogers, *supra* note 13, at 481–82.

follows the line between firm relationships and market relationships.[119]

A. Purpose-Based Worker Classification in Hearst

Prior to the New Deal, the roots of the employee-contractor distinction were found in common law of torts, used to determine "a master's vicarious liability for the conduct of a servant."[120] This body of law understandably based its distinction on how much agency a worker had in determining how the work was carried out, or conversely, how directly their work was controlled by the employer.[121] So the Agency test, also sometimes called the "right-to-control" test, differentiated between employees and contractors by looking at the hiring party's "right to control the manner and means by which the result is accomplished."[122] This focus on direct control over the way that the work is done makes sense when determining a hiring entity's liability for their workers' actions.

However, in 1935, the National Labor Relations Act (NLRA) gave these terms new significance by making them the boundary between laborers who were protected by the Act and those who were not—despite legislative history which indicates that this was not Congress's intent.[123] Congress used the term "employee" to specify those covered by the Act but they did not clearly define it, likely because they did not intend to use the "employee" distinction to exclude large classes of workers from protected status.[124]

The Court's first major attempt to distinguish employees and contractors under the NLRA drew lines based on the purposes of the statute, rather than the traditional tort law jurisprudence.[125] Instead of common law tort principles, the Court based its ruling in *Hearst Publications* on whether the work in question was vulnerable to the mischief the NLRA was designed to prevent. [126] It thus focused not on direct control, as tort law had, but rather on inequality of bargaining power, a worker's dependence on their earnings, and the inability to "resist arbitrary and unfair treatment."[127] These factors that may be present even for those classified as contractors under the common law Agency test.

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119. Anderson & Huffman, *supra* note 12, at 885.

120. Jost, *supra* note 14, at 313–14.

121. Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 197–98 (1999).

122. *Id.*

123. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 83.

124. *Id.*

125. *See* Jost, *supra* note 14, at 320–21; Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 85–86.

126. NLRB v. Hearst Publ'ns, 322 U.S. 111, 126–27 (1944).

127. *Id.* at 127.

Were *Hearst* still the controlling law, there is little doubt that TNC drivers would be categorized as employees. Like modern TNC drivers, the "newsboys" fighting for organizing rights in *Hearst* could be employed full-time or part-time, as a primary source of work or only casually.[128] They worked without direct supervision.[129] However, their earnings were the difference between the price they paid for papers and the price they charged, and both prices were fixed by the publishers or their district managers.[130] Similarly, TNC drivers today can work variable hours and are not employed for fixed terms. They work without reporting to a supervisor (although some argue that the company is blurring that line by exerting more and more direct supervision through the app itself).[131] However, their relationship with the hiring entity is also not subject to the Coasean price mechanism; instead, the apps determine the prices charged to customers and the percentage that is paid to drivers. As a consequence, they have very little bargaining power or ability to resist *Hearst's* "arbitrary and unfair treatment."

In his decision in *Hearst*, Justice Rutledge "[p]resciently . . . acknowledged the need to both look beyond the factory setting and the difficulties of using a single test to determine 'employment' given the emergence of new business structures."[132] It is hard to imagine that Court *not* finding TNC work environments to be susceptible to the kind of mischief the NLRA was designed to prevent.

B. The Common Law Agency Test after Taft-Hartley

But like *per se* antitrust liability, *Hearst*'s purpose-based approach was largely abandoned in the latter half of the twentieth century.[133] This process began when the Eightieth Congress "unraveled many New Deal labor and employment protections."[134] The Taft-Hartley amendments to the NLRA rejected the Court's approach in *Hearst* and explicitly excluded independent contractors, as defined by the common law Agency test, from coverage under the NLRA.[135] The years after Taft-Hartley saw the

128. *Id.* at 116.
129. *Id.*
130. *Id.*
131. *See* Alex Kirven, *Whose Gig is it Anyway? Technological Change, Workplace Control and Supervision, and Workers Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 282 (2018).
132. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 85.
133. *See* Linder, *supra* note 121, at 198–99; *see also* Jost, *supra* note 14, at 318.
134. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 86.
135. Linder, *supra* note 121, at 197; *see also* 29 U.S.C. § 152(3) (1978).

NLRB and courts enshrine the Agency test as the controlling standard, particularly at the federal level.[136]

The exclusion of those classified as contractors under the Agency test was less significant for an industrial workforce.[137] The lines between firm relationships and market relationships were more clear-cut (which may also help explain why *per se* antitrust liability for price fixing was less controversial). However, "[a]midst the broader neoliberal shifts of the coming decades, including . . . the rise of the service economy," businesses used the ambiguities of the Agency test to avoid New Deal obligations to workers.[138] Vina Dubal points out how "the transportation sector was an ideal place to push the legal boundaries because workers were not 'controlled' in the traditional industrial sense."[139]

C. Entrepreneurial Opportunity in FedEx & Uber

Jurisprudence around the Agency test has recently shifted to reflect a greater focus on "entrepreneurial opportunity" as the decisive indicia of control, and by extension, the decisive indicia of a worker's classification.[140] In *FedEx Home Deliveries*, the D.C. Circuit applied the "Entrepreneurial Opportunity" test to drivers and approved the company's classification of drivers as independent contractors.[141] The court discounted familiar indicia of employment, such as the requirement to wear uniforms.[142] They focused instead on the fact that these drivers could use their own vehicles, hire helpers, and exchange property interest in their routes without FedEx's involvement.[143] Labor advocates have roundly criticized the *FedEx* decision as a betrayal of the government's duty to workers masked by empty free market rhetoric.[144]

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136. *See, e.g.,* Linder, *supra* note 121, at 197; Jost, *supra* note 14, at 323; Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 72.

137. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 88.

138. *Id.*

139. *Id.* at 90.

140. FedEx Home Deliveries v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009); NLRB v. Friendly Cab Co., 512 F.3d 1090, 1097 (9th Cir. 2005); *see also, e.g.*, Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002); Jost, *supra* note 14, at 327–31 (While entrepreneurial opportunity was decisive in each of these cases, they have to varying degrees characterized it as the dominant consideration (*FedEx*) or merely one factor in determining control (*Friendly Cab*)).

141. *FedEx Home Deliveries,* 563 F.3d at 504.

142. *Id.* at 503.

143. *Id.* at 498

144. Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083, 1092 (2015); Jost, *supra* note 14, at 332–33; *see, e.g.*, Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 94–95.

The *FedEx* decision did not necessarily constrain the NLRB when it came to classifying TNC drivers. TNC drivers and FedEx delivery drivers do not experience identical work conditions.[145] However, in 2019 the NLRB released an Advice Memo firmly identifying TNC drivers as contractors, using entrepreneurial opportunity as the principle metric for control.[146] The NLRB admitted that the payment method (commission-based, in which the company retains a percentage of drivers' fees) cut in favor of employment.[147] However, this factor was outweighed by drivers' control over their work schedule and location, use of their own vehicle, and the fact that the company does not accept liability for the drivers' conduct.[148] In short, the very same risk-shifting behavior that allows the company to push costs onto workers also insulates them from obligations to those workers.

IV. LEVELING THE PLAYING FIELD BY CLOSING THE GAPS

In the last half-century, antitrust law has grown more tolerant of business models that blur the lines between firm and market relationships, to the point of sometimes allowing price coordination between independent parties. At the same time, judges have opened the door to firms characterizing their workforces as independent entrepreneurs, often contrary to realities on the ground. These policy shifts, combined with digitally-enabled developments in workforce organization, have created a legal void. In that void, firms can avoid labor obligations and still enjoy the benefits of firm-like control over their workforces.[149] Workforce-organizing platforms like transportation network apps can be highly efficiency-enhancing.[150] However, they can also lead to definitional confusion that threatens worker stability and the competitive economic playing field.

This section will outline three conclusions from the controversies surrounding TNCs. First, antitrust and worker protection enforcers can close the legal void by arriving at a shared set of definitions to distinguish employees (governed by firm

145. *See, e.g.,* Jessica Kastin, *Rejecting D.C. Circuit Analysis, NLRB "Clarifies" Independent Contractor Test In Ruling That FedEx Drivers Are Employees Covered By The Act*, JONES DAY, (Oct. 2014), https://www.jonesday.com/en/insights/2014/10/rejecting-dc-circuit-analysis-nlrb-clarifies-independent-contractor-test-in-ruling-that-fedex-drivers-are-employees-covered-by-the-act-ijones-day-labor-blogi [https://perma.cc/DT64-6NUN].

146. Advice Memorandum from Jayme Sophir, Associate General Counsel, National Labor Relations Board Division of Advice, to Jill Coffman, Regional Director, Region 20 (Apr. 16., 2019) [hereinafter NLRB Advice Memo]; *see also* Uber Technologies, Inc., 46 N.L.R.B. A.M.R. 55 (2019).

147. *Id.* at 10.

148. *Id.* at 6–8, 11.

149. *See* Rogers, *supra* note 13, at 482; *see generally* WEIL, *supra* note 113.

150. Lobel, *supra* note 10, at 104–07.

relationships) from independent contractors (governed by market relationships). Second, these definitions may need to be nuanced to best capture complex economic realities—the type of nuance that antitrust law's Rule of Reason and labor law's multifactor tests attempt to capture. However, in general, workers' control over prices provides the clearest line between firm and market relationships. Third, this section will discuss how these shared definitions need not be binary. New business models may demand intermediate categories between employees and independent contractors, where genuine economic independence is only partially realized. Finally, based on this framework, this paper will conclude that TNCs have two options: they must alter their technology and business model to grant drivers meaningful economic independence and control over pricing, or they must reclassify drivers as employees.

A. Calling for a Shared Economic Lexicon

The gig economy will likely produce more and more gradations of non-traditional economic relationships. Antitrust doctrine and worker protection doctrine, then, should work from a consistent set of definitions, to address each of these new business models fairly and even-handedly. In short, the duties placed on businesses by labor and employment law must be inversely proportional to the restrictions placed on them by antitrust law. This methodology is in keeping with the policy goals of both antitrust and worker protection laws, which mirror one another in their purpose. Congress created labor laws to address "the inequality of bargaining power between employees who do not possess full freedom of association or liberty of contract"[151] and their employers.[152] In other words, these laws address situations that are not subject to competitive market forces. Antitrust law, meanwhile, does not condemn the organization of labor within a firm, [153] but addresses economic coordination outside the firm that harms "competitive conditions."[154] To sum it up, relationships in competitive environments are not subject to labor and employment law, but are subject to antitrust law. Relationships within firms are immune from antitrust liability, but subject to labor and employment obligations. Firms in the gig economy should be able to choose freely between tighter coordination of their workforces, and the accompanying duties to workers, or less input on workers'

151. National Labor Relations Act, 29 U.S.C. §§ 151–69 (1935).

152. H.R. Rep. No. 320 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT.

153. 15 U.S.C. § 17 (1914).

154. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

business decisions and a reduced duty to workers. Antitrust and worker protection laws can continue pursuing their respective objectives, but must agree on the borders between independent contractors and employees, firms and free markets, so as to not leave regulatory gaps.

Why must innovative business models pick between burdensome labor requirements and prohibitive antitrust rules? This proposal is not a demand for regulation for its own sake. The reasons for not leaving a gap between these two doctrinal fields are twofold.

First, as mentioned above, regulatory gaps can harm competition by lowering a firm's costs relative to their competitors. Some innovative business models enjoy cost-savings that result from a more efficient business model. However, they can also enjoy arbitrary cost-savings by more cleverly evading the contours of worker protection and antitrust law than their competitors.[155] Second, and more fundamentally, any good definition of employees reflects the same basic dividing line between firm relationships and market relationships that is so important in antitrust. On one side of that line, society needs to be concerned about worker exploitation resulting from unequal bargaining power. On the other, society needs to be concerned about collusion replacing the efficiency of market competition. In short, antitrust and worker protection enforcers need to agree on when a workforce is economically independent enough to be mobilized via market competition, and when it is economically dependent enough to be mobilized by firm relationships. This will produce the best results for workers, competitors, and consumers.

B. Defining a Shared Economic Lexicon

How should labor and antitrust define these agreed-upon boundaries? It is difficult and dangerous to try to oversimplify the definitional test. Both antitrust law's Rule of Reason analysis and worker protection law's multifactor tests for classifying workers recognize that justice requires nuanced analysis. However, any meaningful division between workers and contractors must give strong consideration to workers' access to the competitive marketplace, which is best indicated by their control of pricing.

This may call for a reimagining of the entrepreneurial opportunity language used by modern labor law. Workers with genuine entrepreneurial opportunity, evinced by pricing independence and market-based decision-making, are less in need of employment protections.[156] And genuine entrepreneurial

155. Jost, *supra* note 14, at 315.

156. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 117.

opportunity can only exist in a competitive environment, the type of environment that antitrust laws are designed to protect.[157]

The problem with *FedEx* and the NLRB's Uber decisions is not the rhetoric of "entrepreneurial opportunity," but rather that the search for such opportunity was not grounded in reality.[158] Dubal points out that the *FedEx* court dismissed "findings that the occasion for actual profit was miniscule" and that drivers did not actually operate as "small, independent businesses."[159] *FedEx* and the Uber decisions hinged on workers' theoretical "retention of the right" to exercise entrepreneurial opportunity, rather than their actual inability to do so.[160] By focusing on contractual terms rather than economic reality, these decisions interpreted attempts to shift risk and uncertainty to workers as grants of entrepreneurial opportunity.[161]

Properly reimagined, an Entrepreneurial Opportunity test could better ground worker classification in the Coasean distinction. *Hearst*'s focus on bargaining power and dependence on earnings could be viewed as a search for *real* entrepreneurial opportunity.[162] The same could be said for the Economic Realities test used in some states, which (although suffering from its own blind spots) focuses on worker dependence on the firm.[163] The employment test adopted by the California legislature in 2019 considered whether workers perform this type of labor only for a single firm or whether they also take this kind of work from other parties, independent of the main hiring entity.[164]

The clearest indicia of real entrepreneurial opportunity, and the one best aligned with antitrust law, is the payment method used by the business.[165] Situations in which drivers pay a flat fee to use a service cut in favor of independence (they are merely purchasing an input for their business).[166] Commission-based payment points to employment because the firm retains control over the prices charged and commission earned.[167] This consideration recalls the legislative history of the Taft-Hartley Act, which stated that

157. Maurice E. Stucke, *Is Competition Always Good*, 1 J. OF ANTITRUST ENFORCEMENT 162, 162–63, 165–66 (2013).

158. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 94–95; Tomassetti, *supra* note 143, at 1090–92.

159. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 94.

160. FedEx Home Deliveries v. NLRB, 563 F. 3d 492, 502 (D.C. Cir. 2009); NLRB Advice Memo, *supra* note 145, at 6–8.

161. NLRB Advice Memo, *supra* note 145, at 8; Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 94–95; Tomassetti, *supra* note 143, at 1094.

162. NLRB v. Hearst Publ'ns, 322 U.S. 111, 126 (1944).

163. Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 75.

164. Assemb. B. 5, Reg. Sess. (Cal. 2019).

165. NLRB Advice Memo, *supra* note 145, at 10–11.

166. *Id.*

167. *Id.*

contractors "depend . . . not upon wages, but upon the difference between what they paid for the goods, materials, and labor and what they receive for the end result, that is, upon profits."[168] Naomi Sunshine describes the approach focused on pricing and payment as a system of employees as price-takers.[169] She points out that if "the economic relationship is characterized by one party setting the price terms," the other party's only recourse is to quit.[170]

This method of granting worker protections mirrors modern antitrust analysis. As discussed above, modern antitrust law generally forbids price coordination outside of firms, but recognizes that new technologies and models may require case-by-case consideration using the Rule of Reason. This proposed approach to worker protection generally relies on control of pricing to define employment, but allows other indicia of entrepreneurial opportunity to be considered. Defining employment on the basis of entrepreneurial opportunity, most strongly evinced by control over pricing, would close the legal void that TNCs currently exploit.

C. Intermediate Categories in the Lexicon

However, to say that antitrust and worker protection laws need to operate from a common set of definitions is not to say that these definitions need to be binary. This new definitional framework need not necessarily define a worker as either an employee or an independent contractor. The distinction between firm relationships (and the accompanying labor obligations) and market relationships (and the accompanying antitrust restrictions) may not always be clear. There may be workforces that operate in conditions that are competitive enough that antitrust must play a role, but those workforces may still need some labor or employment law protections. App developers or TaskRabbit workers might be two such examples. Sanjukta Paul characterizes antitrust law as a means of allocating coordination rights.[171] This note agrees that the worker protections allocated to a workforce should be proportional to the coordination rights allocated to the firm.[172] But this does not mean that this allocation need be an all-of-one or all-of-the-other approach; some business models may merit a little of each.

Legal scholars have pointed to numerous intermediate solutions.[173] The rise of the gig economy, and TNCs in particular, have led to a renewed interest in Harry Arthurs's concept of a

168. Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for 'Dependent Contractors'*, 26 BERKELEY J. OF EMP. & LAB. L. 143, 146 (2005).

169. *See* Sunshine, *supra* note 114, at 135.

170. *See id.* at 151.

171. Paul, *Fissuring & the Firm Exemption*, *supra* note 9, at 65.

172. *See* Paul, *Uber as a For-Profit Hiring Hall*, *supra* note 15, at 236.

173. *See* Sunshine, *supra* note 114, at 115.

"dependent contractor" as an half-way point between employees and independent contractors.[174] Such a category could provide regulators with another tool in their box, which could be useful in the gray areas.[175] Senator Mark Warner, Brishen Rogers, and others point to the need to socialize employment benefits, making them independent of any one job.[176] Socialized employment benefits could improve economic performance, reduce inequality, and provide a more fluid job market.[177]

But Naomi Sunshine points out that these intermediate solutions "involve line-drawing of [their] own" and do nothing to fix the current economic categories.[178] Rogers, meanwhile, notes that they would require legislative intervention.[179] Such a major legislative overhaul is not likely forthcoming in the current political climate.[180] So although antitrust and labor thinkers should consider the potential for intermediate economic relationships, this paper will conclude by discussing how best to address TNCs within the existing framework.

D. TNC Drivers Under this New Lexicon

If TNCs are determined to keep drivers as contractors, they should explore technological changes that would grant drivers more independence. The magic of TNCs may not depend on the current model of price fixing.[181] Sanjukta Paul points out that TNCs could "match riders in space and time without setting prices."[182]

The technology could allow riders to enter the starting point and destination for their trip and then give nearby drivers a short window to bid in order to find the lowest price.[183] Alternatively, if road safety concerns prevented drivers from bidding while on the

174. *See id.*; *see also, e.g.,* Lobel, *supra* note 10, at 136.

175. *See generally* Sunshine, *supra* note 114, at 144.

176. *See* Rogers, *supra* note 13, at 516; *See* Mark. R. Warner, *Asking Tough Questions About the Gig Economy*, WASH. POST (June 18, 2015), https://www.washingtonpost.com/opinions/asking-tough-questions-about-the-gig-economy/2015/06/18/b43f2d0a-1461-11e5-9ddc-e3353542100c_story.html [https://perma.cc/K572-MD4V].

177. *See* Rogers, *supra* note 13, at 517.

178. Sunshine, *supra* note 114, at 148–49.

179. *See* Rogers, *supra* note 13, at 514–16, 518.

180. *See id.* at 518.

181. *See supra* Part I.C.

182. Paul, *Fissuring & the Firm Exemption*, *supra* note 9, at 75.

183. *See* Anderson & Huffman, *supra* note 12, at 914. *See also, e.g.,* Kieran McQuilkin, *Auction-Based Ride-Hailing Service Bid2Ride is Launching in the District*, DCINNO: THE BUSINESS JOURNALS (Sept. 17, 2019, 5:23 AM), https://www.bizjournals.com/washington/inno/stories/news/2019/09/17/auction-based-ride-hailing-service-bid2ride-is.html [https://perma.cc/UR88-ERA5]; *Uber tests feature allowing some California drivers to set fares*, REUTERS (Jan. 21, 2020, 4:00 AM), https://www.reuters.com/article/%20us-uber-california/uber-tests-feature-allowing-some-california-drivers-to-set-fares-idUSKBN1ZK15N [https://perma.cc/2T7D-QRW5].

move, drivers could set a going rate for what they would like to charge per mile or per minute each time they start the app. Then, the app could match riders with the nearby driver offering the lowest rate for the trip. An auction-based model would simultaneously resolve the price fixing question and give drivers at least a measure of genuine entrepreneurial decision-making. While not yet widely experimenting with an auction-based model, Uber has recently begun testing a version of the app that would give drivers more control over fares.[184]

These models may produce a less stable market;[185] Lobel cites real-time pricing as a significant benefit of the TNC model.[186] By setting prices, TNCs can tailor supply to demand through surge pricing, and reduce transaction costs by acting as information-brokers.[187] So perhaps the best way for TNCs to avoid labor and antitrust liability is to license their technology to worker collectives or to small businesses (with employee drivers) at a fixed rate. This model would allow these entities to control pricing to provide market stabilization, while shoring up Uber's dubious claim that it is a technology company, not a transportation company.[188]

Any of these technological changes may justify maintaining drivers' independent contractor classification, or shifting them to an intermediate class such as dependent contractors. But absent these changes, the price-focused test for genuine entrepreneurial opportunity would almost certainly classify drivers as employees. As the NLRB noted in their Uber decision, the TNC's payment method currently weighs strongly in favor of employee status.[189] And as many scholars have noted, the purported entrepreneurial independence of Uber drivers, like the purported independence of the workers in *FedEx*, is largely illusory and results only in the shifting of risk from firm to worker.[190] Recall the MIT team's research, which indicates that a large percentage of TNC drivers lose money overall and may not take full entrepreneurial account of their costs and earnings.[191]

This new approach need not spell the end of TNCs. Market analysts predict that extending employment protections to drivers

184. *See Uber tests feature allowing some California drivers to set fares*, *supra* note 182.

185. *See* Paul, *Fissuring & the Firm Exemption*, *supra* note 9, at 75.

186. *See, e.g.,* Lobel, *supra* note 10, at 111.

187. *See id.* at 112.; *see also* Coase, *supra* note 8, at 391.

188. *See* Lobel, *supra* note 10, at 132.

189. *See* NLRB Advice Memo, *supra* note 144, at 10–11.

190. *E.g.,* Dubal, *Wage Slave or Entrepreneur*, *supra* note 9, at 78–81; Paul, *Fissuring & the Firm Exemption*, *supra* note 9, at 12; Rogers, *supra* note 13, at 485, 490–91; *see* Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?,* 93 WASH. U. L. REV. 989, 1021–23 (2016).

191. *See* Zoepf et al., *supra* note 49.

will raise Uber's costs by twenty to thirty percent.[192] However, Sarah Silverstein's survey of the market found that in most cities, taxis were one to two times as expensive, without even taking into account the competitive edge that Uber gets from their model's greater convenience.[193] If TNCs really provide all of the efficiencies they claim to bring to the table, there should be space for them to make concessions to drivers and still remain competitive.[194]

CONCLUSION

As more "sharing economy" technologies like TNC apps enter the market, more opportunities for arbitrary enforcement and mischaracterization will arise. The history of worker classifications prior to the digital economy demonstrates that arbitrary mischaracterizations are not new. However, modern technologies' hitherto unimagined capacity to coordinate work, and legal authorities' hesitance to come to grips with these technologies, means that a consistent approach is necessary now more than ever. And consistency will likely become even more important in the years and decades to come.

The NLRB and the courts can take the first step toward providing such consistency by extending labor protections, and the associated exemptions from antitrust liability, to TNCs and their drivers. Alternatively, antitrust enforcers can step in and force TNCs to find a way to give their drivers the pricing control that their independent contractor status implies. But going forward, enforcers in both antitrust and worker protection will need to return to first principles—and take cues from each other—to avoid being hoodwinked by technological innovation. In the process, more gradations of economic classifications may be required. Because although the binary nature of firm relationships and market relationships may break down, the basic principles of economic justice should not.

192. Steven Greenhouse, *U.S. Cracks Down on 'Contractors' as a Tax Dodge*, N.Y. TIMES (Feb. 17, 2010), https://www.nytimes.com/2010/02/18/business/18workers.html [https://perma.cc/8BBN-S28B].

193. Silverstein, *supra* note 45.

194. *See, e.g., Uber tests feature allowing some California drivers to set fares*, *supra* note 182.