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## A New Paradigm: Rideshare Drivers, Collective Labor Action, and Antitrust

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## **A New Paradigm: Rideshare Drivers, Collective Labor Action, and Antitrust**

THOMAS W. JOO<sup>†</sup> & LETICIA SAUCEDO<sup>††</sup>

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### I. INTRODUCTION

The essence of the employment relationship lies in the willing subordination of the worker to the employer's control.<sup>1</sup> Employment and labor laws were created to counteract the inequality of bargaining power and potential for exploitation inherent in this control relationship.<sup>2</sup> Thus "employees" receive protections such as anti-discrimination mandates, family and medical leave, minimum wage and overtime protections,

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1. See Guy Davidov, Mark Freedland & Nicola Koutouris, *The Subjects of Labor Law: "Employees" and Other Workers*, RSCH. HANDBOOK IN COMPAR. LAB. L. 115, 119 (Matthew Finkin & Guy Mundlak eds., 2015).

2. OTTO KAHN-FREUND, *LABOUR AND THE LAW* 6 (2d ed. 1977); PAUL DAVIS & MARK FRIEDLAND, *KAHN-FREUND'S LABOR AND THE LAW*, 18 (3d ed. 1983).

unemployment insurance, and workers' compensation schemes. Labor law protects the concerted activities of "employees" for mutual aid and protection when they join a union.<sup>3</sup> Workers who do not qualify as employees are labeled "independent contractors" and do not receive such protections; they are expected to protect themselves through market processes and contractual bargaining.

Rideshare firms and other so-called "gig economy" firms purport to increase business efficiency through technology and a workforce made up of independent contractors. In reality, however, the rideshare industry's primary innovations do not *reduce* costs, but merely *shift* them from the firm onto drivers and third parties.<sup>4</sup> This is achieved not through technology, but one-sided contracts and regulatory arbitrage.<sup>5</sup> Rideshare firms pay drivers low net wages while shifting a large portion of production costs onto them—most prominently the costs of owning and operating vehicles.<sup>6</sup>

Moreover, they avoid costs by insisting that their drivers are "independent contractors" and not "employees." The firms claim they are not transportation businesses, but technological "platforms" that enable passengers and independent drivers to find each other and make ride transactions.<sup>7</sup> Uber has gone so far as to claim that because its business is a technology platform, the work drivers perform is "outside the course of

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3. 29 U.S.C. § 157.

4. Hubert Horan, *Will the Growth Of Uber Increase Economic Welfare?*, 44 *TRANSP. L. J.* 33, 42–45 (2017).

5. Regulatory arbitrage is "the practice of operating a business to take maximum advantage of the prevailing regulatory environment (as opposed to delivering the maximum amount of value to the business's customers), usually at the expense of consumers, competitors, or taxpayers, as the case may be." *AT&T Commc'ns. of Cal., Inc. v. Pac-West Telecomm., Inc.*, 651 F.3d 980, 984 n.4 (9th Cir. 2011).

6. Horan, *supra* note 4, at 45–46. In the taxi business, the drivers bear about 67% of costs and the taxi company about 33%, of which 18% are vehicle costs and the remainder overhead. *Id.* at 45. Thus, taxi companies would bear only 15% of costs if they could shift vehicle costs onto drivers. *Id.* When borne by individual drivers, these costs—vehicles, financing, insurance and maintenance—are likely higher, since economies of scale are lost. *Id.* at 46 n.26.

7. *E.g.*, Greg Bensinger, *Uber: The Ride-Hailing App That Says It Has 'Zero' Drivers*, *WASH. POST* (Oct. 14, 2019, 1:16 PM), <https://www.washingtonpost.com/technology/2019/10/14/uber-ride-hailing-app-that-says-it-has-zero-drivers/>; Lyft, Inc., Amendment No. 1 to Form S-1 Registration Statement 102 (Form S-1) (Mar. 18, 2019) [hereinafter Lyft, Inc., Amendment].

Uber's usual business."<sup>8</sup> Treating drivers as independent contractors relieves rideshare companies from complying with employment law requirements such as overtime pay, health care, and employment taxes, and allows for the shifting of these costs onto drivers and the public. Independent contractor status also helps firms avoid tort liability for their drivers' conduct, again shifting costs onto drivers and tort victims. Indeed, the firms publicly acknowledge that their business model relies on legally classifying drivers as independent contractors. In its IPO filing documents, under the required disclosure of "Risk Factors," Uber states, "Our business would be adversely affected if Drivers were classified as employees instead of independent contractors."<sup>9</sup> Lyft's IPO filing similarly states, "If the contractor classification of drivers that use our platform is challenged, there may be adverse business, financial, tax, legal and other consequences."<sup>10</sup>

States have traditionally based the applicability of employment law on a common-law definition of "employee." Derived from the law of "master and servant," it turns on whether a principal has the legal right to control an agent.<sup>11</sup> The firms carefully structure their contracts with drivers to keep costs down and avoid the appearance of an employment relationship. The common-law test has produced conflicting results, however, and some states have protected drivers by statute. The industry has responded by aggressively and successfully lobbying in other states for legislation classifying drivers as independent contractors.

Drivers have little bargaining power in the face of rideshare firms' one-sided contracts that deny them the protections of employment law. Rideshare firms enjoy a significant bargaining advantage because of declining real wages and the need for flexible work to accommodate child care and supplement insufficient incomes. Furthermore, only two firms, Uber and Lyft, control practically the entire U.S. rideshare market.<sup>12</sup> Uber

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8. Bensing, *supra* note 7.

9. Uber Techs., Inc., Registration Statement 28 (Form S-1) (Apr. 11, 2019) [hereinafter Uber Techs., Inc., Registration Statement].

10. Lyft, Inc., Registration Statement 11 (Form S-1) (Mar. 1, 2019) [hereinafter Lyft, Inc., Registration Statement].

11. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

12. Dierdre Bosa, *Lyft Claims It Now Has More Than One-Third of the US Ride-Sharing Market*, CNBC (May 14, 2018, 8:23 PM), <https://www.cnbc.com/2018/05/14/lyft-market-share-051418-bosa-sf.html>. While Lyft is focused in North America, Uber has a wider international presence, where it competes with local rivals. Tina Bellon, *Uber and Lyft Take Different Roads in Search of Profit*, REUTERS (Feb. 7, 2020, 2:53 PM),

holds a commanding share with two-thirds to three-fourths of the market; Lyft holds virtually all the remainder.<sup>13</sup> If Uber's drivers were counted as employees, it would be New York City's "largest for-profit private employer."<sup>14</sup> The dominance of these two firms is self-reinforcing due to network effects: more riders use the dominant apps because more drivers do, and vice versa.<sup>15</sup>

The contractual and political strategies of rideshare companies threaten to deny their workers the protections of labor and employment law. To address the power imbalance between drivers and rideshare companies, a new paradigm must replace labor and employment law. The law should permit drivers to organize collectively for the purpose of bargaining with rideshare firms.<sup>16</sup> Collective bargaining constitutes an agreement among workers (who are typically in mutual competition) not to compete on the basis of wages, benefits and/or working conditions.<sup>17</sup> Thus, labor organizing may constitute anticompetitive concerted action and potentially violate antitrust law. Indeed, when the Sherman Antitrust Act was first passed, it was used more often against unions than corporations.<sup>18</sup> Today, the National Labor Relations Act protects the right of "employees" to organize with respect to wages and working conditions,<sup>19</sup> and the Clayton Act exempts such concerted action

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<https://www.reuters.com/article/us-uber-lyft/uber-and-lyft-take-different-roads-in-search-of-profit-idUSKBN201211>.

13. Bosa, *supra* note 12; Kate Conger, *Uber's First Earnings Report After I.P.O.: \$1 Billion Loss*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/technology/uber-stock-earnings.html>.

14. Sen Li et al., *Regulating TNCs: Should Uber and Lyft Set Their Own Rules?*, 129 TRANSP. RES. PART B: METHODOLOGICAL 193, 194 (2019).

15. Alex Hemingway, *What's Missing From the Uber Debate? Market Power, Congestions, Pollution, and Even Deaths*, POLICYNOTE (Nov. 26, 2018), <https://www.policynote.ca/whats-missing-from-the-uber-debate/>.

16. Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1566–67 (2018); *see also* Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 46 (2019).

17. *Cf., e.g.*, FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 422–23 (1990) (holding a boycott by court-appointed attorneys for indigent defendants in order to obtain higher prices for their services was an unreasonable restraint on trade and a violation of the Sherman Act); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692–93, 695 (1978) (holding a ban on competitive bidding among engineers is not price fixing per se, but anticompetitive and an unreasonable restraint on competition).

18. Lao, *supra* note 16, at 1560.

19. 29 U.S.C. § 157.

from antitrust law.<sup>20</sup> While the NLRA does not prohibit such action by independent contractors, the Clayton Act does not exempt it from antitrust scrutiny. Thus, favorable antitrust standards could open the door to collective bargaining by drivers.

In recent decades, U.S. antitrust law has become more and more lenient toward mergers and concerted action by business firms. It has continued to limit workers' power to combine by agreement "horizontally," even as it has become more lenient toward large firms' use of contract to exercise "vertical" control over smaller independent contractors and other economically weaker parties.<sup>21</sup> We argue that this asymmetry should be rectified. As one commentator argues, "the value of competition underlying our antitrust laws must accommodate the value of empowering workers in seeking fair wages and good working conditions."<sup>22</sup>

The Supreme Court's recent opinion in *Ohio v. American Express* upheld a "platform" firm's restrictions on its independent contractors under a novel and unusually permissive antitrust analysis.<sup>23</sup> According to the Court, when a platform company mediates between two groups, as when a credit card company mediates between merchants and shoppers, all three parties constitute a network that produces a single product: a transaction.<sup>24</sup> The special nature of this product led the Court to employ a lenient antitrust analysis of the contract at issue. Rideshare app companies describe themselves similarly as transaction platforms in a network with drivers and riders. The *American Express* decision should require courts to examine all the contracts involving members of a platform network with the same leniency. Because of the opinion's lenience toward apps' contractual restraints on independent contractors, the latter should receive similarly permissive treatment when they combine via contract in response to such restraints. The Court's platform analysis is consistent with contemporary corporate theory's de-emphasis

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20. 15 U.S.C. § 17.

21. Cf. Steinbaum, *supra* note 16, at 46 ("[A]ntitrust has contributed to the increasing imbalance of power between employers and workers [in two ways] . . . First, antitrust has legalized vertical restraints, allowing the economy's most powerful actors to closely direct and supervise the behavior of less-powerful actors. Second, antitrust has been used by those same powerful actors to prevent less-powerful actors from organizing and coordinating on their own behalf against such concentrations of power.").

22. Lao, *supra* note 16, at 1566.

23. 138 S. Ct. 2274 (2018).

24. *Id.* at 2280.

on the artificial boundaries of a business firm in favor of the network of contracts that is the real engine of production.

More generally, *American Express* is an extreme example of antitrust law's tendency to apply deferential review of the business decisions of firms, especially in novel economic contexts. Collective bargaining can ameliorate the bargaining power disparities between drivers and rideshare firms and counteract the anticompetitive tendencies of this highly concentrated industry. The relaxation of antitrust law as applied to firms appears to show a preference for free markets and contracting to provide economic solutions. Unless the state's approach to the gig economy is intended to favor capital over labor, it should facilitate, not proscribe, labor's attempt to address the peculiarities of the gig labor market with contract-based solutions.

## II. THE EMPLOYMENT LAW CHALLENGE

The rideshare driver model purports to upend the very essence of the employment relationship, which lies in the willing subordination of the worker to the employer's control.<sup>25</sup> Rideshare companies claim that drivers are not their employees. Indeed, the business model of the industry relies on legally classifying drivers as independent contractors. In the required disclosure of "Risk Factors" in its IPO registration documents, Uber states, "Our business would be adversely affected if Drivers were classified as employees instead of independent contractors."<sup>26</sup> Similarly, Lyft's IPO form states, "If the contractor classification of drivers that use our platform is challenged, there may be adverse business, financial, tax, legal and other consequences."<sup>27</sup> Treating drivers as independent contractors relieves rideshare companies from complying with costly employment regulations, such as overtime pay, health care, benefits, and employment taxes. Although the rideshare model purports to increase efficiency through technology, in fact its primary advantage over taxi companies is not cost reduction, but cost *shifting*, from the firm to drivers and credulous investors.<sup>28</sup> In addition to avoiding the requirements of employment law and denying them to drivers, rideshare firms shift vehicle costs, a major cost factor for taxi

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25. Davidov, *supra* note 1, at 5.

26. Uber Techs., Inc., Registration Statement, *supra* note 9, at 28.

27. Lyft, Inc., Registration Statement, *supra* note 10, at 18.

28. Horan, *supra* note 4, at 44–46.

businesses, onto their “independent contractors.”<sup>29</sup>

To deny being employers, rideshare firms claim they merely provide a platform that enables willing customers to connect with willing service providers. This is the business model of the broader platform economy, in which companies position themselves as intermediaries, catalysts, or opportunity makers, providing the platform through which economic or market interactions can occur. They refer to themselves as infrastructure builders, thereby distancing themselves from the work that rideshare drivers ultimately provide to riders. Lyft’s IPO filing states, “We provide a service to drivers to complete a successful transportation service for riders. This service includes on-demand lead generation that assists drivers to find, receive and fulfill on-demand requests from riders,”<sup>30</sup> portraying drivers as neither employees nor independent contractors, but as, like riders, customers who use Lyft’s services. Rideshare companies’ purported business model is summed up in Uber’s operational statement: “On-demand transportation technology is our core service, and the app that connects driver-partners and riders is what makes it all possible.”<sup>31</sup> Lyft’s terms of service, applicable to both drivers and riders who use the app, state: “Lyft does not provide transportation services, and Lyft is not a transportation carrier . . . We have no control over the quality or safety of the transportation that occurs as a result of the Rideshare Services.”<sup>32</sup> Rideshare companies further downplay drivers’ central role in their business by drawing attention to their other, smaller lines of business. As Uber describes its business in its IPO filing:

Our massive, efficient, and intelligent network consists of tens of millions of Drivers, consumers, restaurants, shippers, carriers, and dockless e-bikes and e-

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29. *Id.* at 45–46; *see also* text accompanying note 6.

30. Lyft, Inc., Amendment, *supra* note 7, at 102.

31. *How to Use the Uber App*, UBER, <https://www.uber.com/us/en/about/how-does-uber-work/> (last visited Mar. 27, 2020).

32. Terms of Service, LYFT (Dec. 9, 2020), <https://www.lyft.com/terms>. Similarly, Uber’s terms of service for riders state, in all capital letters, “YOU ACKNOWLEDGE THAT YOUR ABILITY TO OBTAIN TRANSPORTATION . . . THROUGH THE USE OF THE SERVICES DOES NOT ESTABLISH UBER AS A PROVIDER OF TRANSPORTATION . . .” *U.S. Terms of Use*, UBER (Jan. 21, 2020), <https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=general-terms-of-use>.

scooters,<sup>33</sup> as well as underlying data, technology, and shared infrastructure.<sup>34</sup>

Rideshare companies have appealed to drivers by purporting to exercise less control than employers do. Rideshare companies argue that drivers' degree of autonomy renders traditional employment laws inapplicable.<sup>35</sup> Unlike employees, they argue, drivers can set their own schedules; drive wherever and whenever they want; decide how long and how often they want to work; hire other drivers to work for them; decide what kind of car to drive; and maintain ownership and control of their vehicles.

Despite Uber's attempts to characterize itself as merely a virtual platform, Uber's purpose statement reveals that rideshare companies cannot operate without drivers, even as they expand into other businesses. In a rideshare "network," drivers are no less integral than the platform. In addition to providing rides, drivers generate data about routes, traffic patterns, their hours on the job, and average length of rides through their activity.<sup>36</sup> Uber uses this data, in turn, to generate other business growth opportunities.<sup>37</sup>

This Part addresses the importance of the employee/independent contractor distinction under current labor and employment law, and the ways in which the platform economy has eroded the distinctions between employees and independent contractors. It discusses the judicial, legislative, and administrative developments relevant to rideshare work. It includes a discussion of rideshare companies' successful campaign to get states to pass laws declaring drivers independent contractors. The result has been to weaken, or even moot, the common-law tests that courts traditionally use to determine whether a worker is an employee. It

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33. Uber has since sold its Jump e-bike operation. Sam Shead, *Uber Sends Thousands of Electric Bikes and Scooters to the Scrapheap after Lime Deal*, CNBC (May 28, 2020, 8:31 AM), <https://www.cnn.com/2020/05/28/uber-bikes-scrapped.html>. Lyft has scaled back its e-scooter operations. Fernando Alfonso III, *Lyft is Pulling its Scooters from Cities Across the US*, CNN (Nov. 18, 2019, 4:12 PM), <https://www.cnn.com/2019/11/16/business/lyft-scooters-removed-atlanta-dallas-nashville-trnd/index.html>.

34. Uber Techs., Inc., Registration Statement, *supra* note 9, at 1.

35. See Julia Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L.J. 1, 67–70 (2016).

36. See ALEX ROSENBLAT, *UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK* 140–41 (2018) [hereinafter ROSENBLAT, *UBERLAND*]; Luyao Li et al., *Databook: Turning Big Data Into Knowledge With Metadata at Uber*, UBER ENGINEERING (Aug. 3, 2018), <https://eng.uber.com/databook/>.

37. Li, *supra* note 36.

concludes with an analysis of the ways that Uber disavows control over drivers' work, and, at the same time exercises control in ways that employment law does not recognize. The imagery of drivers as independent, entrepreneurial, profit-seeking businesses successfully masks the extent to which Uber controls the market that drivers operate in, and how much of an eco-system the rideshare business model has become.

A. *The Employee/Independent Contractor Distinction in Employment and Labor Law*

Federal, state, and local governments limit their regulatory protection to "employees." The employment and labor law schemes assume that because independent contractors play a different role than employees in the market, their exclusion from employment protections is consistent with legislative purpose.<sup>38</sup> The threshold question in employment regulation is thus whether the relationship between the worker (service provider) and the recipient of the worker's services is an "employment" relationship.

Federal employment statutes contain broad and/or circular definitions of the term "employee." The Fair Labor Standards Act (FLSA), for example, defines an employee as "any individual employed by an employer."<sup>39</sup> The FLSA defines the term "employ" as "to suffer or permit to work."<sup>40</sup> The National Labor Relations Act (NLRA), which governs private collective bargaining, states only whom the term "employee" does *not* include:

any employee . . . , but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, . . . or by any other person who is not an employer as herein defined.<sup>41</sup>

The statute also fails to define "employer," stating only that it includes an employer's agent and does not include governments, the

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38. See Hiroshi Motomura, *Employees and Independent Contractors Under the National Labor Relations Act*, 2 INDUS. RELS. L.J. 278, 279 (1977).

39. 29 U.S.C. § 203(e)(1) (2018).

40. 29 U.S.C. § 203(g) (2018).

41. 29 U.S.C. § 152(3) (2018).

Federal Reserve Bank, or railroads.<sup>42</sup> While each Act excludes independent contractors, it is difficult in practice to determine whether a worker is an employee. Courts, legal scholars, policy makers, and advocates have debated endlessly over whether workers, including rideshare drivers, are properly classified as independent contractors.<sup>43</sup>

Drawing this distinction is also difficult because each employment and labor law statute requires its own scrutiny. Courts have developed multi-factor tests to determine whether a worker is an employee at common law, or under a specific labor or employment statute. None of the tests are outcome determinative; rather, courts use the factors to measure the contours of the relationship.

The common-law, or right-to-control, test for employee status derives from the law of “master and servant” in the law of agency,<sup>44</sup> originally formulated to determine a principal’s vicarious liability for the torts of its agents.<sup>45</sup> According to the Restatement of Agency, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

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42. 29 U.S.C. § 152(2) (2018).

43. See, e.g., Noah Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 280–82 (2011); Orly Lobel, *The Gig Economy and the Future of Employment and Labor Law*, 51 UNIV. S.F. L. REV. 51, 68–69 (2017); Kenneth Dau-Schmidt, *The Problem of “Misclassification” or How to Define Who is an “Employee” Under Protective Legislation in the Information Age*, in THE CAMBRIDGE HANDBOOK OF U.S. LAB. L. FOR THE TWENTY-FIRST CENTURY 140 (Richard Bales & Charlotte Garden eds., 2019); Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 799–80 (2018); Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 296 (2001); Catherine Ruckelshaus, *Labor’s Wage War*, 35 FORDHAM URB. L.J. 373, 380 (2008); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 Berkeley J. Emp. & Lab. L. 251, 281 (2006); Jeffrey Hirsch, *Employee or Entrepreneur*, 68 WASH. & LEE L. REV. 353, 355 (2011); Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 68 (2017); Veena Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 795–96 (2017) [hereinafter Dubal, *Winning the Battle*].

44. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (citing RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958) in defining employee status).

45. See RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958). The definition of “servant” in the Restatement of Agency appears in Chapter 7, “Liability of Principal to Third Person; Torts,” under Title B, “Torts of Servants.”

- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>46</sup>

Employee status is “based on the employer’s right or power to exercise control over the method and means of performing the work and not merely the exercise of actual control.”<sup>47</sup> Whether a worker is an employee or independent contractor under this test is a mixed question of law and fact that “should typically be determined by a jury, and not the judge.”<sup>48</sup> “[N]o fixed rule” is appropriate and “no single phase of the evidence is determinative;” the result “depends in each case upon its particular facts taken as a whole.”<sup>49</sup> Courts use the common-law test to determine whether a worker is an employee under state statutes, as well as under federal statutes such as the National Labor Relations Act, ERISA, and Title VII of the Civil Rights Act of 1964.<sup>50</sup>

The economic realities test, which the Department of Labor and courts use to interpret the Fair Labor Standards Act, seeks to establish whether an employee is economically reliant on an employer for her

46. RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958).

47. *Narayanasamy v. Issa*, 435 F. Supp. 3d 388, 391 (D.R.I., January 16, 2020) (citing Rhode Island common law in a case involving Uber drivers).

48. *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1148 (N.D. Cal. 2015); *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1076 (N.D. Cal. 2015) (citing California common law); *accord Narayanasamy*, 435 F. Supp. 3d at 392 (citing *Cotter*, 60 F. Supp. 3d at 1076).

49. *Narayanasamy*, 435 F. Supp. 3d at 390.

50. *See, e.g., NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 120 (1944); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992); *Supershuttle DFW, Inc.*, 367 N.L.R.B. 75 (2019); *EEOC v. Global Horizons, Inc.*, 915 F.3d 631, 638 (9th Cir. 2019); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 444 (2003).

livelihood. As the Department of Labor notes, “The employer-employee relationship under the FLSA is tested by “economic reality” rather than “technical concepts.”<sup>51</sup> The Supreme Court has noted that factors in determining whether an employment relationship exists under the economic realities test include the extent to which the services provided are an integral part of the business; the permanency of the relationship; the level of the worker’s investment in facilities and equipment; the nature and degree of the employer’s control over the work; the worker’s opportunities for profit and loss; the amount of judgment, foresight and initiative required for success in the market; and the degree to which the worker maintains an independent business or organization.<sup>52</sup> While the economic realities test is broader than the common-law right-to-control test,<sup>53</sup> courts have conflated it with the right-to-control test. Courts have more recently imposed yet another test, a riff on the right-to-control test, which emphasizes entrepreneurial opportunities as another factor in evaluating the independence of workers.<sup>54</sup> None of the tests are outcome-determinative, and courts make fact-specific inquiries to determine employment status every time such a case arises.

#### 1. The Right-to-Control Test and State Employment Law

In *Alexander v. FedEx Ground Package Systems, Inc.*, Federal Express drivers claimed they had been misclassified as independent contractors and made wage claims under state employment law.<sup>55</sup> Presaging the current arguments made by rideshare companies, FedEx claimed it was primarily a logistics company and did not employ drivers.<sup>56</sup> Rather, FedEx asserted that the drivers owned and maintained their own vehicles while setting their own routes and schedules.<sup>57</sup> Multiple class-action lawsuits were filed, and courts throughout the country weighed in on the drivers’ status; after the cases were centralized,

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51. U.S. DEP’T OF LABOR, *Fact Sheet 12: Employment Relationship Under the Fair Labor Standards Act* (2008), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf>.

52. *United States v. Silk*, 331 U.S. 704, 716–19 (1947); *Hearst*, 322 U.S. at 131.

53. *Nationwide Mut. Ins.*, 503 U.S. at 326.

54. See Matthew Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 682 (2013).

55. 765 F.3d 981, 987 (9th Cir. 2014).

56. *Id.* at 989.

57. *Id.* at 990.

the judge in charge of the multi-district litigation certified 26 class actions.<sup>58</sup>

Using the common-law right-to-control test to measure the work relationship, the Ninth Circuit held that the FedEx drivers were employees.<sup>59</sup> The drivers had filed a statewide class action suit in California seeking overtime and back wages under the California Labor Code.<sup>60</sup> FedEx removed the case to federal court, which had to decide whether the drivers were employees.<sup>61</sup> Cases in over forty states were similarly filed across the country, and all the cases were consolidated into multi-district litigation in the Northern District of Indiana.<sup>62</sup> The MDL court certified a class on the wage claims under California law, and held that the plaintiffs were independent contractors as a matter of law in all states, including California, that used the common-law right-to-control test to determine employee status.<sup>63</sup> The plaintiffs appealed the MDL ruling to the Ninth Circuit, which overturned the district court's decision on employment status.<sup>64</sup> The Ninth Circuit held that the FedEx drivers were employees as a matter of law, under California's version of the right-to-control test.<sup>65</sup> The MDL judge later acknowledged that although the drivers all had the same contract, administering the MDL was complicated by differences in agency law among the states.<sup>66</sup> Nonetheless, as the judge noted, "rulings in other courts were trending toward findings of employee status" for the FedEx drivers.<sup>67</sup>

The Ninth Circuit gave little weight to the entrepreneurial opportunities available to drivers, who owned the FedEx vehicles and could hire substitute drivers. Instead, the court noted the extent to which FedEx controlled the details of the drivers' activities, from their dress and appearance, to the specifications over the appearance of the drivers'

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58. *In re FedEx Ground Package Sys., Inc.*, 2017 WL 2672767 at \*1 (N.D. Ind.).

59. *Alexander*, 765 F.3d at 988.

60. *Id.* at 987.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 988. The California common-law test is articulated in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399, 404 (Cal. 1989).

66. *In re Fedex Ground Package Sys., Inc.*, 2017 WL 2672767 at \*1 (N.D. Ind.).

67. *Id.* at \*2.

vehicles, to the general routes FedEx assigned the drivers.<sup>68</sup> The rest of the factors—the right to terminate at will; whether packagedelivery is distinct from the company’s business; whether the work is performed under FedEx’s direction; the skill required for the job; who owns the tools and equipment; the length of the servicecontracts; whether the work is part of FedEx’s regular business; and the parties’ perceptions of the relationship—either weighed in favor of drivers as employees, or did not carry enough weight to overcome the level of control FedEx wielded over the specifics of package delivery.<sup>69</sup>

Ultimately, FedEx settled the claims of the California FedEx drivers. FedEx agreed to pay drivers \$226.5 million to resolve state and federal law employment claims.<sup>70</sup> FedEx subsequently restructured its contractor agreements to conform to the factors that point to independent contractor relationships.<sup>71</sup> It continues to maintain fleets of trucks through subcontracting arrangements with companies that themselves hire drivers.<sup>72</sup>

The Ninth Circuit’s broad analysis of factors in *Alexander* contrasts with the D.C. Circuit’s narrower approach to the control test in an earlier case under the NLRA. When drivers formed a union to bargain collectively with FedEx, the D.C. Circuit held that they were independent contractors who lacked employees’ statutory right to organize.<sup>73</sup> The court asserted “while all the considerations at common law remain in play,” its precedent had, at the “urging” of the NLRB, “‘shift[ed the] emphasis’ away from the unwieldy control inquiry in favor of a more accurate proxy:” whether the workers “have ‘significant entrepreneurial opportunity for gain or loss.’”<sup>74</sup> The court claimed this shift was merely a “subtle refinement” of the right-to-control test that “does not make applying the test purely mechanical,” while acknowledging that it makes “line drawing . . . easier.”<sup>75</sup> The court highlighted several pieces of evidence that pointed to entrepreneurial

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68. *Alexander*, 765 F.3d at 989–90.

69. *Id.* at 994–96.

70. *In re FedEx*, 2017 WL 2672767 at \*6.

71. Dubal, *Winning the Battle*, *supra* note 43 at 790.

72. *Id.* at 791.

73. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).

74. *Id.* at 498.

75. *Id.*

potential. First, a provision in the FedEx operating agreement specified that the drivers were not employees.<sup>76</sup> Second, the operating agreement specified that the drivers controlled the manner and means of doing business, and they were not subject to FedEx rules or disciplinary procedures.<sup>77</sup> Third, the drivers owned their own vehicles, which they could use for other commercial if they so chose.<sup>78</sup> Fourth, drivers could hire other drivers, or find their own replacements if they wanted to take time off.<sup>79</sup> Finally, they could sell, trade, exchange or dispose of their routes without FedEx's permission.<sup>80</sup> The court found that while other factors augured in favor of employee status, they did not outweigh the factor pointing to significant entrepreneurial opportunity. The Ninth Circuit in *Alexander* was dismissive of the D.C. Circuit's approach, stating that "even if correct," the D.C. Circuit's approach would apply only under the NLRA and not under California agency or employment law.<sup>81</sup> The NLRB, however, has since taken the position that Uber drivers are independent contractors under the D.C. Circuit's "entrepreneurial opportunity" approach.<sup>82</sup> The FedEx cases demonstrate not only the difficulty in determining whether workers are employees under labor and employment laws, but they also demonstrate some of the weaknesses of the National Labor Relations Act in protecting collective activity in the workplace. Legal scholars and others have long bemoaned the growing ineffectiveness of the NLRA—as a result of anti-labor interpretations—to protect workers in new work configurations and emerging industries.<sup>83</sup>

FedEx's response to its drivers' claims was to restructure its future contracts so that they reflected the company's desire to establish independent contractor relationships. Rideshare companies have done the

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76. *Id.* at 498.

77. *Id.*

78. *Id.* at 498–499.

79. *Id.* at 499.

80. *Id.* at 500.

81. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 993 (9th Cir. 2014).

82. NLRB, OFFICE OF THE GENERAL COUNSEL, *Advice Memorandum* (April 16, 2019), <https://www.laborrelationsupdate.com/files/2019/05/NLRB-Uber-memo.pdf> [hereinafter NLRB, *Advice Memorandum*].

83. *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002); Benjamin Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694–95 (2008).

same thing, reflecting in their contracts their intention to create independent contractor relationships with their drivers. As we describe below, they have also taken one step further. They have turned to the legislative arena to ensure that their drivers are considered independent contractors for purposes of employment laws, including workers' compensation, wage and hour laws, and unemployment compensation. The role of the common-law factors is still an important one at the legislative level. The factors have become something of a checklist for rideshare employers who want to side-step employment law rules and regulations.

## 2. Driver Treatment under the Economic Realities Test

The employee-independent contractor distinction for drivers has undergone similar analyses under the economic realities test of the Fair Labor Standards Act. In *Saleem v. Corp. Transp. Grp., Ltd.*, for example, the Second Circuit held that drivers were independent contractors for purposes of the FLSA, upholding the district court's summary judgement in favor of the car service company.<sup>84</sup> In that case, drivers for a black car limousine service in New York City sued under state wage laws and the Fair Labor Standards Act.<sup>85</sup> The circuit court focused on determining whether, as an economic reality, the drivers "depend on someone else's business for the opportunity to render service or are in business for themselves."<sup>86</sup> The court applied the economic realities test and its factors, as a guide to determine the economic reality of the arrangement between the drivers and the car service company. The court held that the drivers were, in fact, in business for themselves after considering the factors. The court found that the drivers determined the manner and extent of their business dealings with the company; decided whether to work for the company exclusively, for rivals, or for themselves; decided the extent to which they would invest in their driving businesses; and determined when and how to provide rides for the company's clients.<sup>87</sup> The drivers, were, therefore held to be independent contractors as a matter of law.<sup>88</sup>

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84. *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 134 (2d Cir. 2017).

85. *Id.* at 138.

86. *Id.* at 139.

87. *Id.* at 140.

88. *Id.*

### 3. The Labor-Antitrust Nexus

The employee-independent contractor distinction further affects worker rights in that independent contractors who engage in collective labor action may run afoul of antitrust law. Section 1 of The Sherman Act, the primary U.S. antitrust statute, prohibits “every contract, combination . . . or conspiracy, in restraint of trade” in interstate or foreign commerce.<sup>89</sup> A Section 1 violation has two basic elements: concerted action (a “contract, combination or conspiracy”) and anticompetitive effect (unreasonable “restraint of trade”). Section 1, like the rest of the Act, is short on detail, leaving its specifics to courts and the Act’s enforcement agencies, the Federal Trade Commission and Department of Justice. As the Supreme Court has observed, courts act more like “common-law courts” with respect to antitrust law than in other statutory areas.<sup>90</sup> According to the Court, “Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.”<sup>91</sup>

Collective labor action can constitute concerted action in restraint of trade, the NLRA’s guarantees notwithstanding. Indeed, although the Sherman Act was passed to fight the power of interstate corporate empires, the government brought more Section 1 actions against unions in the Act’s early years.<sup>92</sup> The Supreme Court held in 1908 that labor unions are subject to the Sherman Act, noting that Congress had tried and failed to include an explicit labor exemption.<sup>93</sup> In response, Congress passed Section 6 of the Clayton Act in 1914 to permit unions under the antitrust laws.<sup>94</sup> It states:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . ; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>95</sup>

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89. 15 U.S.C. § 1 (2018).

90. *Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 98 n.42 (1981).

91. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

92. Lao, *supra* note 16, at 1560.

93. *Loewe v. Lawlor*, 208 U.S. 274, 301 (1908).

94. 15 U.S.C. § 17 (2018).

95. *Id.*

The Supreme Court originally interpreted this exemption very narrowly.<sup>96</sup> Following the passage of the Norris-LaGuardia Act and the NLRA, however, it eventually came to recognize a broader judicial exemption for organized labor activity. According to the Court, “labor policy favor[s] the association of employees to eliminate competition over wages and working conditions” and thus the exemption tolerates the anticompetitive effects (and only those effects) that “follow naturally from the elimination of [such] competition.”<sup>97</sup> The Court has expressly held, however, that the exemption does not apply to collective action by non-employees.<sup>98</sup> In another influential case, the Court did not even mention the exemption in holding that independent contractors’ concerted refusal to work constituted an illegal price-fixing agreement, a so-called “*per se*” violation of the Sherman Act Section 1.<sup>99</sup>

#### B. *Judicial, Legislative and Administrative Treatment of Rideshare Drivers*

If rideshare drivers are independent contractors, they not only lack the protection of employment laws, but also run the risk of anti-trust violations if they organize to bargain collectively with rideshare companies.<sup>100</sup> Because the stakes are so high, rideshare drivers have filed multiple lawsuits claiming employee status under wage and hour laws

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96. See, e.g., *Duplex Printing Press v. Deering*, 254 U.S. 443 (U.S. 1921) (prohibiting unions to boycott nonunion employers for the purpose of pressuring them to permit unionization, a so-called “secondary boycott”). Congress later explicitly protected secondary boycotts in the Norris-LaGuardia Act.

97. See *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622, 625 (1975).

98. See *Columbia River Packers’ Assoc. v. Hinton*, 315 U.S. 143, 145 (1942); *L.A. Meat & Provision Drivers’ Union, Loc. 626 v. United States*, 371 U.S. 94, 101 (1962).

99. See *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 434 (1990). In that case, a group of private defense lawyers refused to continue taking court-appointed cases unless the court increased their compensation. *Id.* The “*per se*” doctrine is discussed *infra* Part III.A.

100. *Columbia River Packers*, 315 U.S. at 145–47 (holding that fishermen’s attempts to unionize violated antitrust law because fishermen were independent businesses attempting to control the price of commodities); *Local 626*, 371 U.S. at 98 (holding that middlemen who sold restaurant grease to processors could not engage in collective activity without violating antitrust law); see also Lao, *supra* note 16, at 1561–62; Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. L.J. 969, 970–71 (2016); Sanjukta Paul, *Uber as a For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 234–35 (2017).

and the NLRA.<sup>101</sup> Some state and local laws have classified drivers as employees, while others have classified them as independent contractors.<sup>102</sup> The latter statutes, sponsored by the rideshare industry, have replaced the flexible common-law right-to-control test with a mechanical checklist approach tailored to rideshare drivers' contracts. Although the federal courts have not issued a definitive ruling, the NLRB has taken the position that drivers are independent contractors for NLRA purposes.<sup>103</sup> This Part examines these and other developments in the legal treatment of rideshare drivers.

### 1. Litigation

Two prominent cases involved Uber drivers' status under labor and employment law. Recently, drivers in California sued Uber for wage and other violations of the California Labor Code.<sup>104</sup> The parties settled early in 2019.<sup>105</sup> As part of the settlement agreement, Uber agreed to driver panels that would review Uber decisions regarding termination or deactivation of drivers. Although not anywhere near the protection of a formal labor organization, the settlement's terms did introduce principles of due process and fairness to an otherwise opaque decision-making process about drivers' continued access to the customers.

A second case, still in litigation, has raised (but not yet answered) the question of whether collective bargaining by drivers violates antitrust law. In 2015, the City of Seattle passed an ordinance permitting rideshare drivers to bargain collectively. The ordinance allowed rideshare workers to establish collective agreements with rideshare companies, and regulated the topics that could be negotiated.<sup>106</sup> The Chamber of Commerce sued the city, challenging the ordinance on both Sherman Act and NLRA grounds.<sup>107</sup> According to the Chamber, the Sherman Act preempted the ordinance because it would facilitate price-fixing among

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101. *See, e.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015); Cotter v. Lyft, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

102. *See* discussion *infra* Part II.B.2.

103. *See* discussion *infra* Part II.B.3.

104. O'Connor, 82 F. Supp. 3d at 1135; Verhines v. Uber Techs. Inc., No. CGC-20-583684, *complaint filed*, 2020 WL 1187253 (Cal. Super. Ct., S.F. Cty. Mar. 12, 2020).

105. Uber Settlement Agreement at ¶ 127(b), 3:13-cv-03826-EMC (N.D. CA, 2019).

106. *See* SEATTLE WASH. MUN. CODE § 6.310.735 (H)(2) (2020).

107. Chamber of Com. v. City of Seattle, 274 F. Supp. 3d 1155, 1159 (W.D. Wash. 2017).

drivers in violation of Section 1.<sup>108</sup> The city invoked the so-called *Parker* doctrine, under which Sherman Act immunity extends to anticompetitive action by private actors (such as the drivers) “carrying out the State’s regulatory program.”<sup>109</sup> The district court agreed that the ordinance was within the *Parker* doctrine’s protection<sup>110</sup> and was not preempted by the NLRA.<sup>111</sup>

The Ninth Circuit’s opinion did not determine whether collective bargaining by drivers would violate the Sherman Act or whether drivers are protected employees under the NLRA.<sup>112</sup> It did make some potentially important pronouncements, however. In an apparent victory for drivers, it held that states have the authority to authorize labor organizing by independent contractors.<sup>113</sup> In an apparent victory for rideshare apps, the court endorsed the argument that the apps operate a business distinct from the provision of transportation services.<sup>114</sup> The court held that the NLRA did not preempt the ordinance because the Chamber had failed to establish that the drivers are employees.<sup>115</sup> According to the court, the NLRA preempts only state and local laws governing labor organizing by employees; the states remain free to legislate with respect to independent contractors.<sup>116</sup>

Even though the ordinance is proper under the NLRA, the collective action of drivers would still be subject to the Sherman Act. The court held that the ordinance did not trigger immunity under *Parker*.<sup>117</sup> The immunity applies only when private actors are carrying out a “clearly articulated and affirmatively expressed . . . state policy.”<sup>118</sup> The court reasoned that the collective bargaining by drivers did not carry out such

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108. *Id.* at 1162.

109. *Id.* at 1162–62; *see also* *Parker v. Brown*, 317 U.S. 341, 351 (1943).

110. *City of Seattle*, 274 F. Supp. 3d at 1160–63, 1169.

111. *Id.* at 1171–74.

112. *Chamber of Com. v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

113. *Id.* at 791 (“The Chamber argues that Congress’s choice to exclude independent contractors from the NLRA’s definition of ‘employee’ in 29 U.S.C. § 152(3) implicitly preempts local labor regulation of independent contractors. We disagree.”).

114. *Id.* at 785 (“[T]here is a critical distinction between transportation services by for-hire drivers and ride-referral services by companies like Uber and Lyft.”).

115. *Id.* at 790–95.

116. *Id.* at 794–95.

117. *Id.* at 781–87.

118. *Id.* at 782.

a policy because the ordinance focused on “the provision of privately operated for hire transportation services, not the contractual payment arrangements between for-hire drivers and driver coordinators for use of the latter’s smartphone apps.”<sup>119</sup> The Ninth Circuit did not reach the question of whether the drivers’ collective action under the ordinance would violate the Sherman Act. It remanded the case for the district court to determine whether it would be a *per se* violation of Section 1 or whether it should be reviewed under the more flexible rule of reason.<sup>120</sup> The case is still in litigation.

## 2. State Legislative Developments

Not satisfied with the uncertainty in the courts’ application of the employment and labor tests, rideshare companies have lobbied state legislatures to restrict the definition of “employee” for rideshare drivers. Uber and other rideshare companies drafted model legislation for “transportation network companies” (TNC) that would apply to rideshare platforms,<sup>121</sup> and have supported more general “marketplace contractor” (MC) laws that would apply to online platform providers.<sup>122</sup> Both forms of model legislation would create carve-outs from employment protection for rideshare drivers and other platform workers.<sup>123</sup> The TNC and MC model legislation would create their own tests for exemption from labor standards.<sup>124</sup> Each of the statutory “test” factors would mirror the current

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119. *Id.* at 784.

120. *Id.* at 795. The *per se* rule and rule of reason are discussed *infra* Part III.

121. *Id.* at 4; *see also* Gali Racabi, *Despite the Binary: Looking for Power Outside the Employee Status*, TUL. L. REV. (forthcoming 2021) [hereinafter Racabi, *Despite the Binary*]; GALI RACABI, TRANSPORTATION NETWORK COMPANIES (TNC) AND MARKETPLACE CONTRACTORS (MC) STATE LAWS: PREEMPTION OF LOCAL GOVERNMENT REGULATIONS AND TREATMENT OF EMPLOYMENT STATUS OF DRIVERS (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3269522](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269522); Owain James, *Uber and Lyft are Lobbying States to Prohibit Local Regulation*, MOBILITY LAB (July 24, 2018), <https://mobilitylab.org/2018/07/24/uber-and-lyft-are-lobbying-states-to-prohibit-local-regulation/>; *Commercial Ride Sharing*, THE NAT’L ASSOC. OF INS. COMM’RS (Mar. 4, 2020), [https://content.naic.org/cipr\\_topics/topic\\_commercial\\_ride\\_sharing.htm](https://content.naic.org/cipr_topics/topic_commercial_ride_sharing.htm) (“A TNC is an organization offering prearranged transportation services for compensation using an online application or platform to connect passengers with drivers willing to transport them.”).

122. *See* Rebecca Smith, ‘Marketplace Platforms’ and ‘Employers’ Under State Law—Why We Should Reject Corporate Solutions and Support Worker Led Innovations, NAT’L EMP. L. PROJECT (May 18, 2018), <https://www.nelp.org/publication/marketplace-platforms-employers-state-law-reject-corporate-solutions-support-worker-led-innovation/>.

123. *Id.*

124. An example of such legislation is Florida’s MC statute. *See* FLA. STAT. § 451.02

business model of the platform companies and would ignore major factors of the right-to-control test, including freedom from company control, provision of services outside the scope of the company's work, and operating a separate business.<sup>125</sup>

Interestingly, the conservative lobbying group ALEC promoted the model TNC and MC legislation to states as early as 2014.<sup>126</sup> In less than ten years, ALEC and the rideshare industry have succeeded in passing legislation in 48 states.<sup>127</sup> Uber even drafted bills that became law in Oregon, Ohio, Texas and Washington.<sup>128</sup> States like North Carolina, Arkansas, Indiana, Oregon, Washington, Texas and Florida have all modified the definition of employee at the behest of rideshare companies.<sup>129</sup>

The most common statutory provisions declare that rideshare companies do not control rideshare drivers.<sup>130</sup> In these states, courts still use the right-to-control or similar tests, but the legislation establishes a rebuttable presumption that rideshare drivers are independent contractors.<sup>131</sup> In Utah, rideshare drivers are defined as independent

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(2020).

125. Rebecca Smith, *supra* note 122.

126. See Rebecca Smith et al., *Uber State Interference: How TNC's Buy, Bully and Bamboozle Their Way to Deregulation*, NAT'L EMP. L. PROJECT (Jan 18, 2018), <https://www.nelp.org/publication/uber-state-interference/> [hereinafter, NELP Report].

127. *Id.*

128. *Id.* at 20.

129. See N.C. GEN. STAT. § 20-280.8 (2020); ARK. CODE ANN. § 23-13-719 (2020); IND. CODE § 22-1-6-3 (2020); FLA. STAT. § 451.02 (2020); see also, Racabi, *Despite the Binary*, *supra* note 121.

130. N.D. CENT. CODE § 26.1-40.1-1.07 (2019); COLO. REV. STAT. § 40-10.1-602 (2014); IDAHO CODE § 49-3703 (2015); 625 ILL. COMP. STAT. 57/5 (2021); IND. CODE § 8-2.1-19.1-4 (2015); IOWA CODE § 321N.1 (2017); KAN. STAT. ANN. § 8-2702 (2015); MONT. CODE ANN. § 69-12-101 (2015); NEB. REV. STAT. § 75-302 (2021); NEV. REV. STAT. § 706A.090 (2015); N.M. STAT. ANN. § 65-7-2(2017); OKLA. STAT. tit. 47, § 1011 (2015); S.D. CODIFIED LAWS § 32-40-1 (2021); TENN. CODE ANN. § 65-15-302 (2015); WIS. STAT. § 440.41 (2020); see also Racabi, *Despite the Binary*, *supra* note 121.

131. See ARK. CODE ANN. § 23-13-719 (2015); FLA. STAT. § 451.02 (2018); ARIZ. REV. STAT. § 23-1603 (2016); DEL. CODE ANN. Tit. 2, § 1911 (2016); ALASKA STAT. § 28.23.080 (2017); KY. REV. STAT. § 336.137 (2018); MICH. COMP. LAWS § 257.2137 (2016); MISS. CODE ANN. § 77-8-21 (2016); N.H. REV. STAT. ANN. § 376-A:20 (2018); TEX. OCC. CODE ANN. § 2402.114 (West 2017); W. VA. CODE § 17-29-11 (2016); WYO. STAT. ANN. § 31-20-110 (2017).

contractors for all employment-law purposes, full stop.<sup>132</sup>

Some statutes modify the right-to-control test by creating checklists of conditions sufficient to establish an independent contractor relationship, abandoning common law agency's flexible, context-specific approach, including a narrow emphasis on "entrepreneurial opportunities."<sup>133</sup> These statutes condition independent contractor status on contractual provisions that specify the amount of control the rideshare company can have.<sup>134</sup> One of the factors in the right-to-control test is the parties' mutual understanding: whether they "believe" they are forming an employment relationship.<sup>135</sup> Although no factor takes precedence under the common-law approach, contractual intent has outsized significance in state legislative definitions of independent contractor status for drivers.

Indiana's statute displays all these characteristics. Independent contractor status is established when the worker has a written contract with the platform containing all the following provisions:

(A) The marketplace contractor is providing services as an independent contractor and not as an employee of the marketplace platform.

(B) All or substantially all of the payments paid to the marketplace contractor are to be based on the performance of services or other output by the marketplace contractor.

(C) The marketplace contractor may work any hours or schedules the marketplace contractor chooses. However, if the marketplace contractor does elect to work specified hours or schedules, the marketplace platform may require the marketplace contractor to work during the specified hours or schedules that the marketplace contractor elected to work.

(D) Except as provided in clause (C), the marketplace contractor may perform services for other parties without restriction.

(E) The marketplace contractor bears responsibility for all or substantially all of the expenses that the marketplace contractor pays or incurs in performing the services, without the right to obtain reimbursement from the marketplace platform for the expenses.<sup>136</sup>

Florida's statute, similar to Indiana's, goes so far as to cover drivers

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132. UTAH CODE ANN. § 13-51-103 (West 2019).

133. See discussion *supra* Part II.A.1.

134. See, e.g., ARK. CODE ANN. § 23-13-719 (2015); IND. CODE. § 22-1-6-3 (2018).

135. See RESTATEMENT (SECOND) OF AGENCY § 220(2)(i) (AM. L. INST. 1958).

136. IND. CODE § 22-1-6-3(3) (2018).

retroactively.<sup>137</sup>

Despite the rideshare companies' best efforts, the definition of employment continues to be highly contested state by state. In California, for example, the legislature codified a case setting out a worker-friendly test for determining who is a protected employee for state wage and hour purposes. In 2018, the California Supreme Court held that all workers were presumed employees under California wage and hour laws unless an employer could prove they were independent contractors under a newly formulated "ABC" test.<sup>138</sup> The test replaced the California's version of the right-to-control test for wage and hour cases. Under the ABC test, a worker is presumed to be an employee for purposes of wage and hour regulations unless the employer proves:

- (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) that the worker performs work that is outside the usual course of the hiring entity's business; and
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.<sup>139</sup>

The California legislature quickly codified the ABC test in Assembly Bill 5 (AB 5), extending beyond the wage and hour setting to a broad array of protections under the Labor Code.<sup>140</sup> Notably, although the law lists explicit exemptions for various types of workers, including lawyers and hairdressers, the list does not include rideshare drivers. Rideshare firms are unlikely to be able to satisfy the ABC test. Unlike the state statutes described above, this test gives no legal weight to contractual provisions purporting to establish independent contractor status.

This overview of state activity demonstrates two things. First, employment status is highly contested, and as the battles have moved from the courts to the legislature, the rideshare companies continue to contest driver status. In California specifically, Uber and Lyft joined forces to place Proposition 22, a voter initiative, on the November 2020

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137. FLA. STAT. § 451.02(2) (2018).

138. *Dynamex Operations v. Superior Ct.*, 416 P.3d 1, 35–36 (Cal. 2018).

139. *Id.* at 36–41.

140. CAL. LAB. CODE § 3351 (West 2017) (amended 2020); CAL. LAB. CODE § 2750.3 (repealed 2020).

ballot that would define drivers as independent contractors.<sup>141</sup> The voter initiative would direct the legislature to define rideshare and delivery drivers as independent contractors, essentially creating a rideshare exception to AB 5.<sup>142</sup> The rideshare companies succeeded in getting the voter initiative passed. This paves the way for a rewrite of the law at a statewide level, robbing both localities and courts of the power to decide whether drivers are employees. As a result, the rideshare companies could avoid current minimum-wage, sexual harassment and antidiscrimination laws, unemployment and workers' compensation systems, and efforts (like Seattle's) to permit collective bargaining at the local level.<sup>143</sup>

Second, many state legislatures, influenced by rideshare lobbyists, have supplanted the common-law definition of employment, making it easier for rideshare companies to show their drivers are independent contractors. In those states, Uber and Lyft need only craft their contracts to meet the statutory checklists. Wherever these statutes proliferate, employment law as we know it—along with its common-law nature—will become irrelevant to the discussion.

### 3. Administrative Developments

In April 2019, the Trump Administration's National Labor Relations Board and Department of Labor issued similar memoranda declaring that rideshare drivers were independent contractors.

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141. See CAL. BUS. & PROF. CODE § 7451 (West 2020) (having passed by voter initiative, it was previously known as California Proposition 22, App Based Drivers as Contractors and Labor Policies Initiative). The initiative overrides AB5 on the question of whether drivers are employees. It also enacts wage policies specifically for rideshare drivers, including an earnings floor; a maximum number of work hours per day; healthcaresubsidies; occupational accident insurance; accidental death insurance; and requires companies to develop anti-discrimination and sexual harassment policies. See also Hannah Wiley, *Uber, Lyft and DoorDash Seeking Labor Law Exemption Heads to California Voters*, SACRAMENTO BEE (May 22, 2020, 6:12 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article242948676.html>.

142. California Proposition 22, App-Based Drivers as Independent Contractors and Labor Policies Initiative (2020), BALLOTEDIA, [https://ballotpedia.org/California\\_Proposition\\_22,\\_App-Based\\_Drivers\\_as\\_Contractors\\_and\\_Labor\\_Policies\\_Initiative\\_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)).

143. NELP Report, *supra* note 126, at 13, 32, 24–26. The battle in California is not over, however. A lawsuit is making its way through the courts which challenges the constitutionality of Proposition 22 because it limits legislative authority. See Altshuler Berzon LLP, *Service Employees International Union, Drivers, and Consumer File Constitutional Challenge to Proposition 22* (Feb. 12, 2021), <https://altshulerberzon.com/2021/02/12/service-employees-international-union-drivers-and-consumer-file-constitutional-challenge-to-proposition-22-in-california-supreme-court/>.

The NLRB issued an advice memorandum concluding that Uber drivers are independent contractors.<sup>144</sup> It directed its regional offices to dismiss unfair labor practice charges against Uber filed by rideshare drivers.<sup>145</sup> The NLRB invoked the common-law right-to-control test, but incorporated the “subtle refinement” from the D.C. Circuit’s *FedEx* opinion. It invoked the entrepreneurial opportunities test, announcing that “where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, [the Board] will likely find independent-contractor status.”<sup>146</sup> The Board underscored a driver’s ability to maximize entrepreneurial opportunities due to flexible arrangements with the company, including time on the job.<sup>147</sup> The Board also noted two additional factors: (1) the extent of the company’s control over the manner and means by which drivers conduct business and (2) the relationship between the company’s compensation and the amount of fares collected.<sup>148</sup> All these factors are present in the industry-sponsored state independent-contractor legislation discussed above.

Similarly, the Department of Labor (DOL) issued an opinion letter<sup>149</sup> regarding workers in platform businesses in general, including rideshare workers. The DOL applied each of the economic reality factors to the virtual platform environment, noting that a platform business does not “receive services from service providers, but empowers service providers to provide services to end-market consumers.”<sup>150</sup> The DOL found that platform workers were not economically dependent on specific platform companies; that companies provided significant flexibility to workers to provide services to competing companies, or to pursue economic opportunities; that the relationship between a platform company and its workers was not a permanent relationship but rather a project-based relationship; that the company did not invest in the equipment, materials or facilities needed to provide the service; that workers did not rely on the company for training or skills transfer; and that the workers maintained

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144. See NLRB, *Advice Memorandum*, *supra* note 82.

145. *Id.* at 1.

146. *Id.* at 4 (quoting *Supershuttle DFW, Inc.*, 367 N.L.R.B. 75 at \*1 (2019)).

147. *Id.* at 3–9.

148. *Id.* at 4.

149. U.S. Dep’t of Labor, Wage & Hour Div., FLSA 2019-6, Opinion Letter (Apr. 29, 2019).

150. *Id.* at 7.

control over their profits and losses; and that the business of providing a platform for the service and the business of providing the service itself were different.<sup>151</sup> Upon a review of all the factors, the DOL determined that platform workers were independent contractors.

*C. Rideshare Firms' Hidden Control of Drivers: Employment Relationship or Undue Market Power*

Debates about whether drivers are employees notwithstanding, rideshare companies do exert considerable power over drivers. Rideshare firms draft contracts that are tailored to satisfy the checklists in the industry-sponsored state statutes and also attempt to satisfy the right-to-control, economic realities or entrepreneurial opportunities tests, should they still apply. At the same time, contract provisions empower the firms to exert significant control over drivers in many subtle and complex ways that may survive common-law scrutiny. These agreements include payment structure; vehicle lease terms; rules governing drivers' conduct and the time they spend on the job; restrictions on driver grievances; as well as non-disclosure, non-solicitation, non-disparagement, and non-compete agreements. To the extent this level of control outside of an employment relationship might be considered unprecedented or novel, it is important to understand its contours.

1. Rideshare-Driver Contracts Disavow an Employment Relationship

As noted above, rideshare firms have distanced themselves from their drivers by describing themselves as platforms and not transportation companies. One factor evidencing an employment relationship in the right-to-control test is that the work performed by the worker is within the scope of the employer's business.<sup>152</sup> This factor also appears in many of the state statutes defining drivers as independent contractors. Uber denies that it is engaged in "the business of providing transportation" and even claims that "drivers' work is outside the usual course of Uber's business."<sup>153</sup> According to Uber's Chief Legal Officer, "the usual course of Uber's business . . . is serving as a technology platform for several different types

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151. *Id.* at 7–10.

152. RESTATEMENT (SECOND) OF AGENCY §220(2) (AM. L. INST. 1958).

153. Bensinger, *supra* note 7.

of digital marketplaces.”<sup>154</sup>

Similarly, rideshare firms’ contracts with drivers repeatedly insist that the driver is an independent contractor, not an employee. The contracts emphasize the driver’s independence and “entrepreneurial opportunities.” For example: Uber’s Platform Access Agreement tells drivers, “We are not hiring or engaging you to provide any service; you are engaging us to provide you access to our Platform.”<sup>155</sup> The Agreement continues at length:

The relationship between the parties is solely as independent business enterprises, each of whom operates a separate and distinct business enterprise that provides a service outside the usual course of business of the other. This is not an employment agreement and you are not an employee. You confirm the existence and nature of that contractual relationship each time you access our Platform. Nothing in this Agreement creates, will create, or is intended to create, any employment, partnership, joint venture, franchise or sales representative relationship between you and us.<sup>156</sup>

Lyft’s terms of service, applicable to both drivers and riders, similarly disavow Lyft’s control over drivers:

It is up to the Driver to decide whether or not to offer a ride to a Rider contacted through the Lyft Platform, and it is up to the Rider to decide whether or not to accept a ride from any Driver contacted through the Lyft Platform. We cannot ensure that a Driver or Rider will complete an arranged transportation service. We have no control over the quality or safety of the transportation that occurs as a result of the Rideshare Services.<sup>157</sup>

The Uber driver agreement further asserts that while Uber serves both drivers and riders, Uber is not a party to the driver-rider relationship:

Accepting a Ride request creates a direct business relationship between you and your Rider in accordance with the terms of the transportation service the Rider has requested through our Platform.

To minimize their economic relationships with the driver, rideshare firms assert that the payment relationship is between the driver and the rider. According to Uber’s agreement, “Uber enables you, through the

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154. *Id.*

155. Uber, Platform Access Agreement § 1.1 (Jan. 6, 2020).

156. *Id.*

157. Lyft, Platform Access Agreement § 12 (Nov. 27, 2019).

Driver App, to charge your Rider(s) a ‘Fare’ for each Ride.”<sup>158</sup> Uber seeks to make clear that it does not pay the driver for her driving services; to the contrary, the driver earns the entire fare from the rider, and the driver then remits to Uber a “Service Fee” for serving as a platform and processing payments.<sup>159</sup> Similarly, Lyft’s driver agreement states that Lyft does not pay drivers, but merely collects and passes on riders’ payments to drivers.<sup>160</sup>

Uber further claims to lack control over the manner of work performance, another factor in the right-to-control test.<sup>161</sup> According to its Agreement, “[y]ou will choose the most effective, efficient, and safe manner to reach the destinations associated with a Ride. Any navigational directions offered in the Driver App are offered for your convenience only; you have no obligation to follow such navigational directions.”<sup>162</sup> It further states:

We do not, and have no right to, direct or control you. Subject to Platform availability, you decide when, where and whether (a) you want to offer P2PService facilitated by our Platform and (b) you want to accept, decline, ignore or cancel a Ride . . . request. . . . [Y]ou are not required to accept any minimum number of Rides. . . . and it is entirely your choice whether to provide P2PService to Riders directly, using our Platform, or using any other method to connect with Riders, including, but not limited to other platforms and applications in addition to, or instead of, ours.<sup>163</sup>

Finally, in response to court opinions finding the use of a branded uniform might indicate an employment relationship to customers,<sup>164</sup> the Uber driver agreement states that the use of the Uber brand name does not make a driver an employee:

The parties expressly agree that your access to, or use of, Uber Branded Materials, whether or not authorized, does not indicate an employment or other similar relationship between you and us. You further agree not to

158. Uber, Fare Addendum 1 (Jan. 6, 2020).

159. *Id.*

160. Lyft, Driver Addendum § 3 (Aug. 26, 2019).

161. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (AM. L. INST. 1958) (stating that servant status depends on “the extent of control which, by the agreement, the master may exercise over the details of the work”).

162. Uber, Platform Access Agreement, § 2.6(b) (Jan. 6, 2020).

163. *Id.* at § 1.2.

164. *See, e.g.,* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014).

represent yourself as our employee, representative or agent for any purpose or otherwise misrepresent your relationship with us.<sup>165</sup>

## 2. The Contracts Give Rideshare Firms Subtle Control Over Drivers

### a. Broad Aspects of Control

Despite these nominal expressions of driver independence, other terms in the same contracts exert subtle forms of control over drivers that the state statutes ignore and the common law may fail to take into account. Most broadly, rideshare contracts with drivers are standard form contracts that are non-negotiable and shift significant costs onto drivers.<sup>166</sup> Unlike true independent businesses, drivers have no ability to bargain over their contracts. These adhesion contracts may be unconscionable under state law. Many observers believe that rideshare firms have imposed one-sided terms on drivers by taking advantage of information asymmetries.<sup>167</sup> Drivers' gross pay appears artificially large before calculating and subtracting costs such as vehicle costs, depreciation and risk.<sup>168</sup> Uber has also been accused of recruiting drivers through deception by misrepresenting gross pay as net pay, fabricating claims about high net pay, and by sponsoring questionable academic research to support its PR narratives.<sup>169</sup> Other accusations include bait-and-switch tactics, such as offering incentives to recruit drivers and then reducing compensation after drivers signed long-term vehicle-financing contracts.<sup>170</sup>

Contractual control goes beyond the mere lack of informed bargaining. Uber modifies its contracts with drivers often, changing the

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165. Uber, Platform Access Agreement § 2.7(c) (Jan. 6, 2020); see *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).

166. See discussion *supra* Parts I, II.

167. See Horan, *supra* note 4, at 47 (citing Alex Rosenblat & Luke Stark, *Uber's Drivers: Information Asymmetries and Control in Dynamic Work*, 10 INT'L L. J. COMM. 27 (2016)) [hereinafter Rosenblat & Stark, *Information Asymmetries*]. See also David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 609 (2010) for a discussion on the ways that companies create information asymmetries with customers through constant changes in contract terms that are difficult to keep up with.

168. Horan, *supra* note 4, at 47.

169. *Id.* at 47–9 (citing sources); Hubert Horan, *Uber's "Academic Research" Program: How to Use Famous Economists to Spread Corporate Narratives*, PROMARKET (Dec. 5, 2019), <https://promarket.org/ubers-academic-research-program-how-to-use-famous-economists-to-spread-corporate-narratives/>.

170. Horan, *supra* note 4, at 47–48.

terms of service, commission structures, or prices, which drivers must accept before logging on to the platform.<sup>171</sup> This tactic further aggravates information asymmetry because it is difficult for drivers to keep up with these constant and unilateral contract changes.<sup>172</sup>

Rideshare firms' contracts also control the conditions for exiting the company, through arbitration, confidentiality and intellectual property provisions, all of which appear in contracts of adhesion and mimic provisions commonly found in employment agreements.<sup>173</sup> Even in states like California, where express noncompete contracts are unenforceable,<sup>174</sup> these provisions create a "contract thicket" preventing drivers from leaving the company to compete with it.<sup>175</sup> Both companies have broad confidentiality provisions. Lyft's prohibits use or disclosure of "technical, financial, strategic and other proprietary and confidential information relating to Lyft's business, operations and properties,"<sup>176</sup> while Uber's specifically stakes a claim to all information the drivers have produced during their history with the company and the platform, which presumably includes driving patterns and routes, information about riders and rides, operational information, technical information, marketing information, etc.<sup>177</sup>

In the right-to-control test, the manner of payment is relevant to determining the nature of the work relationship.<sup>178</sup> A regular paycheck dependent on a salary or hourly wage suggests an employer who has control over an employee's livelihood. On the other hand, payment based on the amount of work suggests an independent contractor relationship.

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171. See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1630 (2017) [hereinafter Calo & Rosenblat, *Taking*].

172. Uber, Platform Access Agreement § 1.1 (Jan. 6, 2020).

173. See Lyft, Terms of Service §§ 11, (intellectual property), 17 (arbitration), 18 (confidentiality) (Nov. 27, 2019); Uber, Platform Access Agreement §§ 8 (confidentiality), 9 (intellectual property), 13 (arbitration) (Jan. 6, 2020).

174. See CAL. BUS. & PROF. CODE § 16600 (West 2020).

175. Orly Lobel, *The Contract Thicket: Addition and Supra Addition in Private Law Theory*, (forthcoming 2021) (on file with authors).

176. Lyft, Terms of Service § 18 (April 1, 2021).

177. Uber, Platform Access Agreement § 8.1 (Jan. 6, 2020).

178. See RESTATEMENT (SECOND) OF AGENCY § 220(2)(g) (AM. L. INST. 1958) (stating employment status is influenced by whether payment is determined "by the time or by the job").

This factor is also an explicit checklist factor in many state statutes.<sup>179</sup> Rideshare drivers resemble independent contractors under this criterion, as they are paid according to the rides they give and not by the number of hours they work.<sup>180</sup>

Under the rideshare business model, drivers cannot set their own rates or compete with each other on the basis of price.<sup>181</sup> As noted above, the rates are set through adhesion contracts, and the net rate of pay is far from transparent. Indeed, after a 2019 update of the Lyft app, drivers complained that “they could no longer see how much the rider paid for any given trip,” obscuring whether their payment is actually on a per-ride basis.<sup>182</sup>

In addition, Uber can control when surge pricing is activated, and individual drivers control only whether they participate. The price of a ride surges according to the calculations of a proprietary algorithm during high-demand periods. The company claims the algorithm spikes prices when demand is high to encourage drivers to log on and accept customers. There is little public information about the algorithm, however. Uber claims that it operates independently of any company interference, but this does not change the fact that Uber has unilaterally selected the algorithm as the (non-transparent) method of determining surge prices.

Uber also has the sole power to change its surge policies and has done so often during its existence. Uber changed its surge policies recently to allow drivers to earn surge pricing any time they drive through a surge area, but reducing surge amounts for long trips. The new surge pricing structure tells drivers how much more they will earn in dollar amounts rather than as a function of the base price (e.g., 1.5x).<sup>183</sup> This

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179. See, e.g., IND. CODE § 22-1-6-3(3)(B) (2018).

180. Uber, Fare Addendum (Jan. 6, 2020) (driver is paid for each ride by “a base amount plus amounts based on the Ride’s distance and/or time”); Lyft, Driver Addendum (Aug. 26, 2019) (driver’s payment for each ride “consists of a base fare or pickup fare amount plus incremental amounts based on the actual time and distance”).

181. See *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 819–20 (2016) (claiming that Uber’s fare policies constituted price-fixing in violation of 15 U.S.C. § 1). Although drivers are permitted to charge less than the app’s prescribed fare, drivers have no way of communicating that to a prospective rider, and it does not reduce the amount the driver must pay the app.

182. Sergio Avedian, *Lyft Stops Showing Passenger Ride Details to Their Drivers*, RIDEGURU (Jan. 20, 2019), <https://ride.guru/content/newsroom/lyft-stops-showing-passenger-ride-details-to-their-drivers>.

183. Alex Rosenblat, *The Truth About How Uber’s App Manages Drivers*, HARV. BUS.

means that drivers know how much they will receive as a premium during surge periods, but not how much Uber retains for these trips.

b. Control Over the Details of Work

The rideshare firms have considerable indirect control over how drivers perform and how they conduct themselves on the job. As noted above, Lyft has obscured from drivers on how much riders paid for each trip even after the fact; this prevents drivers from choosing rides by calculating which routes are most profitable.<sup>184</sup> Drivers' choice of rides is further limited because they have no access to information about riders or destinations until they accept their rides on the platform.<sup>185</sup> Drivers do not have viable options for declining rides once they accept and see this information. They are penalized if they accept and subsequently decline a ride, and face deactivation from the platform if they do so repeatedly.<sup>186</sup> Uber's control of this spatial aspect of a driver's service demonstrates how little choice drivers have in their individual rideshare decisions.

Uber has developed mechanisms based on behavioral economics to direct drivers to needed locations. For example, at one point, Uber used heat maps to show drivers where they could garner higher prices for rides, without telling drivers exactly how much more they would make. The color-coded maps indicated where prices were about to surge and where they were surging, but they did not provide drivers with the exact surge price available in the surge area.<sup>187</sup> As one set of scholars noted, "These constraints on drivers' freedom to make fully informed and independent choices reflect the broad information and power asymmetries that characterize the relationship between Uber and its drivers and illustrate how the Uber platform narrows the choices that drivers are free to make."<sup>188</sup>

Uber also directs drivers through its incentive pricing, which

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REV. (April 6, 2016), <https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers> [hereinafter Rosenblat, *Truth*].

184. Avedian, *supra* note 185.

185. Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. COMM. 3758, 3762 (2016) [hereinafter Rosenblat & Stark, *Case Study*].

186. Lyft, Terms of Service § 16 (Nov. 27, 2019); Rosenblat & Stark, *Case Study*, *supra* note 185, at 3762.

187. PATRICK MCQUOWN ET AL., BROWN SCHOOL OF ENGINEERING, AN ANALYSIS OF THE ENTREPRENEURIAL ASPECTS OF UBER'S DRIVER-PARTNER PLATFORM 7-9 (2016).

188. Calo & Rosenblat, *Taking*, *supra* note 171, at 1662.

changes frequently. For example, Uber has promised its drivers a minimum hourly rate if they fulfill certain conditions, including accepting ninety percent or more of the ride requested within the hour.<sup>189</sup> Only Uber has the information about whether drivers have met the conditions, however, and consequently, drivers do not know whether they are owed the minimum hourly rates they are offered.<sup>190</sup> In addition, Uber changes its contractual obligations so often that it is impossible for drivers to know the conditions of their work arrangements from day to day.<sup>191</sup>

In addition to directing where drivers go and which rides they accept, rideshare firms indirectly control how drivers perform their work, including which routes they take while driving.<sup>192</sup> Despite claims that they do not supervise drivers, Uber requires drivers to be tracked at all times.<sup>193</sup> Moreover, rideshare companies have enlisted customers to “act as managers” by helping the firms monitor driver performance and shape their behavior.<sup>194</sup> Drivers who do not meet rating thresholds may have their accounts terminated.<sup>195</sup> Since drivers are likely to be compared to one another, the most reliable way to achieve high ratings is to “modify their behavior to produce a fairly homogenous Uber experience” by incorporating the firm’s “suggestions” for conduct, such as providing (at the driver’s expense) bottled water and phone chargers, opening doors, and taking the passenger’s preferred route.<sup>196</sup>

### c. Control over Drivers’ Time

One of the factors courts use to determine employment status is the amount of control the putative employer has over a worker’s time.<sup>197</sup>

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189. See Rosenblat & Stark, *Case Study*, *supra* note 185, at 3764.

190. *Id.*

191. Calo & Rosenblat, *Taking*, *supra* note 171, at 1661.

192. ROSENBLAT, *UBERLAND*, *supra* note 36, at 133.

193. Brandon Bailey, *Uber Using Software to Track Drivers’ Behavior*, *INS. J.* (June 30, 2016), <https://www.insurancejournal.com/news/national/2016/06/30/418734.html>; Lisa Eadicicco, *Uber Is Tracking Drivers’ Phones to Watch for Speeding* (June 29, 2016), <https://time.com/4387031/uber-driver-app-tracking/>.

194. Rosenblat, *Truth*, *supra* note 183.

195. Lyft, Terms of Service § 16 (Nov. 27, 2019); Uber, Community Guidelines (Apr. 22, 2020); Uber, Platform Agreement § 1.2 (Jan. 6, 2020).

196. Rosenblat, *Truth*, *supra* note 183.

197. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. e (AM. L. INST. 1958) (stating a servant is one who renders “service in which the actor’s physical activities and his time are surrendered to the control of the master”).

Most of the states that have passed laws deeming drivers as independent contractors contain provisions that prohibit the rideshare company from unilaterally prescribing specific hours during which drivers must be available to work.<sup>198</sup> Uber professes that the beauty of its business model is that drivers can decide when to drive and for how long. As an early Uber investor put it, “no driver-partner is ever told where or when to work.”<sup>199</sup> Drivers say they prize this flexibility, which they acknowledge is missing in a traditional employer-employee relationship.

Despite this nominal freedom, Uber has developed subtle mechanisms of control outside of formal contractual provisions that put drivers on the road, keep them there, and discourage driver exit at the end of a work period. Although the narrative of the Uber rideshare system is that, “Uber has been able so far to build with an invisible hand a global network able to “manage” bottom-up and with no such thing as a “schedule,”<sup>200</sup> the reality of control is quite different.

Uber uses behavioral science and even gaming technology to incentivize drivers to get in their cars and stay there.<sup>201</sup> Uber uses “choice architecture,” or design elements meant to influence driver behavior by designing how decisions are presented.<sup>202</sup> It has used video gaming technology, non-cash “prizes” and graphics to keep drivers working longer and in less desirable locations.<sup>203</sup> The company also uses technology that sends a driver the next trip before the driver finishes a ride, encouraging the driver to continue to work.<sup>204</sup> These strategies capitalize on drivers’ cognitive biases, such as loss aversion and availability bias, which force drivers to underestimate low-probability events.<sup>205</sup> As one

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198. See, e.g., IND. CODE § 22-1-6-3(3) (2018); FLA. STAT. § 451.02(1)(a) (2018).

199. Gennaro Cuofano, *How Does Uber Make Money? Uber Business Model in a Nutshell*, FourWeekMBA, <https://fourweekmba.com/uber-business-model/> (quoting Bill Gurley).

200. *Id.*

201. Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html>.

202. Abbey Stemler et al., *How Uber and Other Digital Platforms Could Trick Us Using Behavioral Science- Unless We Act Fast*, THE CONVERSATION (May 10, 2019, 6:38 AM), <https://theconversation.com/how-uber-and-other-digital-platforms-could-trick-us-using-behavioral-science-unless-we-act-fast-116722>.

203. Scheiber, *supra* note 201.

204. *Id.*

205. Stemler et al., *supra* note 202; Rosenblat, *Truth*, *supra* note 183.

observer noted, these tactics force drivers to act “like gamblers at a casino, urged to play just a little longer despite the odds.”<sup>206</sup>

#### d. Control over Vehicles

According to another common-law factor, control over the tools, instruments, or equipment used to perform work might indicate an employment relationship.<sup>207</sup> Rideshare firms do not supply the cars their drivers use; this shifting of costs onto the driver is a critical part of the rideshare business model.<sup>208</sup> Nonetheless, rideshare firms retain indirect control over drivers’ cars. A driver’s car must meet each firm’s minimum specifications.<sup>209</sup> For drivers who do not have a compliant car or prefer not to use their personal car, the firms offer vehicle rental services that afford the firms even greater control over the driver’s equipment.

Both Uber and Lyft formerly offered long-term car leases to drivers. These long-term lease programs were criticized as “predatory” and attracted regulatory scrutiny.<sup>210</sup> According to one financial analyst, “The lease terms [were] awful, you could buy the car for what they [were] being leased for, or maybe even less.”<sup>211</sup> Early on, Uber also offered a car financing program that was tied to drivers’ logged hours. The cost of the car was added to Uber’s commission on every ride logged in the app. As one driver noted, the effect on drivers was coercive. “I just felt like I was trapped, like I was an Uber slave.”<sup>212</sup>

The companies have since replaced their proprietary long-term lease programs with Lyft ExpressDrive and Uber Vehicle Marketplace, short-term rental programs with partners such as Hertz and Avis.<sup>213</sup> Drivers

206. Stemler et al., *supra* note 202.

207. See RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (AM. L. INST. 1958).

208. See discussion *supra* at Introduction.

209. See, e.g., Uber, *Vehicle Requirement: San Francisco Bay Area*, <https://www.uber.com/us/en/drive/san-francisco/vehicle-requirements/>; Lyft, *What You Need to Drive With Lyft in San Francisco*, <https://www.lyft.com/driver/cities/san-francisco-ca/driver-application-requirements>.

210. Sarah Skidmore Sell, *Desperately Seeking Drivers, Uber and Lyft Offer Car Options*, ASSOCIATED PRESS (July 22, 2016), <https://apnews.com/e0d97292395d4dbda2d1b8db17606a20/desperately-seeking-drivers-uber-and-lyft-offer-car-options>.

211. *Id.*

212. Carla Green & Sam Levin, *Homeless, Assaulted, Broke: Drivers Left Behind as Uber Promises Changes at the Top*, GUARDIAN (June 17, 2017), <https://www.theguardian.com/us-news/2017/jun/17/uber-drivers-homeless-assault-travis-kalanick>.

213. See *Uber Vehicle Marketplace*, UBER, <https://www.uber.com/us/en/drive/vehicle->

using Lyft's ExpressDrive rental cars are paid less and subject to "unique restrictions," such as a required minimum number of rides and a prohibition on using the car to drive for other rideshare services.<sup>214</sup> Lyft claims that the lower pay rate reflects insurance costs, but its website recruited drivers by telling them that insurance is "covered" by ExpressDrive rental payments.<sup>215</sup> Uber disclaims responsibility for its Marketplace partners' cars and, like Lyft, subjects them to pay limitations:

Uber is not responsible for the products or services offered by other companies, or for the terms and conditions (including financial terms) under which those products and services are offered. Drivers renting with a rental partner may qualify for trip surge areas and Uber promotions specific to that rental partner, but except as specified in the Driver app, may not qualify to participate in other promotional offers.<sup>216</sup>

Moreover, the rideshare firm controls what rental car a driver may use, as a driver's options are limited to approved car rentals if they are offered at all. As the Uber Marketplace website states, "Driving an unapproved rental car may result in deactivation from the Uber platform."<sup>217</sup> Uber has partnered with big brand car rental agencies Hertz and Avis, which charge the same amount and do not seem to compete with each other to offer deals to Uber drivers.<sup>218</sup> Shorter-term rental partners Getaround and Zipcar charge higher rates to rent for shorter periods of time.<sup>219</sup> As a major corporate partner, Uber earns money from drivers who rent and potentially has some input into the terms offered by the rental companies.

Thus, even though rideshare firms do not provide drivers' vehicles, they impose other forms of control over the equipment. Drivers who

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solutions/ (last visited May 31, 2020).

214. Johana Bhuiyan, *Lower Pay and Higher Costs: The Downside of Lyft's Car Rental Program*, L.A. TIMES (May 20, 2019), <https://www.latimes.com/business/technology/la-fi-tn-lyft-express-drive-20190520-story.html>.

215. *Id.*

216. *Uber Vehicle Marketplace*, *supra* note 213.

217. *Id.*

218. *Drive to Earn with Hertz, Uber, and Lyft*, HERTZ, [https://www.hertz.com/rentacar/misc/index.jsp?targetPage=rideshare\\_faq.jsp](https://www.hertz.com/rentacar/misc/index.jsp?targetPage=rideshare_faq.jsp) (last visited May 31, 2020).

219. *Uber Vehicle Marketplace*, *supra* note 213.

choose to use rented cars must rent from the rideshare company's chosen partner, accept a lower rate of pay, and forego driving for other rideshare services.

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While all these methods of control affect drivers' livelihoods, they are more subtle than those typically considered by common-law courts. In any event, the common-law tests—already difficult to administer and uncertain in their outcomes—are becoming less and less relevant as legislatures modify employment definitions for rideshare drivers. Control does not register at all in checklist statutes. Whether these mechanisms of control rise to the level of employment under the right-to-control test will eventually cease to matter in all but a few states if rideshare companies have their way. As noted above, independent contractors who lack employment law protections also face antitrust scrutiny if they attempt to protect themselves through labor organizing. The next Part discusses developments at the intersection of employment and antitrust law that may open the door to organizing. The ultimate aim is for laws to provide the leverage that rideshare drivers need to truly experience a dignified market relationship with rideshare companies.

### III. THE ANTITRUST OPPORTUNITY

#### A. *Collective Bargaining, Price-Fixing and the Myth of the “Per Se Rule”*

Insofar as employment law protections are unavailable in many states, collective bargaining might offer an alternative method of addressing driver's inferior bargaining power with respect to rideshare firms. Although the NLRA does not protect labor organizing by non-employees, it does not expressly prohibit it. Without the benefit of the antitrust labor exemption, however, collective bargaining by rideshare drivers would be open to scrutiny as a price-fixing agreement under Section 1 of the Sherman Act. This Article argues that it should survive such scrutiny because drivers are an integral part of rideshare business networks.

We begin with some background in antitrust law. According to the Court, “the essential inquiry remains the same” in all antitrust cases “whether or not the challenged restraint enhances competition.”<sup>220</sup> The

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220. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

Court applies the “rule of reason,” a term that denotes not a “rule” but rather the whole body of case law concerning whether an agreement has an unreasonably anticompetitive effect.<sup>221</sup> The Court has described the rule of reason as “an inquiry into market power and market structure designed to assess the combination’s actual effect.”<sup>222</sup> A court determines that effect by examining “the specifics of the challenged practices and their impact upon the marketplace.”<sup>223</sup> Proving anticompetitive effects involves “analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”<sup>224</sup> The goal is to “distinguish[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”<sup>225</sup> There is, however, no checklist or formula for making this determination.

Certain types of agreements, such as price-fixing, are sometimes said to be anticompetitive based on their “nature or character” and thus “illegal *per se*.”<sup>226</sup> The terminology is outdated and misleading, however, insofar as it appears to state that some types of agreements are illegal as a matter of law.<sup>227</sup> In fact, the Court has expressly disavowed a categorical approach and now expressly refuses to conclude that any business conduct has anticompetitive effects based solely on its “nature.”<sup>228</sup> Rather, the Court relies on its experience with certain kinds of conduct to *abbreviate* the evidentiary inquiry required to show that an agreement is unreasonably anticompetitive.<sup>229</sup>

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221. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (“Restraints that are not unreasonable *per se* are judged under the ‘rule of reason.’”).

222. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). “Market power” refers to the ability to set prices without regard to the disciplining forces of supply and demand, while “market structure” refers to the extent of concentration.

223. *United States v. Arnold, Schwinn & Co.*, 338 U.S. 365, 374 (1967), *overruled by* *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

224. See *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

225. *Am. Express Co.*, 138 S. Ct. at 2284 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

226. See *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

227. See *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (stating that the so-called “*per se* rule” is separated from the context-specific “rule of reason” only by a “vestigial line”).

228. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103; *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1, 23 (1979).

229. See *BMI*, 441 U.S. at 23.

Thus, even if an independent contractors' agreement to bargain collectively constitutes "price fixing," whether such an agreement would violate antitrust law is a fact-specific question, not a question of law. Indeed, the Supreme Court has expressly stated that price-fixing agreements among rivals are not categorically illegal: "When two partners set the price of their goods or services they are literally 'price fixing' but they are not *per se* in violation of the Sherman Act."<sup>230</sup> Courts now state that conduct is declared illegal "*per se*" only if it's likely anticompetitive effects are well known to courts; this is knowledge typically based on judicial experience with the type of conduct at issue and the context in which it appears.<sup>231</sup> By nature, such a conclusion is not literally categorical: it requires *some* kind of context-specific inquiry into the conduct's effects, even if only indirectly by assessing its resemblance to familiar conduct and contexts.<sup>232</sup> Thus the so-called "*per se*" rule means only that a reduced evidentiary inquiry is required when a case resembles a situation with which courts have "considerable experience."<sup>233</sup> All Section 1 cases involve the same "essential inquiry," but fall along a continuum with respect to the required evidentiary burden. The "*per se* rule" simply describes the part of the continuum where the evidentiary burden is at its lowest.<sup>234</sup>

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230. *Id.* at 9; *see also id.* at 23 ("Not all arrangements among . . . competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints.").

231. *PolyGram Holding*, 416 F.3d at 37 ("[T]he rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."); *BMI*, 441 U.S. at 2 ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . .") (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607–08 (1972)); *BMI*, 441 U.S. at 9 ("'[P]rice fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable."). While historical experience with the anticompetitive effects of similar agreements is the typical basis for "*per se*" analysis, the Court has stated in dicta that it is not necessarily required. *NCAA*, 468 U.S. at 100 n.21 (refusing to apply *per se* analysis but stating that "while judicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules . . . the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry.").

232. *NCAA*, 468 U.S. at 104 n.26 ("*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.").

233. *BMI*, 441 U.S. at 23.

234. *See PolyGram Holding*, 416 F.3d at 35 ("[T]he Court . . . has backed away from any reliance on fixed categories and toward a continuum . . . our categories of analysis of anticompetitive effects are less fixed than terms like "*per se*," "*quick look*," and "rule of

The Court follows a simple procedural structure in applying the rule of reason.<sup>235</sup> An antitrust plaintiff bears the initial burden of making a prima facie case, by showing that the challenged conduct has an adverse effect on competition. A Section 1 plaintiff can make a prima facie case using either direct or indirect evidence that the defendant's concerted conduct has anticompetitive effects. Direct evidence is that which directly shows such an anticompetitive effect: an actual increase in price or reduction in output. Indirect evidence is that which supports an inference that the challenged conduct will have an anticompetitive effect. Indirect evidence includes evidence that the defendant has market power (the ability to set prices higher than the competitive market level) and evidence that the conduct is anticompetitive in nature.<sup>236</sup>

If the plaintiff makes out a prima facie case, the burden of production shifts to the defendant to rebut the prima facie case by showing that the challenged conduct has "some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services."<sup>237</sup> This burden-shifting structure illustrates an important substantive doctrinal point: even when the plaintiff demonstrates that the challenged agreement has anticompetitive effects, a court will also consider whether it has offsetting procompetitive effects.

#### B. "Business Deference"

In its move away from categorical analysis toward a more context-specific one, Section 1 jurisprudence can be said to incorporate a principle of "business deference." Since the rise of neoclassical law-and-economics in the 1970s, antitrust jurisprudence has become more deferential to challenged business conduct, particularly when it appears in purportedly novel business contexts. The Court extends greater deference to business conduct when it perceives the effects to be less

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reason" tend to make them appear.'" (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999))).

235. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citing JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATIONS* § 12.02[2] (2d ed. 2017)).

236. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011).

237. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986); see also *Am. Express Co.*, 138 S. Ct. at 2284 ("After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive 'redeeming virtues' of their combination." (citing *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993))).

predictable. That predictability depends heavily on the law’s familiarity with the relevant business context. Less familiar business contexts require more factfinding and analysis.<sup>238</sup> The novelty of the situation is relevant: a court asks “whether the experience of the market has been so clear . . . that a confident conclusion will follow from a quick (or at least quicker) look . . . .”<sup>239</sup> The more novel the business context, the more detailed factual inquiry is required and the more procompetitive justifications become relevant.<sup>240</sup>

This deference to business conduct is reminiscent of the “business judgment rule” in state corporate law. Under that rule, shareholders have no cause of action for breach of fiduciary duty against a corporate director or officer if the defendant acted in good faith in the interests of the corporation—and, moreover, the court applies a very strong presumption that all director and officer conduct is in good faith and in the interests of the corporation.<sup>241</sup> This deference has traditionally been explained with the argument that “the judges are not business experts.”<sup>242</sup> That reluctance to judge business decisions is consistent with the antitrust principle that courts should be cautious about condemning contracts unless “the experience of the market has been . . . clear.”<sup>243</sup>

Business deference in antitrust law extends even to price-fixing agreements, the archetype of a familiar anticompetitive practice. In fact, the doctrine of allowing defendants to use procompetitive justifications to rebut the plaintiff’s case developed in this context. In *Broadcast Music, Inc. v. Columbia Broadcasting System* (“*BMI*”), owners of copyrighted musical compositions agreed to a joint scheme that sold blanket licenses to use all the compositions. The purpose and effect of the agreement was to fix a single price for the blanket license, but the Court refused to declare the arrangement *per se* illegal even if it constituted price fixing in the “literal” sense.

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238. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 n.21 (1984) (“[J]udicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules.”); *BMI*, 441 U.S. at 10 (declining to hold a kind of price-fixing agreement illegal *per se* because “[w]e have never examined a practice like this one before.”).

239. *Cal. Dental Ass’n*, 526 U.S. at 781.

240. *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005) (“[T]he Court . . . has backed away from any reliance on fixed categories and toward a continuum.”).

241. See, e.g., *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

242. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

243. *Cal. Dental Ass’n*, 526 U.S. at 781.

Instead, the Court remanded the case for fact-finding and review under the rule of reason.<sup>244</sup> Flipping the *per se* rule's confidence in judicial experience, the Court seemed reluctant to condemn the blanket-licensing agreement because of its unfamiliarity: it had "never examined a practice like this before."<sup>245</sup> The Court went out of its way to point out to the court on remand that the agreements might have beneficial effects on competition. According to the Court, the unique contractual arrangement created a product "quite different from anything an individual owner could issue."<sup>246</sup> Blanket licensing significantly reduced the cost of making licenses available (i.e., production costs), "which is, of course, potentially beneficial to both sellers and buyers . . . ."<sup>247</sup> Furthermore, blanket licensing is not merely the equivalent of licenses to multiple songs, but "is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product."<sup>248</sup>

The Court did not have to reach this issue of procompetitive effects, nor did it have an evidentiary record with respect to it. Whether the *per se* rule applied was the only antitrust-related question on which certiorari was sought or granted.<sup>249</sup> Nonetheless, the Court not only rejected categorical analysis for a context-specific inquiry, but introduced the influential rule that procompetitive justifications can save agreements, including price-fixing agreements, despite their anticompetitive effects.<sup>250</sup> Moreover, the Court strongly suggested the licensing scheme had such justifications.<sup>251</sup>

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244. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1, 24–25 (1979).

245. *Id.* at 10.

246. *Id.* at 23.

247. *Id.* at 21.

248. *Id.* at 21–22.

249. Brief for Petitioners at 4, *BMI*, 441 U.S. 1 (No. 77-1583). The only other question in the petition, which the Court did not address, was whether blanket licensing constituted a "misuse of copyright." *Id.*

250. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984) ("Broadcast Music squarely holds that a joint selling agreement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."). More recently, the Court stated that some restraints on trade may have anticompetitive characteristics but nonetheless "stimulat[e] competition [and] are in the consumer's best interest." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

251. *See Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*,

The Court applied the same analysis to a price-fixing agreement in *NCAA v. Board of Regents*, where the member universities of the National Collegiate Athletics Association (NCAA) agreed on “recommended” prices for television rights to broadcast each game and a cap on the total number of games each school could license. The agreement constituted literal horizontal price-fixing and had the demonstrated anticompetitive effect of raising the price and reducing the supply of games for broadcast. The Court nonetheless considered the NCAA’s counterargument that the agreement was “essential” to a procompetitive purpose: the marketing of college football games, an unusual and desirable product that benefited consumers.<sup>252</sup>

In both *NCAA* and *BMI*, the Court applied this relaxed antitrust scrutiny because the challenged agreements allegedly enabled the defendants to offer valuable products: college football and the blanket license. While the Court ultimately rejected the argument in *NCAA*, it treated it more favorably in *BMI*, where a network of agreements among copyright owners was indispensable to creating a product “quite different from anything an individual owner could issue.”<sup>253</sup> Similarly, rideshare companies assert that their product is not transportation, but connections between riders and drivers. Insofar as this is accurate, contracts among rideshare apps, drivers and riders are indispensable to the provision of the product and deserve relaxed scrutiny.

### C. Business Deference and the “Transaction Platform” Context

#### 1. *Ohio v. American Express*, 2SPs, and Extreme Business Deference

Like *BMI*, the Supreme Court’s recent opinion in *Ohio v. American Express* (“*AmEx*”) also involved contracts that enable unusual kinds of

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620 F.2d 930, 937 (2d Cir. 1980) (“The entire trial in the District Court concerned primarily the issue of whether direct licensing was feasible [as an alternative to blanket licensing].”). Indeed, while the *BMI* opinion has become highly influential, the Second Circuit saw it merely as a reversal on the *per se* issue and treated the rest of the opinion as dicta. *Id.* at 935. The Second Circuit went on to affirm the district court’s holding that the licensing scheme had no anticompetitive effect, and thus did not address the issue of procompetitive justifications. *Id.* at 935–39.

252. *NCAA*, 468 U.S. at 113–14. The Court ultimately rejected this argument because the trial court had found that the agreement did not improve marketing. *Id.* at 114. Under a true *per se* analysis, however, defendants would not even have had the opportunity to rebut. *See id.* at 100.

253. *BMI*, 441 U.S. at 23.

products. *American Express* was the Court's first opinion to expressly recognize the "structured" Rule of Reason,<sup>254</sup> but at the same time, it carved out an exception: a new and more lenient Section 1 analysis for so-called "transaction platforms."<sup>255</sup> A transaction platform is a type of "two-sided platform" (2SP). A 2SP is a business that facilitates connections between members of two interdependent groups and coordinates interactions between them. For example, a traditional marketplace brings buyers and sellers together to enable sales transactions.<sup>256</sup> According to the *AmEx* Court, "credit-card networks are a special type of two-sided platform known as a 'transaction' platform," distinguished by an especially high degree of interdependence among its constituent parts.<sup>257</sup> This increased interdependence derives from the fact that a transaction platform "cannot make a sale to one side of the platform without simultaneously making a sale to the other."<sup>258</sup> According to the Court, these simultaneous, interdependent sales constitute a single product—a "transaction."<sup>259</sup>

According to the Court, American Express is a transaction platform that connects a merchant and a cardholding shopper to make a charge transaction possible.<sup>260</sup> Similarly, a rideshare app would seem to qualify as a transaction platform because it connects a driver and a rider to make

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254. *Am. Express Co.*, 138 S. Ct. at 2284.

255. *Id.* at 2280.

256. David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 668 (2005).

257. *Am. Express Co.*, 138 S. Ct. at 2277.

258. *Id.* at 2280.

259. *Id.* at 2286. Here, the Court misconstrued the "simultaneous" relationship, and thus the network effects, between the two sides of a charge-card transaction. Although the cardholder and merchant must "simultaneously choose to use the network," *id.*, only the merchant chooses to purchase services in any one transaction, because cardholders pay an annual fee and no per-transaction fee (because anti-steering agreements forbid them). *Id.* at 2283. Thus, it is untrue that AmEx simultaneously "sells one transaction's worth" of services to a merchant and one to a cardholder. Cardholders never buy one transaction's worth of services. In other words, the marginal price of a transaction to the merchant is the fee, while the marginal price to the cardholder is zero, and does not vary with the price to the merchant. Thus, it is unclear why the network effects between merchant and cardholder demand would be particularly strong. Rideshare, by contrast, is a better example of a "transaction platform" as it does involve simultaneous, price-influenced purchasing decisions on both sides of the platform by rider and driver.

260. See Evans & Noel, *supra* note 256, at 668.

a ride transaction possible.<sup>261</sup> Because AmEx is a transaction platform, the Court applied an unusually lenient antitrust analysis and favorable presumptions about the competitive value of AmEx's practices. As in *BMI*, the Court focused on the valuable product being produced—transactions—and believed the context was sufficiently novel that the competitive effects of business conduct were difficult for a court to predict. The Court thus cautiously declined to regulate the firm's contracts.

Every 2SP and the two groups it connects constitute an interdependent system such that each of the three parts is unlike a buyer or seller in the typical "one-sided" context. According to *AmEx*, transaction platforms receive special antitrust treatment because this level of interdependence is particularly high, creating a single integrated network that produces a single product. The unusually close relationships among the platform and its two sides mean that its economic value derives from the way the three elements combine and operate as a contractually created network. AmEx is special for antitrust purposes because it is one part of a tripartite contractual network that produces transactions. Uber and Lyft, along with their drivers and riders, each makes up a similar three-part network. The principle of business deference suggests that courts should be cautious about over-regulating any of the contracts that make the network run, not only those, such as vertical restraints, that favor the rideshare app, but also others, such as horizontal contracts among drivers.

In the transaction context, as in *BMI*, it is not a corporation, but a contractual network that is necessary to create the unique product worthy of legal protection. Thus, lenient antitrust review of contracts should not be limited to the corporation, such as AmEx or Uber, at the nominal center of the network, but to the network as a whole. Contemporary corporate law recognizes that a business firm is not an entity but a convenient shorthand for a complex system of contracts: a "nexus of contracts."<sup>262</sup> According to the originators of this influential theory, "it makes little or no sense to

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261. Although the term "online platform" is often used to refer to web-based technologies, "two-sided platform" simply means a mediating entity of some kind and has no technological connotation. Indeed, a shopping mall or farmer's market could be considered a 2SP. Evans & Noel, *supra* note 256, at 668.

262. See Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) ("Contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc.").

try to distinguish those things which are ‘inside’ the firm . . . from those things that are ‘outside’ of it. There is in a very real sense only a multitude of complex relationships (i.e., contracts).”<sup>263</sup>

## 2. Transaction Platforms in *Ohio v. American Express*

In *AmEx*, the Supreme Court explained how a transaction platform and its two sides operate as a single interdependent network. A charge-card issuer like American Express provides a payment-processing service and sells different aspects of it to cardholders and to merchants that join its network. An issuer charges merchants a fee on each transaction, giving merchants incentive to “steer” shoppers away from using cards that charge higher fees. Most card issuers make money primarily from cardholders’ interest payments. AmEx’s business model, however, depends on merchant fees, not interest. AmEx thus charges higher merchant fees than other card issuers.<sup>264</sup> In addition, AmEx provides cardholders with generous rewards that incentivize them to make more and larger purchases.<sup>265</sup> Because AmEx rewards spending, its customers tend to have higher incomes and spend more.<sup>266</sup> A merchant thus has incentive to join the AmEx network in order to attract such customers into the store. Once such a customer has decided to make a purchase, however, the merchant has incentive to encourage them to use a different, cheaper card in order to avoid the higher AmEx fee, a practice known in the industry as “steering.” AmEx’s contracts with the merchants in its network thus required them to agree not to engage in any form of steering.

In *American Express*, the Department of Justice and a number of state governments challenged AmEx’s anti-steering agreements under Section 1 of the Sherman Act.<sup>267</sup> Because AmEx provides a service to the merchant that the merchant in effect resells to the customer as part of the sale, the plaintiffs claimed that the anti-steering agreement was an unreasonable restraint on the ways that a merchant can resell AmEx’s product— in antitrust terminology, an illegal “vertical restraint.” The

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263. *Id.* at 311.

264. *Am. Express Co.*, 138 S. Ct. at 2282.

265. *Id.*

266. *Id.*

267. Visa and Mastercard, which formerly had anti-steering agreements, were also defendants at trial and, along with AmEx, won on appeal to the Second Circuit. *See id.* at 2283 n.5. Before AmEx took the case to the Supreme Court, however, Visa and Mastercard signed consent decrees renouncing their anti-steering practices. *See id.*

Supreme Court ultimately held that the anti-steering agreements did not violate Section 1.

The district court found a Section 1 violation after a lengthy trial.<sup>268</sup> The plaintiffs had made their prima facie case based on both direct and indirect evidence of anticompetitive effects. There was direct evidence that card fees charged to merchants by all the major card issuers had risen significantly since the prohibition of steering.<sup>269</sup> The district court also found indirect evidence in the form of market power over merchant fees. Because merchants had to accept AmEx cards or face losing their customers, AmEx had “the power to repeatedly and profitably raise their merchant prices without worrying about significant merchant attrition.”<sup>270</sup> By preventing merchants from favoring the cheapest card network, AmEx caused “an absence of price competition among American Express and its rival networks”<sup>271</sup> and “‘disrupt[ed] the normal price-setting mechanism’ in the market.”<sup>272</sup> American Express argued in its defense that the agreements had procompetitive justifications, but the trial court found them unconvincing.

The Second Circuit reversed the trial court, and the Supreme Court affirmed the reversal. The Court agreed with the plaintiffs that the anti-steering agreements had caused merchant fees to increase. However, they found that the plaintiffs’ prima facie case was faulty because it was based on an incorrect definition of the relevant “market.” According to the Court, AmEx is a “two-sided platform” (2SP) and more specifically a “transaction platform.”<sup>273</sup> As such, it serves a “two-sided market” that includes not only the merchants in its network, but also its cardholders.<sup>274</sup> The plaintiffs’ direct evidence failed, as it showed a price increase on only the merchant side of the market, and not in the overall

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268. The trial transcript was almost 7,000 pages long, including the expert testimony of four economics professors, and was accompanied by over 1,000 exhibits. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 152 (E.D.N.Y. 2015), *rev’d and remanded*, *United States v. Am. Express Co.*, 838 F.3d 179, 200 (2d Cir. 2016), *aff’d sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

269. *Am. Express Co.*, 88 F. Supp. 3d at 151.

270. *Id.*

271. *Id.*

272. *Ohio v. Am. Express Co.*, 138 S. Ct. 2275, 2294 (2018) (Breyer, J., dissenting) (quoting *United States v. Am. Express Co.*, 88 F. Supp. 3d 148, 209 (E.D.N.Y. 2015)).

273. *Am. Express Co.*, 138 S. Ct. at 2280.

274. *Id.* at 2286.

two-sided market.<sup>275</sup> The Court did not expressly address the indirect evidence of market power with respect to merchant fees,<sup>276</sup> but that too concerned only one side of the market and thus would fail under the same logic.

In economic theory, a 2SP serves two distinct but interdependent groups of customers.<sup>277</sup> The 2SP supplies a different product to each group, but the demand for each product depends in large part on the level of demand for the other product. For example, carrying a credit card is more valuable to shoppers if more merchants accept it, and accepting the card is more valuable to merchants if more shoppers carry it.<sup>278</sup> Similarly a rideshare app is more valuable to drivers if more riders use it, and vice versa.

This interdependence affects the way prices are determined. Because demand volume on each “side” of the platform is interdependent, it follows that the prices the 2SP charges each of the twosides are also interdependent. For the typical (i.e., “one-sided”) firm, price determines business volume in a simple way: as price goes up in a given market, demand (and therefore volume) goes down, and vice versa. Unless costs or demand increase, a rise in price is (“direct”) evidence of anticompetitive effects.

The 2SP theory holds that the determinants of price and output are much more complicated for 2SPs. Because demand on each side of the platform has a complementary effect on demand on the other side, the price the platform charges on each side depends on the *interactions* between each side of the platform. The prices “depend in a complex way on the price elasticities of demand on *both* sides, the nature and intensity of the indirect network effects between each side, and the marginal costs that result from changing the output of each side.”<sup>279</sup>

Because of this interdependence, maximizing output and, thereby, revenue depends not only on the price the firm charges on one side or the other, and not even by the total price itself, but by the price *structure*: how

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275. *Id.* at 2287 (“Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power.”).

276. Indeed, the Court stated that the plaintiffs’ case was based “exclusively on direct evidence.” *Id.* at 2284.

277. Evans & Noel, *supra* note 256, at 668. The Court’s opinion cited this article heavily.

278. *Am. Express Co.*, 138 S. Ct. at 2280–81 (citing DAVID S. EVANS & RICHARD SCHMALENSEE, *MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS* 25 (2016)).

279. Evans & Noel, *supra* note 256, at 681.

the platform *allocates* the total price between the two sides.<sup>280</sup> When network effects are sufficiently strong, “two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand.”<sup>281</sup> To maintain overall volume under such conditions, a price increase on one side will necessitate a countervailing decrease on the other.

The Court declared that AmEx, as a “transaction platform,” had sufficiently strong network effects to create these self-balancing conditions. A card transaction occurs only when the merchant and cardholder simultaneously agree to use that card network.<sup>282</sup> Due to this simultaneity, “two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand.”<sup>283</sup> This close connection means a two-sided transaction platform in effect does not supply two products (e.g., merchant services and cardholder services), but supplies two consumers (merchant and cardholder) simultaneously with a single product—a “transaction.”<sup>284</sup>

Due to the high level of demand interdependence, the Court held that AmEx could not simply raise merchant fees without initiating a “feedback loop of declining demand:” merchant demand for AmEx services would not only decline, decreasing cardholder demand, which would further decrease merchant demand, and so on, reducing AmEx’s total business volume and revenues. AmEx’s increased merchant fees did not indicate anticompetitive effects unless cardholder fees had *also* increased.<sup>285</sup> That is, plaintiffs would have had to show an increase in the aggregate price of

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280. *Id.* at 673 (quoting Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: An Overview* 40 (March 12, 2004) (unpublished manuscript) (on file with MIT), [https://web.mit.edu/14.271/www/rochet\\_tirole.pdf](https://web.mit.edu/14.271/www/rochet_tirole.pdf)) (“A market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board.”).

281. *Am. Express Co.*, 138 S. Ct. at 2285.

282. *Id.* at 2286.

283. *Id.* One commentator questions this characterization, arguing that “[m]ost of the features scholars point to as evidence of the exceptionalism of platform companies are defining characteristics of almost all service production,” but due to “bedazzlement by platform technology . . . we are more ready to believe that Uber intermediates a market, but a restaurant does not intermediate a market between buyers of hospitality services (diners) and sellers (waiters).” Tomassetti, *supra* note 35, at 6–7.

284. *Am. Express Co.*, 138 S. Ct. at 2286.

285. Oddly, however, the Court held for the defendants rather than remanding the case for further factfinding. *Id.* at 2287.

a credit card *transaction*.<sup>286</sup>

D. *AmEx Created a New, Lenient Antitrust Analysis for the Transaction Platform Context*

The Court's new analysis is significantly more burdensome for plaintiffs and lenient toward transaction-platform defendants. First, *AmEx* added a new element to the plaintiffs' primary case by making market definition a threshold question. "To assess this evidence," the Court stated "we must first define the relevant market."<sup>287</sup> This is a significant departure from existing doctrine. As noted previously, the ultimate question in any antitrust case is always the same: how the defendant's conduct affects competition.<sup>288</sup> Market definition is merely one tool for identifying market power;<sup>289</sup> market power—the defendant's ability to dictate price—is merely a form of *indirect* evidence that the conduct had anticompetitive effects.<sup>290</sup> If there is *direct* evidence of anticompetitive effects in the form of price increases, demonstrating market power is unnecessary, rendering formal market definition unnecessary.<sup>291</sup> *AmEx* changed this rule in the 2SP context.

Second, *AmEx* further increased the burden on plaintiffs by rejecting evidence of price increases (or, presumably, market power) unless it applied to both sides of the platform. Under standard antitrust analysis, a market is made up of products that can replace one another<sup>292</sup>: for example, "whether merchant-related and shopper-related services are

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286. *Id.* at 2286 ("Price increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall [price] of the platform's services.").

287. *Id.* at 2285.

288. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 ("[T]he essential inquiry [in a §1 case] remains the same—whether or not the challenged conduct enhances competition.").

289. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (2010).

290. *NCAA*, 468 U.S. at 109–10. *See also Am. Express Co.*, 138 S. Ct. at 2297 (Breyer, J., dissenting) (noting that no single firm can produce anticompetitive effects in the absence of market power (citing *Ind. Fed'n of Dentists v. FTC*, 476 U.S. 447, 460–61 (1986))).

291. *Am. Express Co.*, 138 S. Ct. at 2296 (Breyer, J., dissenting) (citing *Ind. Fed'n of Dentists*, 476 U.S. at 460–61).

292. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (a relevant market for antitrust purposes is made up of "commodities reasonably interchangeable by consumers for the same purposes . . .").

*substitutes*, one for the other, so that customers can respond to a price increase for one service by switching to the other service.”<sup>293</sup> A two-sided market is not based on substitutability: merchants cannot respond to an increase in merchant fees by becoming cardholders, nor can cardholders respond to an increase in annual fees by joining the merchant network.<sup>294</sup>

The broader definition of the relevant market makes it harder to prove a relevant price increase or market power. Facts that constitute evidence of anticompetitive effect in other contexts are rendered irrelevant by new theoretical arguments. Outside the 2SP context, the increase in merchant fees would have constituted direct evidence of anticompetitive effect, and AmEx’s ability to raise merchant fees without losing customers would have constituted indirect evidence. The transaction platform analysis rejects that evidence based on the theory that two-sided markets are self-balancing: a price increase on merchants alone does not have anticompetitive effect because it necessitates a price decrease on the consumers.<sup>295</sup>

Because the *AmEx* Court recognized no anticompetitive effects, the defendants were not required to show any procompetitive effects. The Court nonetheless cited such effects, relying on the 2SP theory rather than evidence. Indeed, the only *demonstrated* benefit was AmEx’s receipt of increased merchant fees. There was no evidence of benefits to cardholders or other parties. Citing assertions of “expanding output and improved quality,” however, the Court stated that competition among credit card companies had increased.<sup>296</sup>

Moreover, the transaction platform argument is inherently based on the procompetitive value of the anti-steering agreements. The anti-steering agreements increased merchant fees, but were not shown to have increased cardholder fees; that is, they altered the allocation of the total transaction price as between merchants and cardholders. The heart of 2SP

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293. *Am. Express Co.*, 138 S. Ct. at 2298 (Breyer, J., dissenting).

294. *Id.* The trial court also found that merchants constituted a market under the so-called “hypothetical monopolist” test. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 187 (E.D.N.Y. 2015). Under that variation on substitution analysis, a given product constitutes a relevant market if, hypothetically speaking, a monopolist of that product could impose a small but significant and non-transitory increase in price (“SSNIP”) “without losing so many sales to other products that its price became unprofitable.” *Id.* at 176 (quoting *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001)).

295. The Court was not moved by evidence that AmEx did not use all of the merchant price increases to benefit cardholders. *Am. Express Co.*, 138 S. Ct. at 2288.

296. *Id.* at 2289.

theory is that a 2SP maximizes volume not by transaction price alone, but by how it *allocates* the total transaction price.<sup>297</sup> By deferring to the anti-steering agreements, then, the Court was presuming they had the procompetitive effect of maximizing volume. Indeed, AmEx may even be read to reverse the burden of proof for 2SPs. It appears to be the plaintiff's burden to *disprove* the asserted procompetitive effects of the defendant's conduct.<sup>298</sup> American Express did not have to prove that increased prices on merchants generated offsetting price reductions to cardholders. (Indeed, as noted above, the trial court found that AmEx did not use all of the revenue from increased merchant fees to benefit cardholders.)<sup>299</sup> It only had to assert the *possibility* of such an effect to convince the Court that the government had incorrectly defined the market and thus had failed to show an anticompetitive effect. Thus, it appears that the plaintiff must prove that a price increase on one side of a 2SP did *not* cause price reductions on the other side.

According to the Court, this lenient antitrust review is appropriate for a special subset of 2SPs: "transaction platforms," whose two sides have especially "pronounced indirect network effects and interconnected pricing and demand."<sup>300</sup> The Court found AmEx to be a transaction platform based solely on its intuitive application of 2SP theory, citing no evidence of heightened interdependence between merchants and cardholders. Thus, the Court appears to declare as *a matter of law* that evidence of a "one-sided" price increase or market power is insufficient whenever a defendant plausibly claims to be a "transaction platform."

Like American Express, rideshare apps are 2SPs, and more specifically transaction platforms that bring members of two interdependent user groups together to consummate a single simultaneous transaction. Uber describes itself as a medium where virtual

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297. Evans & Noel, *supra* note 256, at 673 (quoting Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: An Overview* 40 (March 12, 2004) (unpublished manuscript) (on file with MIT)), [https://web.mit.edu/14.271/www/rochet\\_tirole.pdf](https://web.mit.edu/14.271/www/rochet_tirole.pdf) ("A market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board.").

298. See JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 183 (Harv. Univ. Press 2019) ("If . . . feedback analysis is incorporated into market definition, courts would be expected to balance in-market harms and benefits, so the plaintiff must *disprove* offsetting benefits as part of its prima facie case. That approach is friendlier to platform defendants." (emphasis added)).

299. See *Am. Express Co.*, 88 F. Supp. 3d at 215.

300. *Am. Express Co.*, 138 S. Ct. at 2278.

marketplaces bring together transaction participants, including riders and drivers.<sup>301</sup> Uber’s driver agreement states, “We are not hiring or engaging you to provide any service; you are engaging us to provide you access to our Platform.”<sup>302</sup> Lyft’s S-1 similarly portrays both driver and riders as its customers: “We provide a service to drivers to complete a successful transportation service for riders. This service includes on-demand lead generation that assists drivers to find, receive and fulfill on-demand requests from riders . . . .”<sup>303</sup>

E. *Drivers Deserve the Same Lenient Antitrust Review as Platform Firms*

1. Drivers and Transaction Platform Networks

As Justice Breyer argued in his dissent, the Court argued that 2SPs are distinct from other firms, but did not explain why that distinction makes a difference for market definition purposes.<sup>304</sup> The *AmEx* Court’s decision to define the relevant antitrust market based on interdependence of demand not only lacked doctrinal precedent, but also was not dictated by economic theory. It was a policy decision. Even if two sides of a platform exhibit highly interdependent demand, it does not follow that they constitute a single “market” for antitrust purposes. (As noted previously, markets are typically defined by substitutability, not demand

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301. Uber, Platform Access Agreement § 11.1 (Jan. 6, 2020) (“We are not hiring or engaging you to provide any service; you are engaging us to provide you access to our Platform.”). Uber has claimed that *only* drivers are its “customers;” riders are not “customers” because they use its app without charge. Uber Technologies, Inc., Amendment No. 1 to Form S-1 Registration Statement 144-45 (Form S-1) (April 26, 2019). Uber likely took this position in hopes of reducing its liability exposure to riders for driver misconduct or accidents. For purposes of *AmEx*’s 2SP theory, however, the fact that riders use the app for free is irrelevant. Apps are transaction platforms that connect drivers on one side to riders on the other. Moreover, rideshare apps are “free” to customers only in narrow literal sense. Apps charge the rider by setting fares and taking their revenues from those fares.

302. Uber, Platform Access Agreement § 1.1 (Jan. 6, 2020).

303. Lyft, Inc., Amendment No. 1 to Form S-1 Registration Statement 102 (Form S-1) (Mar. 18, 2019).

304. *Am. Express Co.*, 138 S. Ct. at 2297. The majority based its approach to market definition on the close relationship between merchant and cardholder services. As the dissent observed, however, “‘Grouping complementary goods into the same market’ is ‘economic nonsense’” that has no relation to “‘the rationale for the policy against monopolization or collusion.’” *Id.* at 2295–96 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* 431 (4th ed. 2011)). Gasoline and tires, for example, are complementary products, but the price of tires does not limit a gasoline seller’s ability to raise its prices. *Id.*

interdependence.) Evans and Noel, leading 2SP theorists heavily cited by the *AmEx* Court, avoid the term “two-sided market” because “market” is “a term of art for competition policy.”<sup>305</sup> As economists, not lawyers or regulators, Evans and Noel choose to focus on a firm’s response to network effects between its customer groups and try to avoid commenting on the relevant unit of analysis for regulatory purposes.

Doctrine aside, the Court’s larger point appeared to be that price increases on one side of a transaction platform are self-correcting. If a platform increases prices on one side, the Court reduced them on the other. The *AmEx* Court held it was the plaintiff’s burden to show that this correction had *not* happened. That presumption rests on the notion that merchant demand and cardholder demand are highly interdependent. But the Court did not explain how to prove that interdependence is sufficiently high, nor did it cite any evidence showing that demand interdependence was in fact high.

*AmEx* is easier to understand as an example of business deference. While demand interdependence is a characteristic of transaction platforms, their uniqueness derives from their product: transactions. *AmEx* was not concerned with interdependent markets per se, but with protecting transactions (more precisely, the contracts involved in producing them) from potentially harmful antitrust actions. The redefinition of markets in *AmEx* is best understood as a doctrinal tool for achieving this by raising the burden of proof on plaintiffs. The Court viewed credit transactions as a valuable product and the contractual networks that create them as a useful business practice. In such a context, courts are hesitant to predict the competitive effects of contracts, and thus hesitant to regulate them.

As argued above, the Court’s rejection of the *per se* approach demonstrates a refusal to presume that business decisions have anticompetitive effect, particularly in novel contexts. In *BMI*, the perceived novelty of blanket licensing led the Court to reject the *per se* rule and instruct the trial court to consider procompetitive benefits. In *AmEx*, the perceived novelty of transaction platforms led the Court to go significantly further: it not only presumed procompetitive justifications without evidence, but also used them to rebut proven anticompetitive effects. Furthermore, while the contracts in *BMI* were the very

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305. Evans & Noel, *supra* note 256, at 672. They further point out that “two-sided market” is a confounding term because it is used variously and inconsistently to refer to 2SPs and to the customer groups they serve. *See id.*

contracts that created the blanket license, the anti-steering agreements did not directly create transactions, but restricted the behavior of merchants and raised their price.

The vertical restraints in *AmEx*, like the horizontal blanket license in *BMI*, received relaxed antitrust scrutiny not because of any specific economic characteristic of the defendant *firm*, but because the Court saw the product as unusual and complex.<sup>306</sup> The Court cited nothing unusual about the copyright owning entities in *BMI*. The Court's deference to their actions was based on its unfamiliarity with the product and inability to predict how the contracts would affect competition. Given that lack of confidence, it was unwilling to call it anticompetitive, despite its resemblance to price-fixing.

Insofar as the deference in *AmEx* is to the business that produces transactions, it should extend not only to agreements that benefit the platform app, but to all the contracts that make up the interdependent *network* required to produce transactions. The unit of analysis in antitrust law and economic regulation has historically been the "firm," which is typically identified with a corporation. *AmEx*, however, states that "transactions" are produced not by platform corporations, but by the intertwined relationships among platforms and their two "sides." Similarly, contemporary corporate theory recognizes that a "firm" is not a unitary entity with fixed boundaries, but a series of interconnected contracts among independent actors. Legal entities like corporations serve only a formal function; they do not define the bounds of the productive unit, which encompass more than the corporation. This is especially true with respect to a "postindustrial corporation" that does not merely make widgets in its factory, but generates wealth through relationships, outsourcing and financial transactions.<sup>307</sup> The relevant focus of inquiry is not an entity, such as AmEx or Uber, but the sum of "a complex process in which the conflicting objectives of individuals . . . are brought into equilibrium within a framework of contractual relations."<sup>308</sup> Under this view, "there is . . . no core, no hierarchy . . . no firm . . . . Instead, there is a set of interrelated agreements or relationships

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306. The *AmEx* opinion acknowledged that earlier Court cases had dealt with 2SPs such as publications that serve readers and advertisers, but distinguished them as less complex than "transaction platforms." *Am. Express Co.*, 138 S. Ct. at 2286.

307. See Tomassetti, *supra* note 35, at 7 (stating Uber is a "postindustrial corporation, an entity whose formal boundaries bear little relation to the organization of productive activity").

308. Jensen & Meckling, *supra* note 262, at 311.

among all participants in an economic activity—equity holders, debt holders, managers, workers, suppliers, and customers.”<sup>309</sup> Thus, Uber and Lyft are corporations, but those are merely legal entities. The relevant *economic* unit that produces ride transactions is the tripartite *network* that includes drivers and riders as well as the corporation.

Insofar as *AmEx* gives antitrust deference to a “transaction platform,” it is because it is a part of such a network, not because it is the most important part. Thus drivers, no less than rideshare firms, should benefit from that deference. Drivers add an additional dimension of novelty, further confounding judicial expectations and justifying business deference, in that they fit poorly into established employee-independent contractor categories; indeed, drivers are a new hybrid of independent contractors, employees and consumers.<sup>310</sup> Insofar as they fall into the residual legal category of independent contractor, however, each driver is the equivalent of a small business firm. The Court has given *AmEx*, a massive, dominant firm in the 2SP context, a presumption that its contractual innovation is procompetitive; drivers in the 2SP context should be afforded the same presumption if they contract among themselves to bargain collectively.

If *AmEx*'s lenient version of the rule of reason applies only to the so-called platform providers and not to rideshare drivers, the doctrine would move antitrust law away from its traditional focus on the welfare of consumers and toward a focus that favors the welfare of firms. After all, the 2SP model starts by identifying a firm's profit-maximizing level of output and presumes that procompetitive benefits flow therefrom. That is, it would imply that theoretical benefits to firms are enough to establish that conduct is procompetitive, but theoretical benefits to consumers are not. (As noted above, rideshare apps portray drivers as consumers of app services, akin to riders. Similarly, the 2SP model treats both sides of a platform as a single “market,” meaning drivers are part of the same market as riders.) Furthermore, it would imply that large firms are entitled to a presumption that their contractual innovation is procompetitive, but

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309. G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887, 947 (2000).

310. Uber, Platform Access Agreement § 1.1 (Jan. 6, 2020) (“We are not hiring or engaging you to provide any service; you are engaging us to provide you access to our Platform.”). Lyft's S-1 also portrays drivers as customers. See Lyft, Inc., Amendment No. 1 to Form S-1 Registration Statement 102-103 (Form S-1) (Mar. 18, 2019) (“We provide a service to drivers to complete a successful transportation service for riders. This service includes on-demand lead generation that assists drivers to find, receive and fulfill on-demand requests from riders . . .”).

independent contractors (that is, small independent businesses) are not. More bluntly, a refusal to apply a lenient antitrust standard to workers in the transaction platform context would indicate a bias in favor of capital over labor.

## 2. Antitrust Review of Drivers' Collective Action

Given that drivers' contracts merit lenient antitrust review under transaction platform theory, what are the relevant arguments? As a threshold matter, labor agreements among rideshare drivers might be said to differ from anti-steering agreements and rideshare-app contracts in that they are "horizontal" agreements among rivals, as distinct from "vertical" restraints imposed down the supply chain. But the significance of the horizontal-vertical distinction, like categorical antitrust analysis generally, has withered away.<sup>311</sup> As noted above, the per se rule for horizontal price-fixing has been supplanted by the rule of reason.<sup>312</sup> As two prominent commentators have put it, "the Court has consistently moved in the direction of a unitary rule of reason that focuses antitrust analysis on competitive effects."<sup>313</sup>

As noted above, the redefinition of "markets" in *AmEx* is merely one doctrinal tool for making antitrust review more deferential to the production of transactions. It need not be applied literally to every transaction platform contract. Drivers, as a different part of the transaction network, may not serve "two-sided markets" like platforms do, but they are equally indispensable to transaction production and thus equally deserving of antitrust leniency. In all antitrust cases, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition."<sup>314</sup> As we have seen, a defendant may survive that inquiry by either a lack of anticompetitive effects or the presence of procompetitive effects. In the transaction context, *AmEx* held that the evidentiary burden of showing anticompetitive effects is very high, while procompetitive effects can be shown by theory and conjecture and require no evidence.

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311. See, e.g., Andrew I. Gavil & Jordan L. Ludwig, *The Many Sides of Ohio v. American Express Co.*, ANTITRUST, 2018, at 8, 12.

312. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103; *Broad. Music Inc. v. Colum. Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979).

313. See, e.g., Gavil & Ludwig, *supra* note 314, at 12.

314. *NCAA*, 468 U.S. at 104.

Drivers' collective labor action would likely increase the price platforms pay for labor. That would constitute a horizontal price-fixing agreement, likely with anticompetitive price effects. But even if so, *BMI* indicates drivers should have the opportunity to rebut with procompetitive justifications. As Part II of this Article shows, rideshare industry is a duopoly with a strong bargaining power advantage over drivers and has used its wealth and influence to tilt the law in its favor. Although they may not rise to the level of "market power" in antitrust doctrine, counterbalancing those advantages may have procompetitive effects by mitigating anticompetitive tendencies in the industry.

*AmEx* holds that one-sided market power threatens competition, because a transaction platform system is self-correcting: a price increase on one side necessitates a countervailing price decrease on the other side. Because this self-correction is the putative engine of competitive pricing in transaction platform networks, antitrust law should remove impediments to the self-correcting process. Collective bargaining by drivers may have this effect by serving as a counterweight against the anticompetitive characteristics of the rideshare industry. For example, as noted previously, the industry has used its wealth and influence to lobby for favorable legislation. Individual drivers cannot engage in such activity, but concerted driver action could. As will be discussed below, concerted driver action could be a counterweight to the industry's highly concentrated structure, its overallocation of costs to drivers, and, most important, the potential for predatory pricing.

Courts should not require much, if any, evidence to support these arguments. As explained above, *AmEx* suggests that procompetitive arguments in the transaction context are subject to a very low standard of proof. Although the Court has stated in passing that Section 1 seeks to determine whether "anticompetitive effects outweigh its procompetitive effects," it has not indicated what showing by defendants would be sufficient to rebut a *prima facie* case. It is unclear whether it is sufficient merely to convince the court that a significant procompetitive effect *exists* or whether it must literally be shown to be larger than the anticompetitive effects. No reported case has required an empirical balancing approach.<sup>315</sup> While logically appealing, that proposal raises difficult (if not impossible) issues of empirical measurement. The *BMI* Court's suggestion that blanket licensing was procompetitive was plausible, but it would be

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315. See GAVIL, KOVACIC, BAKER, & WRIGHT, *ANTITRUST LAW IN PERSPECTIVE* 256 (3d ed. 2017).

difficult (if not impossible) to quantify the procompetitive value of any business practice, all the more so for an entirely new practice, such as the blanket license or a labor combination among rideshare drivers. Due to the futility of empirical measurement, courts in practice appear to consider not the relative magnitude of effects, but the weight of the evidence.<sup>316</sup> The *AmEx* Court departed from this trend, however: it rejected evidence of market power and price increases, and found procompetitive effects, based primarily on economic theory. Similarly, courts should impose a low evidentiary bar on rideshare drivers asserting procompetitive effects of collective labor action.

a. Counteracting Firms' Allocation of Costs to Drivers

Rideshare companies allocate a high proportion of the cost of a ride transaction to drivers. As noted above, they keep their costs down by shifting them onto drivers. This low driver pay suggests either a lack of choice in the job market or information asymmetries about real net pay. Just as AmEx dominated the charge-card market, Uber and Lyft control virtually the entire U.S. rideshare market.<sup>317</sup> This dominance is self-reinforcing due to network effects: riders tend to use only the dominant apps because most drivers do, and vice versa.<sup>318</sup> 2SP theory suggests that allocating costs to drivers would reduce driver demand for rideshare apps, necessitating lowering rider prices. Evidence suggests, however, that drivers have little bargaining power in the face of industry concentration. The average net pay for Uber drivers (fares earned less Uber's share and the driver's vehicle expenses) is \$11.77 per hour.<sup>319</sup> In some markets, net pay is below minimum wage.<sup>320</sup> In comparison, the average hourly wage for all private-sector workers is \$32.06 and the average for service workers is \$14.99.<sup>321</sup>

It might be argued that rideshare companies' ability to shift costs onto drivers is merely one-sided market power. But while *AmEx* held that

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316. See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

317. Bosa, *supra* note 12. While Lyft is focused in North America, Uber has a wider international presence, where it competes with local rivals. Bellon, *supra* note 12.

318. Hemingway, *supra* note 15.

319. Lawrence Mishel, *Uber and the Labor Market*, ECONOMIC POLICY INSTITUTE (May 15, 2018), <http://epi.org/145552>.

320. *Id.*

321. *Id.*

one-sided market power is not the equivalent of “market power,” it did not hold that it entirely lacks significance as an anticompetitive effect. Under the 2SP theory’s own logic, one-sided market power diminishes the feedback effects between the two sides of the platform and thus diminishes the necessity of offsetting a one-sided price increase with a price decrease on the other side. This is illustrated by the district court’s finding that AmEx had the power to raise merchant prices without losing business: an increased merchant price had only a *limited* downward effect on merchant demand, and thus had only a *limited* downward effect on cardholder demand, and so on.

Similarly, rideshare apps ability to shift costs onto drivers appears to disrupt the feedback effect between driver price and customer price, resulting in inefficient pricing.<sup>322</sup> Collective bargaining by drivers could have a procompetitive effect by counteracting apps’ one-sided market power. As described above, rideshare apps unilaterally prescribe fares (including “surge” increases) and the percentage of each fare that goes to the app; they impose further costs on drivers by requiring them to supply their own vehicles and by controlling the details of their work. Like the merchants in *AmEx*, drivers are prohibited from recovering their costs by charging a higher fare or imposing surcharges.<sup>323</sup> This “disrupt[s] the normal price-setting mechanism’ in the market.”<sup>324</sup> In *AmEx*, the anti-steering provisions “created a barrier to allowing cardholders to react to the total charge,” since merchants could not charge specifically for the use of AmEx, or even tell shoppers about the higher cost of AmEx.<sup>325</sup>

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322. Horan, *supra* note 4, at 34–35 (“The price signals that allow drivers and customers to make welfare maximizing decisions have been deliberately distorted” by the shifting of costs onto drivers).

323. The anti-steering agreements in *AmEx* were less disruptive of the feedback link between merchants and cardholders, because a merchant could indirectly pass on fee increases by raising all its retail prices. The disruption of demand interconnectivity in the rideshare context might arguably disqualify drivers and riders from constituting a unitary “two-sided market.” As noted above, however, the *AmEx* Court focused solely on the generic qualities of “transaction platforms” and paid no attention to the context-specific facts that might disrupt interconnectivity.

324. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2294 (2018) (Breyer, J., dissenting) (quoting *Am. Express Co.*, 88 F. Supp. 3d at 209). The anti-steering provisions “created a barrier to allowing cardholders to react to the total charge,” since merchants could not charge specifically for the use of AmEx, or even tell shoppers about the higher cost of AmEx. Jeffrey L. Harrison, *Ohio v. American Express: Misunderstanding Two-Sided Platforms; the Charge Card “Market;” and the Need for Procompetitive Justifications*, 70 *MERCER L. REV.* 437, 446 (2019). Similarly, drivers cannot impose markups based on the fees they pay to Uber.

325. Harrison, *supra* note 324, at 446.

Similarly, rideshare apps' unilateral control over fares means the app, and not market forces, determines how much of their costs drivers can pass on to riders.<sup>326</sup>

b. Counteracting Predatory Pricing and Misallocation of Capital

With only two firms, the rideshare industry is extremely concentrated. Antitrust law looks skeptically at extreme concentration in an industry, because a small number of firms can more easily engage in collusive behavior. The antitrust analysis of mergers is predicated on the idea that “where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding.”<sup>327</sup>

While concentration increases the danger of anticompetitive collusion, the industry seems to be moving in the opposite direction. Rideshare firms have allocated more of the aggregate ride price to drivers in order to reduce rider prices and seize market share. Rideshare firms continue to attract investment capital and their stock prices continue to rise despite their unprofitability.<sup>328</sup> This is not because the firms expect to reduce costs and make operations profitable in the foreseeable future.<sup>329</sup>

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326. In response to the passage of AB5 and other legislative definitions of “employee,” however, Uber announced it would allow drivers in California and some other states to mark up Uber’s fares. While some drivers object to Uber’s price-setting policies, an Uber rider has sued the company on the theory that its practice of “surge pricing,” or raising fares in response to demand spikes, is a price-fixing conspiracy with drivers. After losing in customer arbitration, the plaintiff appealed in federal court on the ground that the arbitrator ruled against Uber out of fear of retaliation. Tina Bellon, *Uber Customer Claims Company Won Price-Fixing Suit Because Arbitrator Was Scared*, REUTERS (May 22, 2020, 6:34 PM), <https://www.reuters.com/article/us-uber-lawsuit/uber-customer-claims-company-won-price-fixing-suit-because-arbitrator-was-scared-idUSKBN22Y2ZZ>.

327. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 77 (D.D.C. 2011); see also U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 7.1 (Aug. 19, 2010) (suggesting that mergers that eliminate rivals in concentrated markets are likely to attract antitrust investigation because they may facilitate cartelization among the remaining competitors).

328. Lyft’s stock price jumped 15% and Uber’s 10% after they reported respective net losses of \$398.1 million and \$2.9 billion for the first quarter of 2020. Lora Kolodny, *Lyft Shares Jump 15% As Company Reports More Riders Than Last Year Despite Coronavirus*, CNBC (May 6, 2020, 5:30 PM), <https://www.cnbc.com/2020/05/06/lyft-earnings-q1-2020.html>; Lora Kolodny, *Uber Shares Shoot up After CEO Says Ride Volume Is Increasing Again After April Bottom*, CNBC (May 7, 2020, 6:15 PM), <https://www.cnbc.com/2020/05/07/uber-uber-earnings-q1-2020.html>.

329. In early 2020, before the pandemic, Uber predicted a profitable fourth quarter for 2020, but a \$1 billion loss for the year, while Lyft predicted it would not reach profitability before the end of 2021. Bellon, *supra* note 12.

Rather, with the backing of investment capital, they seek to conduct costly fare wars to take market share from one another and from taxi businesses, as well as from public transportation.<sup>330</sup>

Price wars are generally thought to benefit consumers and competition, but under certain conditions, they can have destructive effects in the long run. Artificially low prices for rideshare transportation, subsidized by investment capital and underpaid drivers, may be inefficiently allocating resources to support an unprofitable and possibly unsustainable industry.<sup>331</sup> Because the rideshare business model is consistently losing money and offers no significant economies of scale, the only apparent way to make profits is to destroy rivals in the fare wars and then raise prices to profitable levels.<sup>332</sup> A firm is guilty of illegal “predatory pricing” if it sets prices below marginal cost in order to eliminate its rivals and use the resulting market power to recoup its losses by increasing prices.<sup>333</sup> Many observers believe this is the only logical endgame of the rideshare industry.<sup>334</sup> Although predatory pricing is rare and difficult to prove, it is the only foreseeable way the rideshare industry can become profitable. Rideshare firms’ persistent power to attract investors despite their unprofitability suggests that Wall Street believes

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330. Kate Conger, *Uber’s First Earnings Report After I.P.O.: \$1 Billion Loss*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/technology/uber-stock-earnings.html>; Steven Hill, *Ridesharing Versus Public Transit*, THE AMERICAN PROSPECT (Mar. 27, 2018), <https://prospect.org/infrastructure/ridesharing-versus-public-transit/r>.

331. It is possible that neither Uber nor Lyft will ever become profitable or will do so only in radically scaled-down form. *Can Amazon, Uber, and Lyft All Thrive After the Coronavirus?*, N.Y. MAGAZINE: INTELLIGENCER (May 1, 2020), <https://nymag.com/intelligencer/2020/05/can-amazon-uber-and-lyft-all-thrive-after-the-coronavirus.html>. In that case, founders and others who cashed out early will have profited through paper wealth creation, leaving behind losing investors and a hollowed-out transportation supply. *Id.*; Hill, *supra* note 330. Indeed, whether it survives or not, ridesharing threatens to decimate public transportation, with disastrous impacts on income distribution, pollution and traffic. *Id.*

332. Jeff Spross, *Uber Is Basically Promising Investors it Will Become a Monopoly*, THE WEEK (Apr. 15, 2019), <https://theweek.com/articles/834836/uber-basically-promising-investors-become-monopoly>.

333. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 209 (1993).

334. Hill, *supra* note 330. Taxi companies recently sued Uber, alleging predatory pricing in violation of California unfair competition law. *Uber Techs. Pricing Cases*, No. A154694 (Cal. Ct. App., 1st Dist. Mar. 23, 2020). The California Court of Appeals dismissed without reaching the merits, holding that Uber was exempt from the statute because the state utilities commission had jurisdiction to regulate its rates.

in can subsidize price wars in exchange for future profitability.<sup>335</sup> One observer has suggested the institution of price floors to protect competitors, particularly public transportation, from predatory pricing.<sup>336</sup> While that approach makes economic sense, it is practically inconceivable in the current deregulatory climate.

Contract and market forces, however, can inhibit predatory pricing if antitrust law permits driversto organize. As integral elements of the rideshare transaction platform network, drivers' contracts deserve the same business deference as platform firms' contracts. Under a lenient approach to the rule of reason, even if driver organization were to increase labor prices, such anticompetitive effects would be outweighed by procompetitive effects. Based on the Court's reasoning in *AmEx*, procompetitive effects could be established by theoretical arguments and would require no empirical proof.

#### IV. CONCLUSION

This Article argues that employment laws are increasingly irrelevant in the platform context, where fewer and fewer workers qualify as employees despite being subject to a high degree of control. In addition, antitrust doctrine has traditionally prevented independent contractors from protecting themselves through collective bargaining. Over the past several decades, however, the Supreme Court has shown a tendency to apply deferential antitrust scrutiny to agreements in certain complex and novel contexts, particularly in the so-called "transaction platform context." This lenience should apply to collective bargaining by rideshare drivers (and potentially by other platform workers).

Employment laws fail to protect rideshare drivers because the "employee-independent contractor" distinction is a poor fit with the platform economy. The tests for determining employment status—right-to-control, economic opportunities, and entrepreneurial opportunity—focus on traditional workplaces. Courts, legislatures, and administrative agencies have deemed drivers to be independent contractors despite the extensive control that rideshare companies have over their work activities. Although some courts have found drivers to be employees, the fight over employee status is now being conducted in the legislative arena.

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335. *Can Amazon, Uber, and Lyft All Thrive After the Coronavirus?*, *supra* note 331. ("[Uber will] be a smaller business . . . . And quite frankly, riders should be paying more. So there just needs to be a redistribution of stakeholder value here."); Hill, *supra* note 330.

336. Hill, *supra* note 330.

While some state legislatures have sought to define drivers as independent contractors, a majority of states have enacted industry-sponsored statutes with a relatively hands-off approach to substantive regulation of rideshare companies. Most have, in effect, redefined “independent contractor” such that drivers and other “gig” workers are not “employees” despite platform companies’ extensive control over them.

Antitrust law provides an opportunity to rectify the imbalance of power in the rideshare company-driver relationship. While labor organizing by independent contractors has been called “*per se* illegal,” in fact the Supreme Court’s *AmEx* opinion is part of a long trend away from categorical antitrust analysis and toward context-sensitive and deferential review of business agreements, particularly in the context of innovative products. The *AmEx* Court created new, extremely deferential antitrust standards to protect platform-mediated “transactions.” Although the platform company was the defendant, the *AmEx* Court’s basis for deference was the special nature of transactions: they are produced by a complex network involving the platform and its two sides. The relaxed antitrust standard of review for the platform in *AmEx* thus paves the way for similar lenient treatment of other agreements in the transaction platform context, such labor organizing among drivers. Concerted activity by drivers may have procompetitive effects by counteracting predatory pricing and other anticompetitive effects.

We acknowledge that many drivers and their advocates will be reluctant to give up on employment law and concede that drivers are independent contractors under antitrust law. We certainly do not want to inhibit efforts to expand employment law protections to more workers, including drivers. In jurisdictions where drivers qualify as employees or receive some other statutory protections, labor organizing may serve as an adjunct, or it may prove unnecessary. But employment law protections are off the table in those states with statutes expressly denying employee status to drivers. In those jurisdictions, it may be time to consider replacing employment law with a new legal paradigm for worker protection. The option of organizing would also appeal to those rideshare drivers and other gig workers who prefer to be independent contractors rather than employees.<sup>337</sup>

Additionally, critics of corporate power may resist the *AmEx* opinion

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337. Kim Kavin, *I Don’t Want To Be Anybody’s Employee*, REASON (Aug./Sept. 2020), <https://reason.com/2020/07/05/i-dont-want-to-be-anybodys-employee/>.

and the general trend toward lenient antitrust doctrine.<sup>338</sup> The broad trend of lenience in antitrust law may be troubling in its implications for corporate power, but it cannot be denied, and is likely to persist in light of the markedly conservative shift in the makeup of the federal bench. It may be more realistic to argue for formally symmetrical application of the lenient approach (to both capital and labor) than to seek a more drastic reversal of the trend.

The fight over the definition of “employee” demonstrates how stagnant employment law has become. We argue that drivers, as small businesses, can make agreements with each other to counteract the anticompetitive effects of the rideshare business model, antitrust law and the NLRA notwithstanding. At this moment in legal history, this contract-based solution is a politically realistic way to advance workers’ interests. Sometimes the answer to a vexing, complicated and long-standing legal problem is simply to look to a different area of law.

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338. Cf. Hiba Hafiz, *Labor Antitrust’s Paradox*, 86 U. CHI. L. REV. 381, 392 (2019) (arguing that labor advocates should be wary of adopting the consumer welfare standard because of its potential anti-labor consequences).