

RESTRAINING THE UBER MODEL: ANTITRUST LAW AND THE GIG ECONOMY IN NEW YORK AND CALIFORNIA

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INTRODUCTION

Kim had recently taken up driving for the rideshare company Lyft.¹ Almost all of her customer reviews were positive, and she had just achieved a Platinum reward based on her driver rating and frequency of use.² A Black woman in Seattle, Kim's only negative interactions with riders involved a racist comment and her terse response on one occasion and a refusal to give a ride to a rude customer on another. One day, Kim attended a meeting at the local Teamsters office to discuss organizing with other rideshare drivers. The next day, her Lyft account was permanently "deactivated"—the euphemism employed by Lyft and its competitor Uber to signify a driver's firing. Lyft claimed, unverifiably, that she had received poor reviews. As an independent contractor, Kim was ineligible for unemployment benefits, she had no entitlement to severance, and she could not challenge Lyft's basis for her termination as pretextual and a violation of her right to organize.

The labor relation typified by Kim's experience with Lyft, sometimes termed the Uber Model, forebodes a grim future for labor. Employers desirous of a means to evade labor laws have found in the Uber Model not just the legal framework to do so but the coercive political power to stymie countervailing regulation. Marshall Steinbaum and Sanjukta Paul identify two ways in which federal antitrust law has bled into the labor field to the detriment of workers: (1) the erosion of antitrust law's prohibition on vertical restraints—a dominant firm's imposition of prices or other conditions on subordinate firms or contractors—has enabled the growth of the gig economy, and (2) the threat of antitrust law enforcement against independent contractors suffocates the possibility of worker collective action.³ Both phenomena have circumscribed the rights and entitlements of the category of worker that Harry Arthurs dubbed "the de-

1. The narrative in this paragraph is adapted from an article in Seattle's *The Stranger*. Sydney Brownstone, *Seattle Lyft Driver Wants to Know Why She Was Deactivated After Attending a Teamsters Organizing Meeting*, THE STRANGER SLOG (Nov. 19, 2015), available at thestranger.com/blogs/slog/2015/11/19/23163805/seattle-lyft-driver-wants-to-know-why-she-was-deactivated-after-attending-a-teamsters-organizing-meeting.

2. The Platinum reward entitles drivers to free roadside assistance, a discount on tax software, and limited discretion in selecting rides. *Lyft Rewards*, LYFT, help.lyft.com/hc/en-us/articles/360035885974-Lyft-Reward (last visited June 4, 2021).

3. Marshall Steinbaum, *Antitrust, The Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45 (2019); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L. J. 969 (2016).

pendent contractor”⁴—laborers classified as independent contractors but functionally subordinate to one or several principal firms. Drawing on Arthurs’s classification and Steinbaum’s and Paul’s antitrust analysis, this Note addresses how state-level antitrust law can challenge these developments and provide a laboratory to trial a legal regime that combines labor law’s worker-empowering ethos with antitrust law’s aversion to coercive corporate concentration. By integrating labor and antitrust law, these states would produce a means of effectively confronting the gig economy in its largest markets and provide an example for other states to adopt.

This Note limits its review of state law and its proposal to New York and California for several reasons. According to a 2019 SEC filing, New York and California are home to three of Uber’s five largest metropolitan markets globally.⁵ Combined or even individually, if these two states were to challenge gig companies’ use of vertical restraints, they could transform the gig economy nationally. Additionally, both states are aggressive and effective antitrust enforcers, and both have taken substantial steps to regulate the gig economy, albeit not always successfully. However, this Note’s assessment of state-level antitrust law is broadly applicable across the other 48 states, and any state could adopt the concluding proposal.

The gig economy is the weed that grows through the cracks in the legal foundation of laws governing labor and corporate control. Part I of this Note illustrates how weaknesses in labor and employment laws have enabled the development of the gig economy, how labor law has proven incapable of reversing this trend, and how antitrust law arrests organic organizing among gig workers. Part II identifies the judicial imposition of an impotent standard of review for challenged vertical restraints and the resultant prosecutorial neglect as necessary preconditions for the gig economy’s emergence. Fundamental aspects of the Uber Model, including its pricing algorithm and the means by which the principal controls gig workers’ behavior, are only lawful because of antitrust law’s erosion. This Note suggests that state law can revive antitrust enforcement but that the law on the books may not be enough to stop the gig economy’s regulatory evasion. Part III proposes targeted amendments to New York and California antitrust laws that would prohibit the exercise of certain vertical restraints over dependent contractors. Properly implemented and zealously applied, these

4. H. W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L. J. 89 (1965).

5. Uber Tech., Inc., Registration Statement (Form S-1) (Apr. 11, 2019).

prohibitions could solder the gaps between labor and antitrust laws, harmonizing the laws that govern economic subordination of labor.

I.

THE LAWS THAT GOVERN LABOR

This part begins with a section discussing the concept of the dependent contractor and its place in U.S. labor law. Next, it shows how the Uber Model depends on the exploitation of dependent contractors. It then demonstrates why states' attempts to address this emerging model through employment law, including statutory amendments to employee classification tests, have failed. The final section examines the state of gig worker collective bargaining and demonstrates how the specter of antitrust enforcement against gig workers prevents effective organizing.

A. *Dependent Contractors and U.S. Labor Law*

“Dependent contractor” is not a legal term of art, but rather an epithet that highlights the contradictory position of workers who are nominally independent in the practice of their craft but subservient in their economic relationship to a principal. These workers enjoy only the barest benefits of their legal free agency while being denied the legal protections of the employment relationship. The National Labor Relations Board (NLRB) once stretched the category of employee broad enough to protect many dependent contractors, but Congress stymied this reach, and even recent Boards with Democrat-appointed majorities have read “employee” too narrowly to enfranchise many dependent workers classified as independent contractors.

The common law agency test is the typical means of determining a worker's status as either an employee or an independent contractor for purposes of labor, tax, and social welfare laws. The agency test weighs a number of factors to distinguish employees from independent contractors, including the principal's level of control over the agent, the agent's required skill, the owner of the instrumentalities and tools, the method of payment, and whether the labor is part of the employer's regular business.⁶ These factors effectively capture an

6. The 2015 Restatement of Employment Law would modify the agency test to classify as employees those whose principal “effectively prevents the individual from rendering . . . services as an independent businessperson. § 1.01[a]. The Restatement replaces “independent contractor” with “independent businessperson” to emphasize entrepreneurial opportunity. RESTATEMENT OF EMPLOYMENT LAW § 101A. (AM. L. INST. 2015). See discussion in *In re Vega*, 149 N.E.3d 401, 411–14 (N.Y. 2020) (Rivera, J., concurring).

agent's practical dependence but elide the more important factor of economic dependence.

Canadian labor law scholar Harry Arthurs introduced the concept of the "dependent contractor" in 1965 to describe laborers whose independence in the exercise of their work renders them "independent contractors" for purposes of the common law agency test but whose economic dependence on a single employer substantially resembles the subservient relationship of a common law employee.⁷ These workers lack the opportunities to advance out of the relationship through superior business acumen, instead relying perpetually on the continued patronage of the principal in the same manner as do employees. Unlike employees, however, they do not enjoy statutory rights or protections against their principals. As examples of dependent contractors, Arthurs listed "[s]elf-employed truck drivers, peddlers, taxicab operators, farmers, fishermen, and service station lessees."⁸

At the time of Arthurs's writing, a broad economic dependence-based conception of employee status that had threatened to displace the agency test in U.S. law had instead been snuffed out. In 1914, Judge Learned Hand, perhaps for the first time in American law, applied an economic positionality test to determine employee status, rejecting the agency test in a case where it would have unfairly denied an injured miner damages from his former employer.⁹ Thirty years later, in *NLRB v. Hearst Publications, Inc.*, the Supreme Court relied on Hand's economic dependence formulation in extending the National Labor Relations Act (NLRA) to dependent contractor newspaper distributors.¹⁰ However, in 1947, Congress rejected the *Hearst* Court's broad reading of "employee," overturning the decision legislatively with the Taft-Hartley Act, which explicitly exempted independent contractors from the NLRA's coverage.¹¹ In the interceding three

7. Arthurs, *supra* note 4.

8. *Id.* at 89.

9. *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914) (rejecting the Lehigh Valley Coal Company's argument that it was not engaged in the business of coal mining but merely "in letting out contracts to independent contractors").

10. *N.L.R.B. v. Hearst Publ'ns*, 322 U.S. 111 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *accord* *N.L.R.B. v. Blount*, 131 F.2d 585 (8th Cir. 1942). The same test was extended to the Federal Labor Standards Act in *Walling v. American Needlecrafts, Inc.*, 139 F.2d 60 (6th Cir. 1943). New York's highest court relied on the decision in *Hearst* and on a different Hand decision in rejecting an antitrust action against a union of independent laundry drivers. *People v. Gassman*, 295 N.Y. 254, 260–61 (N.Y. 1946) (distinguishing the broad "genus" of "worker" from the narrow "species" of "employee"), citing *In re All Star Feature Corp.*, 231 F. 251 (S.D.N.Y. 1916) (J. Hand) (discussing the terms "workman" and "servant" in Bankruptcy Act priority provisions).

11. 29 U.S.C.A. §§ 151–61 (West).

quarters of a century, federal courts and agencies have largely ignored economic dependence in the application of federal laws and regulations.

The NLRB has frequently reformulated its test for determining employee status, gradually shifting its focus from the employer's right of control to the worker's entrepreneurial opportunity, but economic dependence has not featured in its determinations, maintaining the divorce between workers' conditions and their classification. For decades, the employer's right of control was the determinative issue, evaluated via factors such as ownership of means of labor, control over the agent's performance, discipline, and fixed versus variable compensation. In a pair of 1998 decisions, the NLRB expanded its agency test to consider several other factors, which had the potential to liberalize employment categorization.¹² The newly added "entrepreneurial opportunity" factor could have captured the economic dependence of workers lacking the means to transcend their subservient status.¹³ However, in 2005 the Bush II Board¹⁴ twisted the 1998 factors, including entrepreneurial opportunity, to create an even more employer-friendly test.¹⁵ Board Member Wilma Liebman dissented, arguing that economic dependence itself should be treated as a significant factor and citing to other countries' adoption of a dependent contractor category.¹⁶ However, even when liberals retook a majority on the Board during the Obama administration, they did not include economic dependence as a factor in the agency test.

The Trump NLRB adopted a particularly inapposite version of the agency test, disavowing "economic dependence" and transmogrifying

12. *Roadway Package, Inc.*, 326 N.L.R.B. 72 (1998) (finding delivery drivers were employees based on centrality to Roadway's business, lack of entrepreneurial opportunity, and employer-provided training, among other factors); *Dial-a-Mattress Operating Corp.*, 326 N.L.R.B. 75 (1998) (finding delivery drivers were independent contractors based on entrepreneurial opportunity, ability to hire their own employees, and self-provided training, among other factors).

13. For a progressive argument in favor of "entrepreneurial opportunity," see Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67 (2013).

14. It is a common convention in discussions of the NLRB to refer to a Board by the name of the President who appointed a majority of its members. The Board has five seats, three of which are typically occupied by members representing the president's party. Because of members' five-year terms and the Senate's sometimes intransigence in considering appointees, the partisan composition often lags a president's inauguration by months. For example, in a historically *quick* reversal, President Biden did not have the opportunity to appoint a Board majority until August 27, 2021, over seven months after the beginning of his term.

15. *St. Joseph News-Press*, 345 N.L.R.B. 31 (2005) (determining newspaper deliverers were independent contractors).

16. *Id.* at 484–87.

fyng “entrepreneurial opportunity” into an employer trump card for all but the most extreme cases. In 2019, the Board in *SuperShuttle*¹⁷ declared it was overturning an Obama Board precedent that it alleged relied on economic dependence, although the prior decision never invoked the concept.¹⁸ While the Obama Board treated entrepreneurial opportunity as a single factor in the agency test, the Trump Board elevated it as the test’s “animating principle.”¹⁹ As the *SuperShuttle* dissent pointed out, the majority constructed this principle from whole cloth, with no basis in NLRB case law or the common law of agency.²⁰ Later that year, in *Velox Express*,²¹ the Board ruled that an employer’s misclassification of workers as independent contractors does not violate Section 7 of the NLRA.²² Around the same time, the NLRB General Counsel released a non-precedential advice memo concluding that Uber drivers are correctly classified as independent contractors under *SuperShuttle*.²³

The common law agency test, so long as it does not consider a worker’s economic dependence, produces a legal dichotomy that excludes a large swath of the workforce from legal protection. Conservative Boards’ hostility toward the economic dependence factor—aided by liberal Boards’ ambivalence—has extended this disenfranchisement to workers’ collective bargaining rights, thereby removing the means by which dependent contractors might otherwise self-regulate their working conditions.

B. *Dependent Contractors and the Uber Model*

Arthurs’s identification of the agency test’s dependent contractor loophole challenged contemporary understandings of the test’s effectiveness, but his classification holds even more relevance half a century later with the rise of the gig economy.²⁴ The gig economy

17. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019).

18. *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014), enforcement denied, 849 F.3d 1123 (D.C. Cir. 2017) (finding that a previous holding by the same court that a different group of FedEx workers were independent contractors was binding).

19. *Supershuttle DFW, Inc.*, at 1, quoting *FedEx Home Delivery, Inc. v. N.L.R.B.*, 563 F.3d 492, 497 (D.C. Cir. 2009) (overturning Board finding that FedEx drivers were employees for purposes of the Act).

20. *Supershuttle DFW, Inc.*, at 22–25.

21. *Velox Express, Inc.*, 368 N.L.R.B. No. 61 (2019).

22. *Id.* at 7–12.

23. N.L.R.B. Gen. Couns. Mem. Cases 13-CA-163062 et al. (Apr. 16, 2019).

24. The full literature on the gig economy citing Arthurs would be too numerous to list. Scholarship applying Arthurs’s frame to the gig economy or its precursors include the following: Stephen E. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP.

predates on the law's margin, manipulating this defect in agency law to contract for low-cost, low-maintenance, low-rights labor. This is not a mere incident of the industry; it is its foundational principle.

The gig economy takes many forms, but the most ubiquitous, harmful, and confounding type of gig work is the Uber Model. The gig economy is an amorphous collection of often app- or web-based labor and commerce platforms. It is sometimes framed as the “sharing economy” because many gig platforms re-commodify the worker's means of survival, turning the private home or the personal automobile into a profit-generating tool. The gig economy is not limited to rideshare and delivery services but also includes short-term apartment and home rentals (the Airbnb model)²⁵ and task-based micro-work (the Mechanical Turk model).²⁶ This Note limits its analysis to the model typified by rideshare and delivery platforms that is sometimes called the Uber Model. Under this model, the worker maintains a potentially long-term “contract” relationship with one or several platforms and performs a service central to the economic purpose of that platform. The worker typically provides some material input—in the case of rideshare drivers, a car—that contributes to the facade of driver independence while shifting purchase, maintenance, and depreciation costs onto workers. The short-term employer—the gig service purchaser—has none of the statutory obligations of an employer, and

& LAB. L. 153 (2003); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143 (2005); Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017); Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105 (2018); Harry Arthurs, *The False Promise of the Sharing Economy*, in LAW AND THE “SHARING ECONOMY”: REGULATING ONLINE MARKET PLATFORMS (Derek McKee, Finn Makela & Teresa Scassa, eds. 2018).

25. Airbnb itself illustrates many of the worst phenomena discussed in this Note. The labor of cleaning and some customer relations is performed by individual hosts at no cost to Airbnb. But the customer service that must be performed by the corporation is “fissured,” contracted out to a separate corporation, Arise Virtual Solutions. Arise operates a particularly exploitative variation of the Uber Model, employing independent contractors to answer customer calls for Airbnb, Instacart, and other corporations while charging workers thousands of dollars for mandatory trainings and equipment. Ken Armstrong, Justin Elliott & Ariana Tobin, *Meet the Customer Service Reps for Disney and Airbnb Who Have to Pay to Talk to You*, PROPUBLICA (Oct. 2, 2020), <https://www.propublica.org/article/meet-the-customer-service-reps-for-disney-and-airbnb-who-have-to-pay-to-talk-to-you>.

26. On this latter phenomenon, see WILMA B. LIEBMAN & ANDREW LYUBARSKY, CROWDWORK, THE LAW, AND THE FUTURE OF WORK, PERSP. ON WORK 22 (2016).

neither does the platform, which positions itself as a “for-profit hiring hall.”²⁷

Under the Uber Model, gig employers sacrifice their abstract right of control over employees in order to exercise a more absolute economic control over dependent contractors. These employers evade the classification of their workers as “employees” by diligently navigating around unfavorable factors in the common law agency test while nonetheless treating workers as employees in almost every remaining sense. With Judge Hand’s economic dependence test snuffed out of the labor law, the NLRB draws the dividing line at what the Trump Board characterizes as “entrepreneurial opportunity.” In finding that Uber drivers would qualify as independent contractors, the NLRB General Counsel emphasized three factors: drivers’ ability to pick their work hours, to pick their geographic marketplace, and to work for Uber’s competitors.²⁸ While drivers undoubtedly appreciate the former two factors, their decisions are bounded by a competitive marketplace forcing drivers to travel further afield or to work odd hours to consistently find riders. As for “multi-homing,” the practice of working for multiple employers simultaneously, Steinbaum demonstrates that the major rideshare platforms have found ways to disincentivize drivers from exercising this privilege through acceptance rate–based bonuses.²⁹

By successfully classifying their workers as independent contractors, gig employers evade numerous statutory and regulatory responsibilities to their workers. Minimum wage rates, maximum hour regulations, unemployment insurance and workers’ compensation programs, anti-discrimination laws, and other statutes and regulations designed to resolve some of the imbalances of the employment relationship do not cover rideshare drivers misclassified as independent contractors. Perhaps most importantly, independent contractor status places workers outside the protection of collective bargaining laws and in the crosshairs of antitrust liability.

Despite corporate PR campaigns presenting grinning rideshare and delivery drivers as well-remunerated proselytizers of the “future of work,” drivers suffer low wages, debt, and precarity. A 2018 study found that the average Uber driver’s discretionary compensation—deducting fees, overhead, and certain taxes that would otherwise be paid

27. Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017).

28. N.L.R.B. G.C. Memo, *supra* note 23.

29. Steinbaum, *supra* note 3, at 55–56.

by the employer—was just \$10.87 per hour,³⁰ with no retirement or health benefits and no entitlement to unemployment insurance or workers' compensation. In New York, Los Angeles, Chicago, and several other cities, this puts Uber drivers' wages below the local minimum wage.³¹ At the same time that the Uber Model substitutes contractors for employees, it substitutes customer reviews for middle management. Drivers are subject to riders' subjective assessments, and gig companies typically place no check on customers' implicit or explicit racial and gender biases. Drivers live in fear of an unexpected, unexplained, and unchallengeable deactivation on the basis of poor rider reviews or some other inscrutable metric.³² A recent survey of California rideshare drivers shows the devastating impact of the COVID-19 pandemic on drivers' economic well-being.³³ Although the full health impact on drivers remains a mystery, the survey found that 26 percent of California drivers lacked health insurance and large percentages were food insecure or greatly concerned about the risk of being evicted.³⁴

The Uber Model, as a means of supplanting established and often unionized competitors, cannot operate unless workers are classified as independent contractors. Its thin margins from anti-competitive pricing cannot sustain secondary labor costs such as health insurance, workers' compensation, and unemployment insurance. However, even if it could afford to correctly classify workers, Uber and other gig companies are as hostile to workers' meaningful collective action as are the worst traditional firms.

C. *Restraining the Uber Model Through Employment Regulations*

States have attempted but failed to mitigate employers' exploitation of dependent contractors through employment regulations. Although the law governing private-sector collective bargaining—here shortened to simply “labor law”—is the almost-exclusive province of federal agencies and courts, states maintain significant discretion over

30. Lawrence Mishal, *Uber and the Labor Market*, ECON. POL'Y INST. (May 15, 2018), epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy/.

31. *Id.* See also FRANK MANZO IV & ROBERT BRUNO, ON-DEMAND WORKERS, SUB-MINIMUM WAGES: EVIDENCE FROM TRANSPORTATION NETWORK PROVIDER TRIPS IN THE CITY OF CHICAGO, ILL. ECON. POL'Y INST. (2021).

32. Carolyn Said, *Uber, Lyft Drivers Fear Getting Booted from Work*, S. F. CHRON. (Oct. 14, 2018, 12:39 PM), <https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-fear-getting-booted-from-work-13304052.php>.

33. RIDESHARE DRIVER COVID-19 SURVEY DATA BRIEF, WE DRIVE PROGRESS & MOBILE WORKERS ALLIANCE (2020).

34. *Id.*

employment regulations: the minimum standards, entitlements, and protections enjoyed by workers. Labor lawyers and academics disagree over whether dependent contractors should be reclassified as employees, left in their precarious position, or placed in a new intermediate classification. However, even reclassification of dependent contractors as full employees under state law does not afford workers a means of enforcing their rights absent the legally protected right to organize and bargain collectively.

Canada's labor law in some jurisdictions affords dependent contractors the same legal status as employees. Harry Arthurs's theory of the "dependent contractor" led to a reordering of the legal categories governing employment classification in Canada. Courts and regional legislatures gradually incorporated the category into the country's labor law, assigning dependent contractors the full rights and privileges of employees.³⁵ In February 2020, the Ontario Labor Relations Board ruled that Canadian Foodora drivers—analogueous to UberEats or DoorDash drivers—are dependent contractors,³⁶ and subsequently Ontarian Foodora drivers won their union election.³⁷

Some states in some contexts apply an alternative to the agency test termed the ABC test, which does not explicitly invoke economic dependence but nonetheless effectively categorizes most dependent contractors as employees. Although the ABC test was first applied in 1935 and has remained in use in select contexts since then, it has gained prominence only recently with Massachusetts's adoption of the test in 2007.³⁸ The ABC test limits the inquiry to three factors: (A) Is the worker free from the employer's control in the performance of the labor? (B) Is the labor outside the employer's usual course of business? And (C) is the worker engaging in the same labor either independently or in service of other principals? The employer has the burden of answering all three in the affirmative in order to overcome the presumption that a worker qualifies as an employee.

California's recent experience with the ABC test is illustrative both of the threat the test poses to gig companies and of the lengths to which they will go to obstruct it. The California Supreme Court unanimously adopted the ABC test in its 2018 *Dynamex* decision,³⁹ and the

35. *Id.* at 653.

36. *Can. Union of Postal Workers v. Foodora Inc.*, 2020 CanLII 16750 (Can.).

37. *Can. Union of Postal Workers v. Foodora Inc.*, 2020 CanLII 41787 (Can.).

38. See Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L. & SOC. CHANGE 53, 65 (2015).

39. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018) (adopting the ABC test, discussed *infra*).

state legislature then codified the test in 2019 with the passage of Assembly Bill 5 (AB 5).⁴⁰ This modified agency test categorized many gig workers as employees for purposes of state employment regulations, unemployment insurance, and workers' compensation. After the bill went into effect, Uber and Lyft refused to reclassify their drivers as employees,⁴¹ setting up a legal battle. However, the showdown never came to pass.

In 2020, gig companies funded and passed a California ballot initiative partially overturning AB 5 and carving out a middle category between employee and independent contractor for gig workers. Rideshare companies Uber and Lyft, along with delivery app companies DoorDash, Instacart, and PostMates, jointly spent more than \$200 million dollars in support of Proposition 22,⁴² which creates a carveout from AB 5 for app-based rideshare and delivery drivers. The ballot initiative mimics some employment law protections through minimum earnings, healthcare subsidies, and accident insurance, but it leaves the broader issues employment laws are designed to address unresolved and unresolvable. The California legislature can only override Prop 22 provisions with a seven-eighths majority.⁴³ As a result, California gig workers have nominally stronger protections than before *Dynamex*, but the door to employee status has shut.⁴⁴

Both worker advocates and gig employers have at times endorsed establishing an intermediate category of worker entitled to some of the protections of an employee,⁴⁵ but the intermediate category has proven to be an unsatisfactory compromise. Although Prop 22 classifies drivers as independent contractors, its grant of limited additional

40. California Assembly Bill 5 (AB 5), 2019 Cal A.B. 5. (codifying the ABC test).

41. Shiring Ghaffary, *Uber and Lyft Say They Don't Plan to Reclassify Their Drivers as Employees*, Vox (Sept. 11, 2019, 6:50 PM), <https://www.vox.com/2019/9/11/20861599/ab-5-uber-lyft-drivers-contractors-reclassify-employees>.

42. *California: Prop 22 Strips Gig Workers of Minimum Wage*, HUM. RTS. WATCH (Nov. 9, 2020, 10:38 AM), hrw.org/news/2020/11/09/california-prop-22-strips-gig-workers-minimum-wage. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative*, BALLOTPEDIA (2020), [ballotpedia.org/California_Proposition_22,App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](http://ballotpedia.org/California_Proposition_22,App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)).

43. *California Proposition 22*, *supra* note 42.

44. Prop 22's implementation has been at least temporarily stalled by a lower court ruling that ruled the ballot initiative unconstitutional. *Castellanos v. California*, No. RG21088725 (Cal. Super. Ct. Aug. 20, 2021).

45. See, e.g., Kennedy, *supra* note 24; Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2016). Abbey Stemler, *Between and Between: Regulating the Shared Economy*, 43 *FORDHAM URB. L.J.* 31 (2016).

protections effectively shoehorns a weak intermediate category into California law. Intermediate categories in other countries' laws produce perverse incentives, in some cases providing a desirable alternative to employee status with the result of accelerated reclassification of workers. Spain's recently established intermediate category offers almost full employee rights, and as a result businesses have largely avoided it.⁴⁶ The intermediate category established in Italy in 1973 grants very few rights above independent contractor status, leading to arbitrage of former employees into the category.⁴⁷ Such a classification system risks legitimizing and codifying the current system of hyper-exploitation of dependent contractors while incentivizing further contracting out and reclassification.⁴⁸ Italian legislators have responded by creating a default presumption of employee status, but this has led to increased costs and bureaucracy.⁴⁹

Prop 22 has emboldened gig company investors, who see in it a broadly replicable model for the reorganization of U.S. industry. The growth of rideshare and delivery driver apps displaces taxi drivers, other ride services, restaurant workers, and grocery workers. However, the Uber Model may reach much further if Prop 22–inspired legislation can proliferate a non-industry-specific intermediate category. Since its passage, Uber has launched an initiative called IC+ with the purpose of passing similar laws nationwide.⁵⁰ In states that currently award unemployment insurance to deactivated drivers, such as New York,⁵¹ IC+ legislation could be a way of evading these marginal costs.⁵² In states considering legislation similar to California's AB 5, IC+ is a ready-made compromise that stymies progressive legislation without costing gig companies too much. Not every state's laws can be subverted through two hundred million-dollar ballot ini-

46. Cherry & Aloisi, *supra* note 24, at 667–75.

47. *Id.* at 656–67.

48. Sunshine, *supra* note 24.

49. Cherry & Aloisi, *supra* note 24, at 682–84.

50. Edward Ongweso Jr., *What Is 'IC+', Uber's New Plan to Warp Labor Laws Nationwide?*, MOTHERBOARD: TECH BY VICE (Nov. 19, 2020), <https://www.vice.com/en/article/akdvpa/what-is-ic-ubers-new-plan-to-warp-labor-laws-nationwide>.

51. *In re Vega*, 149 N.E.3d 401 (N.Y. 2020) (affirming decision of the Unemployment Insurance Appeal Board classifying Postmates delivery drivers as employees); *In re Lowry*, 139 N.Y.S.3d 238 (N.Y. App. Div. 2020) (affirming UI Appeal Board decision classifying Uber drivers in Upstate New York as employees).

52. The first attempt to bring IC+-type legislation to New York imploded spectacularly, as the proposed bill's sponsor withdrew her support in the face of public backlash. Josefa Velasquez & Claudia Irizarry Aponte, *Big Tech-Backed Gig Worker Union Bill Fails to Get in Gear in Albany*, THE CITY (June 8, 2021), available at <https://www.thecity.nyc/work/2021/6/8/22525270/gig-worker-union-bill-fails-albany>.

tatives, but gig company lobbyists can achieve similar ends, particularly in states with legislatures less liberal than California's.

Gig companies recognize base-level employment protections as an affordable compromise so long as workers cannot negotiate collectively for something better. Even employee status without the right to a union, as was briefly the status of gig workers under AB 5, is only a Band-Aid for protecting workers. The cruel and patriarchal dynamics of "domestic servile relations" were imprinted into early formulations of the industrial employment relationship and remain embedded there today.⁵³ This hierarchy, manifest in the legally reinforced power imbalance between employers and employees, has as its status quo the feudal presumption of near-limitless employer power to surveil, discipline, and terminate. Discrimination laws regulate some of the most egregious abuses of power, while unemployment insurance and workers' compensation laws mitigate some of the harm of losing the ability to work, but alone, the employee wields little more power in the workplace than the dependent contractor.

The value of employee status is inclusion in the legal framework of collective bargaining law and the protected right to organize. Union contracts almost always provide for just cause termination, preventing arbitrary, discriminatory, or retaliatory termination. They also provide for seniority, progressive wage scales, severance, layoff protections, and other terms generally not offered by non-union firms. However, the true benefit of the right to organize and bargain collectively is not in the terms of a collective bargaining contract but in the ability of workers to confront their employer as a collective entity of comparable influence. Where one employee is powerless, many together wield sufficient economic power to reorder the employment relationship.

Employment regulations offer a means to set minimum standards and protections for gig workers, but they fall short when they cannot be vindicated and expanded upon through the right to organize and bargain collectively. Workers must be free to exercise the right to assemble for their mutual aid and protection. It is on this issue that the gig economy and contingent labor represent as much a failure of anti-trust law as of labor law.

D. Antitrust Law and Gig Worker Collective Action

Antitrust law is designed to break up otherwise unchallengeable concentrations of economic power and to protect competition from the

53. Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315 (2014).

anti-competitive coordination of large firms. In its 20th- and 21st-century orientations, it is concerned not just with large firms' economic domination of markets but also with fair competition and the harmful effects that redound to consumers. However, the Sherman Act—the foundational law of U.S. antitrust—is treated as a common law statute, with a broad interpretative delegation to the judiciary.⁵⁴ And conservative courts have rarely missed an opportunity to steer antitrust law into the path of worker collective action, even despite repeated contrary declarations of congressional intent.⁵⁵

“[T]he labor of a human being is not a commodity or article of commerce.” This forceful statement of the dignity of labor prefaces Section 6 of the 1914 Clayton Act,⁵⁶ which Congress passed with the purpose of exempting labor unions from antitrust liability. Contemporary labor leaders augured Section 6 would be “the dawn of labor’s freedom from industrial feudalism.”⁵⁷ New York and California incorporated equivalent provisions into their respective antitrust laws,⁵⁸ and New York even added the declaration into its state constitution in 1938,⁵⁹ guaranteeing the fundamental right to a union to all *employees*.

With the development of the labor law and employees’ exemption from antitrust law, a legal divide formed between the collective action of employees and that of independent contractors. Although the Supreme Court construed the Clayton labor exemption narrowly,⁶⁰ the adoption of comprehensive labor law in the New Deal period largely assuaged the threat of antitrust enforcement for workers classified as employees who organized collectively. The National Labor Relations Act protects most workers’ collective bargaining rights, preempting antitrust law’s application to covered employees. However, for workers classified as independent contractors, neither the NLRA nor the

54. See discussion in Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 *YALE L.J.* 175 (2021).

55. Paul, *supra* note 3, at 1020–1033.

56. 15 U.S.C. § 17 (Antitrust laws not applicable to labor organizations).

57. *Editorial Notes*, 39 *CIGAR MAKERS OFFICIAL JOURNAL* 5 (Sept. 1915), quoted without attribution in Edwin E. Witte, *The Doctrine That Labor Is a Commodity*, 69 *ANNALS AM. AC. POL. SCI. & SOC. SCI.* 133 (1917).

58. N.Y. GEN. BUS. LAW § 340-4 (Consol. 2021); CAL. BUS. & PROF. CODE § 16703 (West 2021).

59. N.Y. CONST. art. 1, § 17.

60. *Paine Lumber Co. v. Neal*, 244 U.S. 459, 483–84 (1917) (limiting Section 6 protection to lawful and legitimate activities, construed narrowly); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 468–69 (1921) (ruling Section 6 did not preempt an injunction against union secondary activity); *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n of North America*, 274 U.S. 37 (1927).

labor exemption apply. To the extent that they organize for mutual aid and protection, they do so under threat of criminal and civil sanctions.

Gig workers, like all workers, would be most capable of improving their wages and conditions of employment if they were able to negotiate collectively with their employers. However, independent contractors' collective action—whether withholding labor or negotiating with employers—violates the dominant judicial interpretation of federal antitrust law.⁶¹ Courts have interpreted federal antitrust law's labor exemption as not reaching the labor of independent contractors. The Supreme Court has enjoined attempts by unions of independent contractors to negotiate since the 1940s.⁶² More recently, the Supreme Court found non-employee workers' collective action constituted illegal cartel activity, subject to criminal sanctions.⁶³ The Federal Trade Commission (FTC) has challenged collective action by doctors, lawyers, musicians, and athletic instructors.⁶⁴

New York and California courts interpreting their respective anti-trust laws' labor exemptions have interpreted them to cover some dependent contractors, although they do not provide protection from federal antitrust law. The New York Court of Appeals applied the "workingmen" labor exemption⁶⁵ in the Donnelly Act, the state's anti-trust law, to independent contractors in the 1946 case *People v. Gassman*.⁶⁶ The court reasoned that while unionized independent laundry drivers were not employees for purposes of state labor law or the state constitution, they were nonetheless "workingmen," exempted from anti-trust liability for their lawful collective action.⁶⁷ California's Cartwright Act, an antitrust law especially concerned with corporate

61. Paul, *supra* note 3; Steinbaum, *supra* note 3, at 57–61; Sandeep Vaheesan, *How Contemporary Antitrust Robs Workers of Power*, L. & POL. ECON. BLOG (July 19, 2018), [lpeblog.org/2018/07/19/how-contemporary-antitrust-robs-workers-of-power/](http://peblog.org/2018/07/19/how-contemporary-antitrust-robs-workers-of-power/).

62. *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942) (enjoining price negotiations by a union of independent fishermen); *L.A. Meat & Provision Drivers Union, Loc. 626 v. United States*, 371 U.S. 94 (1962) (ordering a union to expel independent contractor "grease peddlers" and enjoining related practices).

63. *FTC v. Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411 (1990).

64. Vaheesan, *supra* note 61.

65. N.Y. GEN. BUS. LAW § 340 (Consol. 2021).

66. 295 N.Y. 254, 260–61 (1946).

67. *Id.* *Gassman* was cited several times to protect independent contractors from Donnelly Act liability. *See Singer v. Kirsch Beverages*, 65 N.Y.S.2d 400, 402 (N.Y. App. Div. 2d Dep't. 1946) (finding independent contractor peddlers "are proper subjects for unionization"); *Ardita v. Bright*, 129 N.Y.S.2d 895 (N.Y. App. Div. 2d Dep't. 1954) (mem.) (finding theater performers to be "workingmen" following *Gassman*); *but see Arnold Bakers, Inc. v. Strauss*, 153 N.Y.S.2d 999 (App. Div. 2d Dep't. 1956) (finding distributors to be entrepreneurs and distinguishing *Gassman*); 317 U.S. 341 (1943).

concentration, exempts labor as well as farmers and some small businesses from liability.⁶⁸ In the 1950s, a state appellate court applied the Cartwright Act's labor exemption to dependent contractor bakery drivers with a citation to *Gassman*.⁶⁹ In *Messner v. Journeyman Barbers*, Justice Traynor found that the Cartwright Act labor exemption protected independent contractor barbers who picketed a barber shop for refusing to sign a minimum price and wage contract.⁷⁰ However, the *Gassman* and *Messner* decisions provide no safe harbor for gig workers attempting to bargain collectively; they may protect workers from state antitrust law, but state court decisions interpreting state antitrust law have no bearing on federal courts' interpretation of the Sherman Act.

Another potential means of evading antitrust liability and erecting an infrastructure for dependent contractor collective bargaining lies in antitrust law's state-action exemption. In *Parker v. Brown*,⁷¹ the Supreme Court introduced a new exemption to antitrust law: state-action immunity. The Court has subsequently applied state-action immunity to "nonstate actors carrying out the State's regulatory program."⁷² If individual states establish collective bargaining regimes for gig workers classified as independent contractors, and if the states are themselves heavily involved in the operation of these systems, they may be able to create a bargaining system for gig worker unions without rendering those unions subject to antitrust enforcement.

The most notable, although unsuccessful, attempt to legislate a government-mediated collective bargaining system for gig workers launched in Seattle in December 2015. That month, the Seattle City Council enacted an ordinance establishing a collective bargaining infrastructure for rideshare and taxi drivers classified as independent contractors.⁷³ The ordinance's collective bargaining system bore little resemblance to the NLRA, with substantial involvement from city officials in the certification and bargaining processes. Uber and others challenged the ordinance in *Chamber of Commerce v. City of Seattle*⁷⁴

68. CAL. BUS. & PROF. CODE § 16703 (West 2021) (Exclusion of Labor) ("Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity.").

69. Los Angeles Pie Bakers Ass'n v. Bakery Drivers Loc. No. 276, 122 Cal. App. 2d 237, 241 (1953).

70. *Messner v. Journeyman Barbers*, 53 Cal. 2d 873 (1960). *Messner* was more recently applied to uphold collective negotiations by California dentists. *California Dental Ass'n v. California Dental Hygienists' Ass'n*, 222 Cal. App. 3d 49, 64 (Ct. App. 1990).

71. 317 U.S. 341 (1943).

72. *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013).

73. Seattle, Wash., Ordinance 124968 (Dec. 23, 2015).

74. 890 F.3d 769, 775 (9th Cir. 2018).

on antitrust and labor law preemption grounds. The Ninth Circuit rejected the labor law preemption claim, analogizing independent contractors to farmworkers and other workers over whom the NLRB lacks jurisdiction.⁷⁵ However, the court invalidated the ordinance as preempted by federal antitrust law, ruling that state-action immunity does not apply to city ordinances.⁷⁶

The Seattle ordinance presents a tempting but inadequate roadmap for states to legislate collective bargaining regimes for gig workers.⁷⁷ It has not survived judicial review, rendering it legally tenuous. A 2015 Supreme Court case finding that a state-sanctioned board of dentists did not receive state-action immunity indicates the exemption's narrow applicability.⁷⁸ The Seattle model is also industry-specific and thus not easily adapted to newly emerging gig fields. And, most importantly, it requires significant state involvement, weakening unions' role. This takes the initiative out of workers' hands to organize and work together, radically reducing their involvement in establishing the bargaining unit and negotiating a contract. Without this initial input, unions become unaccountable service providers rather than collective expressions of the will of their constituents.

Gig employers wield antitrust as a bludgeon to dissuade their workers from organizing. Even if workers succeed in organizing independently, they could be enjoined, fined, jailed, or ordered to pay unreasonable sums in restitution under the liberal remedies available through antitrust law. Employment regulations and labor law have

75. *Id.* at 793. The farmworker analogy may not be as strong as the court suggested. The exclusions of farmworkers and domestic workers resulted from a pragmatic compromise with Southern Democrats who sought to exclude majority-Black professions from labor law's coverage. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. J. 95, 96 (2011). The exclusion of independent contractors, added to the NLRA by the 1947 Taft-Hartley Act, could be read as manifesting an affirmative policy of preserving the independent contractor relationship separate from federal or state labor law. However, for a court that did not adopt this view, see *Baggett Transp. Co. v. Int'l Brotherhood of Teamsters*, 289 Ala. 666 (1972) (rejecting claim of NLRA preemption of state labor law regulation of independent contractors).

76. 890 F.3d at 783. See discussion in William B. Gould IV, *Dynamex is Dynamite, but Epic Systems is its Foil – Chamber of Commerce: The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 1020–23 (2018); Jacob Aleknavicius, *On-Demand Drivers and the Right to Collective Bargaining: Why Seattle's Ordinance Does Not Violate Federal Antitrust Laws*, 95 CHI.-KENT L. REV. 299 (2020).

77. For arguments in favor of the Seattle model, see Gould, *supra* note 76, at 1025; Eugene K. Kim, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 YALE L.J. 428, 461–475 (2020).

78. *North Carolina State Bd. of Dental Exam'rs v. F.T.C.*, 574 U.S. 494 (2015).

failed to resolve the situation. However, a means of effective gig economy regulation lies dormant in antitrust law.

II.

THE LAWS THAT GOVERN CORPORATE CONCENTRATION AND CONTROL

This Part illustrates the potential and the failure of antitrust law to stymie the development of the gig economy through its prohibition on corporate exercise of vertical restraints. It begins by explaining how conservative courts impaired federal antitrust enforcement through the adoption of an ineffectual standard of review. It then shows how the resulting lax prosecutorial regime enabled the development of the gig economy. The Uber Model relies on vertical price-fixing and non-price vertical restraints, both of which are effectively legalized under the prevailing federal antitrust regime. The subsequent sections outline the potential divergence between state and federal antitrust law to suggest that New York and California are in a position to reassert a firm standard of review for vertical restraints. The final section assesses how the Uber Model would fare subject to aggressive enforcement of each state's antitrust laws.

A. *The Law of Vertical Restraints on Trade*

In antitrust law, vertical restraints on trade are restrictions on the autonomy of one party imposed through contract by another party in the supply chain. The case law typically divides vertical restraints into two categories: vertical price-fixing and non-price vertical restraints. Both types of vertical restraints achieve many of the same anti-competitive effects of the better-known horizontal restraints—coordination between competitor firms⁷⁹—but through the exercise of a single firm's coercive power. Antitrust scholars and judges typically frame the economic impact of vertical restraints in terms of their effect on consumers, horizontal competitors, or the abstract concept of competition, but when contracting parties wield vastly unequal bargaining power, vertical restraints can harm the weaker contracting party too. A monopolist firm can contract with subordinate firms or independent contractors to shift market risk, liability, and regulatory obligations onto their backs while fixing low prices and requiring exclusive sales

79. It is not a settled matter whether the pricing algorithm inherent in the Uber Model constitutes illegal *horizontal* price-fixing. For a comparison of the *Meyer v. Kalanick* case, discussed *infra*, and the Seattle model, discussed *supra*, elaborating on the “firm exemption,” see Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65 (2019).

of the principal's other inferior products. It is this practice that the Supreme Court once recognized as unlawful under the Sherman Act, and it is the same practice that enables Uber Model employers to evade labor laws while nonetheless setting fare prices and controlling gig workers' routes, hours, and other behavior.

As an initial framing observation, the language of power relations—for example, “domination,” “subordination,” and “bargaining”—employed in this Note, while common in discussions of labor law, is largely alien to modern antitrust discourse. Today's courts, infected with the sophistic economism of Richard Posner, Robert Bork, and the Chicago School,⁸⁰ have interpreted antitrust law as a lubricant of consumer-oriented competition, and one only to be applied sparingly. However, a growing literature documents how courts' application of antitrust law has divorced it from its purpose, ignoring the text of antitrust statutes when inconvenient to the needs of big business.⁸¹ The traditional, although contested, narrative of the origins of federal antitrust law presents moderate Republicans passing the Sherman Act to stave off the growing militancy and influence of the Populist movement and other progressive advocates for antimonopoly laws.⁸² But markedly absent in discussions of the Sherman Act is any acknowledgment of what motivated the antimonopolists: fury and despair at rapidly consolidating industrial capitalism, economic inequality, and rural poverty.⁸³ Antimonopolists did not seek to facilitate capitalism; many sought its abolition.⁸⁴ Of course, the antitrust law that Congress enacted was a shadow of the antimonopolists' radical vision, but in its

80. Ariel Katz, *The Chicago School and the Forgotten Political Dimension of Antitrust Law*, 87 U. CHI. L. REV. 413 (2020).

81. Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); Tim Wu, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 (2021); Paul *supra* note 54.

82. HANS THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 58–60 (1955), discussed in George R. Stigler, *The Origin of the Sherman Act*, 14 J. L. STUD. 1, 1–3 (1985) (attempting and largely failing to demonstrate that the passage of the Sherman Act was the product of congressmembers' self-interest).

83. DAVID R. BERMAN, *RADICALISM IN THE MOUNTAIN WEST, 1890–1920: SOCIALISTS, POPULISTS, MINERS, AND WOBBLIES* 40 (2007) (“The preamble to the [1892 Populist Party] platform referred to the United States as a nation where ‘the fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few.’ To the Populists, this land of ‘tramps and millionaires’ was on the ‘verge of moral, political, and material ruin.’”).

84. On the Populists' sympathy for socialism, see JOHN S. McCORMICK & JOHN SILLITO, *A HISTORY OF UTAH RADICALISM: STARTLING, SOCIALISTIC, AND DECIDEDLY REVOLUTIONARY* 29–30 (2011).

rejection of corporate concentration and coordination, the Sherman Act carries the germ of a progressive challenge to corporate domination. Progressive antitrust scholars and lawyers can and should reclaim the subversive language of the antimonopolists in interpreting and characterizing antitrust law.

Forceful opposition to corporate manipulation of prices, albeit in tepid language, animated the Supreme Court's treatment of vertical restraints in its earliest cases. In the foundational case of *Dr. Miles*,⁸⁵ the Court established a *per se* prohibition on vertical price-fixing agreements. For most of the 20th century, the Court recognized vertical price-fixing as a *per se* antitrust violation,⁸⁶ and for a brief period it treated some non-price vertical restraints the same.⁸⁷

Some of the most significant case law in the field of price and non-price vertical restraints developed in the prosecution of monopolist oil suppliers and their coercive contracts with gas station lessees.⁸⁸ Oil companies would lease gas stations to independent contractors under a contract that required them to exclusively purchase gasoline and other products from the oil company and that sometimes set the price at which the gas would be sold to consumers. The Supreme Court struck down such exclusivity contracts as illegal vertical restraints on trade in *Standard Oil*.⁸⁹ Oil suppliers then sought to evade antitrust liability by classifying lessees as their agents but not their employees. The Supreme Court upheld a district court's finding in *Richfield Oil* that suppliers could not skirt the law by classifying franchisees as their non-employee agents.⁹⁰ In *Union Oil*,⁹¹ the Court also rejected a lease-consignment agreement in which an oil company assigned a lease to an independent contractor and in exchange set the price at which its oil would be sold. The Court found that Union Oil's price-fixing constituted a *per se* antitrust violation.⁹²

85. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

86. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (identifying "raising, depressing, fixing, pegging, or stabilizing the price of a commodity" as *per se* illegal restraints); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (applying *Socony-Vacuum* to agreements fixing maximum prices).

87. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (prohibiting exclusivity contracts and other non-price vertical restraints).

88. Notably, Arthurs cites to "economically vulnerable lessees of . . . gas stations" as an example of dependent contractors in need of the right to bargain collectively. Arthurs, *supra* note 4.

89. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

90. *United States v. Richfield Oil Co.*, 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd*, 343 U.S. 922 (1952).

91. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

92. *Id.* at 24.

Although the Uber Model implicates a different type of vertical price-fixing, most recent case law on vertical price restraints deals with resale price maintenance (RPM). RPM agreements involve a supplier corporation dictating a maximum, minimum, range, or exact price for the retail sale of its product. RPM agreements present their own complex effects and incentives, and progressive jurists have at times favored proprietary associations' use of RPM agreements to challenge anti-competitive price-cutting firms.⁹³ However, when a dominant supplier or retailer fixes prices, it can shift risk costs onto those parties, prevent new entrants to the market, inhibit intrabrand competition, and raise consumer prices.⁹⁴

The field of antitrust law was redefined by the publication of Robert Bork's *The Antitrust Paradox*⁹⁵ in 1978. Bork characterized contemporary antitrust enforcement as overly strict, leading to what his acolytes now denigrate as antitrust law's "inhospitality tradition."⁹⁶ Bork argued that modern organizational economics contradicted antitrust law's prohibitions and that courts should evaluate vertical restraints under the "rule of reason," which courts already applied in other areas of antitrust law where a practice could not be considered inherently anti-competitive.⁹⁷

Bork's writings precipitated a rapid reorganization of antitrust enforcement and jurisprudence, particularly in the field of vertical restraints,⁹⁸ and the *per se* ban on territorial and customer non-price

93. Most notably, Louis Brandeis saw trade associations of small proprietors, even those that cooperatively set prices, as an allowable check on the growth of chain stores. See discussion in Laura Phillips Sawyer, *The U.S. Experiment with Fair Trade Laws: State Police Powers, Federal Antitrust, and the Politics of "Fairness," 1890-1938* (Harv. Bus. School, Working Paper No. 16-060, 2015), hbs.edu/ris/Publication%20Files/16-060_a118e81a-e5b5-477e-ac3c-40761c98fd8.pdf.

94. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: the Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 283-84 (2017); Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONSUMER L. REV. 32 (2007).

95. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

96. Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L. J. 953, 954 (2014).

97. Bork, *supra* note 95, at 66.

98. This shift is detailed in D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, The Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014). Sokol considers not only vertical price-fixing and non-price vertical restraints but also Robinson-Patman Act cases, under which a distributor firm may be found to have engaged in illegal anti-competitive behavior by adopting discriminatory pricing as to its retailers. While not discussed here, Robinson-Patman cases have followed the same pattern of other vertical restraints—rapid decline in enforcement and the imposition of an almost insurmountable burden on plaintiffs leading to extremely

vertical restraints was the first domino to fall. In the final years of aggressive antitrust enforcement, the Supreme Court in *Arnold, Schwinn* declared that exclusivity contracts constitute *per se* antitrust violations unless the supplier retains title to the resale goods, as in a consignment agreement, thereby effectively prohibiting at least some non-price vertical restraints.⁹⁹ Some on the Court feared that a *per se* ban on territorial restraints would harm franchisees and contractors by forcing principals to reclassify them as employees, but their concerns were short-lived.¹⁰⁰ A decade later, in *Sylvania*,¹⁰¹ the Court relied on Bork's writing in overturning the *per se* ban on non-price vertical restraints. The Court found persuasive the argument that non-price vertical restraints could stimulate competition through increased efficiency and avoidance of the "free rider" effect.¹⁰²

The Supreme Court gradually eroded vertical price-fixing's *per se* illegality over the final decades of the 20th century.¹⁰³ In *Monsanto*, the Court added to plaintiffs' evidentiary burden in proving vertical price-fixing.¹⁰⁴ *Sharp Electronics* narrowed the anti-competitive effects considered in challenges to RPM agreements to interbrand, as opposed to intrabrand, competition.¹⁰⁵ In other words, competition with horizontal competitors remains relevant to the rule of reason inquiry, but a product's price competition between its multiple vendors is not. *Sharp Electronics* also in effect overturned *Simpson v. Union Oil*,¹⁰⁶ which had prohibited the use of consignment relationships to price fix sales of goods by retailers classified as agents.¹⁰⁷ In *State*

rare showings of anti-competitive effect. See Ryan Luchs et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 MGMT. SCI. 2123 (2010). For a discussion of why Uber's surge pricing does not violate the Robinson-Patman Act because it is a service and not a commodity, see Keyawna Griffith, *The Uber Loop-hole That Protects Surge Pricing*, 26 VA. J. SOC. POL'Y & L. 34 (2019).

99. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

100. See *id.* at 388–89 (Stewart, J., concurring in part and dissenting in part).

101. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (citing Bork five times).

102. *Id.* at 54–56.

103. See discussion in Christopher S. Kelly, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.: The Final Blow to the Use of Per Se Rules in Judging Vertical Restraints – Why the Court Got It Wrong*, 28 N. ILL. U. L. REV. 593, 608 (2008); Jeffrey L. Harrison, *Dr. Miles's Orphans: Vertical Conspiracy and Consignment in the Wake of Leegin*, 45 WAKE FOREST L. REV. 1125, 1140–43 (2010).

104. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762–64 (1984) (noting that price and non-price vertical restraints are "in many, but not all, cases similar or identical").

105. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (stating that anti-trust is primarily concerned with interbrand and not intrabrand competition).

106. 377 U.S. 13 (1964).

107. See *id.* at 21–24.

Oil,¹⁰⁸ the Court overruled the *per se* illegality of maximum RPM agreements, which the Court characterized as potentially pro-competitive and beneficial to consumers. Ten years later, in the controversial *Leegin*¹⁰⁹ decision, the Court ended the nearly century-old *per se* illegality of minimum RPM agreements.¹¹⁰

The Supreme Court's *Sylvania*, *State Oil*, and *Leegin* decisions did not fully legalize any vertical restraints on trade, but by substituting the rule of reason for *per se* prohibition, these decisions rendered most challenges to vertical restraints costly, unpredictable, and fruitless. The rule of reason test requires courts to engage in the task of weighing "destruction of competition in one sector . . . against promotion of competition in another sector."¹¹¹ The party challenging a vertical restraint has the initial burden of demonstrating that it has an anti-competitive effect. The defendant can then introduce evidence of pro-competitive effects. Liability turns on a weighing of the effects.¹¹² The test is hopelessly speculative and arduous to satisfy, and it makes antitrust litigation expensive and ineffective.¹¹³ A 1992 study found

108. *State Oil Co. v. Khan*, 522 U.S. 3 (1997). *State Oil* effectively ended maximum RPM enforcement. From the date of the *State Oil* decision to 2014, only six maximum RPM cases were brought, none successfully. Sokol, *supra* note 98 at 1010.

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

110. Lance McMillian argues persuasively that the Court exceeded its proper role by overruling explicit congressional intent expressed in the 1975 Consumer Goods Pricing Act. See Lance McMillian, *The Proper Role of Courts: The Mistakes of the Supreme Court in Leegin*, 2008 WIS. L. REV. 405 (2008).

111. Mark E. Roszkowski, *The Sad Legacy of GTE Sylvania and Its "Rule of Reason": The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 154 (1989) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

112. Without the Supreme Court's imprimatur, some lower courts have abandoned balancing in favor of what began as a pro-plaintiff supplement: the less restrictive alternative (LRA) test. When the defendant has demonstrated pro-competitive effects, the plaintiff can still win on a § 1 claim by demonstrating that the same beneficial effects could be achieved through a less restrictive alternative. LRAs are difficult to prove and are held to a strict standard. By ignoring balancing and requiring the plaintiff to show an LRA, these courts' application of the rule of reason test can be particularly unfavorable to plaintiffs. See C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 941–42 (2016); Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 587–88 (2009); Gabe Feldman, *The Demise of the Rule of Reason*, 24 LEWIS & CLARK L. REV. 951 (2020).

113. Alan M. Barr, *Antitrust Federalism in Action—State Challenges to Vertical Price Fixing in the Post-Leegin World*, ANTITRUST SOURCE, Dec. 2009, at 1, 2. For an article-length critique of the rule of reason, see Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009) (concluding that the rule of reason, at least as it is currently applied, renders the law unenforceable). See also Nicole McGuire, *An Antitrust Narcotic: How the Rule of Reason Is Lulling Vertical Enforcement to Sleep*, 45 LOY. L.A. L. REV. 1225 (2012).

that in 90 percent of cases citing *Sylvania*, likely comprising the vast majority of non-price vertical restraint federal antitrust cases, the defendants were successful.¹¹⁴ Subsequent studies of cases turning on the rule of reason showed that between 1977 and 1999, plaintiffs succeeded in demonstrating anti-competitive effects in just 16 percent of cases; between 1999 and 2009, plaintiffs demonstrated anti-competitive effects in only 3 percent of cases.¹¹⁵ Even if minimum RPM cases prove more successful under the rule of reason, it has proven an impenetrable barrier to the litigation of most vertical restraint claims.

The reorientation of antitrust law toward a blinkered consumer welfare prescription and the enforcement-impeding rule of reason standard has set the stage for massive conglomerates to dominate U.S. and international markets. It has catalyzed the proliferation of anti-competitive business models, hegemonic corporations' capture of regulatory agencies and politicians, and spiking wealth inequality.¹¹⁶ And in its abdication of its role in policing vertical restraints on trade, anti-trust law has fostered the perfect conditions for the development of the gig economy.

B. Vertical Restraints and the Gig Economy

As the rule of reason opened the door to unchecked vertical restraints, large firms discovered new means to operate strict controls over non-employee agents, widening the gap between labor and anti-trust law. This development incentivized firms to reclassify employees as independent contractors and to outsource labor to subordinate firms.¹¹⁷ The Uber Model is the latest and most pernicious outgrowth of vertical restraint nonenforcement.

114. Sokol, *supra* note 98, at 1011 (citing Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1991)).

115. Sokol, *supra* note 98, at 1011–12 (citing Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 (1999) (citing Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009)).

116. Khan & Vaheesan, *supra* note 94, at 236–38.

117. This phenomenon is sometimes called “fissuring,” a term invented by labor policy expert David Weil to characterize the self-reproducing aspect of the practice. Once a firm begins to contract out or reclassify labor, incentives grow to fissure further. Fissuring reduces labor costs by evading employment regulations and frustrating collective bargaining. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014). *See also* Steinbaum, *supra* note 3 at 46–48; David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RUSSELL SAGE FOUND. J. SOC. SCI., no. 5, Dec. 2019, at 147, 151 (estimating that 19% of private sector workers labor in “industries where fissured arrangements predominate”). The erosion of vertical restraints enforcement is directly tied to fissuring’s ubiquity. Paul, *supra* note 79.

Uber is a functional rideshare service only to the extent that it can provide riders with cheap and numerous drivers, and to do this it exercises certain controls over drivers whose ostensible independence is the hallmark of their non-employee status. Sociologist Alex Rosenblat and researcher Luke Stark have documented how Uber manipulates app-based information asymmetries to control drivers.¹¹⁸ Drivers are not given sufficient information prior to accepting a ride to determine whether it will be profitable, and in cases where they accept an unprofitable ride—for example, because the distance required to reach the rider exceeds the length of the trip—cancellation can lead to deactivation.¹¹⁹ Uber’s related practice of surge pricing—geographically specific temporarily inflated prices to entice drivers to travel to zones where demand outstrips supply—allocates labor while shifting the cost of relocation onto drivers, who are not compensated for their travel time. These practices are part of a dystopian regime of algorithmic management beyond the scope of this Note but deftly characterized in Rosenblat’s recent book *Uberland*.¹²⁰

Uber exercises a vertical price restraint by setting the trip fare charged to a rider and the fee paid to a driver. Uber casts itself as an intermediary between independent drivers and their customers, but in price-fixing, it preempts any opportunity for competitive negotiation of prices between the ostensibly independent parties to the transaction. Uber’s pricing algorithm sets the price paid by the consumer based on an opaque set of factors, which include trip duration, distance, driver availability, and traffic.¹²¹ Some fraction of this fare is paid to drivers, but neither the driver nor the rider know the other party’s charge.

The Uber Model also implicates several non-price vertical restraints. Steinbaum identifies two non-price vertical restraints that Uber exercises over its drivers: surveillance and “non-linear driver pay structures.”¹²² Uber’s surveillance technologies allow both the company and the customer to monitor the driver’s chosen route in order to police “shirking,” the use of a circuitous route to artificially inflate a fare. Although this restraint can be understood as preventing dishonest business practices to the benefit of consumers, it also reduces drivers’ autonomy in their choice of route. Uber may discipline a driver with a

118. Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, 10 INT’L J. COMM. 3758, 3758 (2016).

119. *Id.* at 3762.

120. See generally ALEX ROSENBLAT, *UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK* (2018).

121. *How Uber’s Dynamic Pricing Model Works*, UBER: BLOG, <https://www.uber.com/en-GB/blog/uber-dynamic-pricing/> (last visited June 3, 2021).

122. Steinbaum, *supra* note 3, at 55–56.

reduced fare if the passenger complains of a circuitous route, even if the driver rerouted to avoid unreported traffic or construction obstructing the recommended route. Real or perceived app-based surveillance of driver activity even outside of work hours, as illustrated by the Lyft deactivation story in this Note's introduction, operates a level of control over driver behavior that would be objectionable even under an employment relationship.

Rideshare companies use complex and inscrutable compensation systems to encourage driver exclusivity and other behaviors. "Non-linear driver pay structures" refers to a system of bonuses designed to incentivize drivers to use the principal's app exclusively, rather than operating multiple rideshare apps simultaneously. Lyft drivers who achieve Platinum status based on rider ratings and frequency of use over a three-month period are rewarded with free roadside assistance, discounted tax software, and the ability to preview a ride's direction and distance before accepting.¹²³ Gig companies' reliance on customer reviews is problematic not least because it effectively outsources middle management to riders, producing a disciplinary regime marred by riders' implicit and explicit biases. However, non-linear driver pay structures also incentivize exclusivity, which is typically understood as a non-price vertical restraint. The use of driving hours in calculating rewards level induces drivers to drive exclusively or primarily for a single app. It is not an exclusivity contract, but it renders non-exclusivity impractical.

A challenge to Uber Model vertical restraints under federal anti-trust law has as an initial hurdle the definition of the market. In anti-trust law, markets are contested and sometimes counterintuitive. There is an absence of case law addressing vertical restraints in service provision, as such restraints were essentially infeasible before the advent of modern organizational templates like the Uber Model and the app technologies that enable them. However, this Note conceives of the Uber Model as analogizable to oil suppliers subordinating gas station lessees as their agents to sell gasoline to consumers. Under the Uber Model, the app-based company acts as a super-ordinate firm, dictating the terms by which its contractors—typically drivers—sell their services to consumers. The market is the provision of on-demand services, and the gig company is essentially selling the service directly to the consumer, but the Uber Model inserts the independent contractor as an artificial intermediary lacking the power to meaningfully negotiate with either party. A reviewing court may perceive the market simi-

123. Lyft, *supra* note 2.

larly, but there are alternative characterizations of the market that a court might also find persuasive.

Most ominous among the alternative market definitions is the Supreme Court's recent invention of the "two-sided market" and the "transaction platform" in its rejection of a challenge to "steering" provisions in American Express's contracts with retailers.¹²⁴ In *Ohio v. AmEx*, the majority was persuaded that contracts between AmEx and retailers prohibiting the latter from encouraging customers to use lower-fee credit cards had no anti-competitive effect because it did not demonstrably reduce output.¹²⁵ In other words, AmEx can, as it did, charge retailers exorbitant fees while denying them the opportunity to steer customers toward cheaper alternatives, and the Supreme Court will not find this anti-competitive unless a large enough number of retailers cease to accept AmEx and thus sacrifice thousands of dollars of business. This tortured logic has drawn harsh criticism from progressive antitrust scholars, who have variously characterized *Ohio v. AmEx* as "problematic,"¹²⁶ "ridiculous,"¹²⁷ "nonsense,"¹²⁸ and what "might be one of [the Supreme Court's] worst, most regrettable wrong turns in decades."¹²⁹ If *Ohio v. AmEx* remains good law—optimistic scholars speculate it may not¹³⁰—there is broad agreement that Uber would be recognized as a two-sided platform,¹³¹ which would likely lead to the dismissal of a vertical restraints challenge under the Sherman Act.

Even if, however, a vertical price-fixing challenge were to proceed under the more favorable market definition suggested above, the rule of reason presents another hurdle. Under *Dr. Miles*, which treated

124. See generally *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (Breyer, J., dissenting).

125. *Id.* at 2289–90.

126. Douglas Melamed, *The American Express Case: Back to the Future*, 18 *COLO. TECH. L. J.* 1, 14 (2020).

127. Tim Wu, Opinion, *The Supreme Court Devastates Antitrust Law*, *N.Y. TIMES* (June 26, 2018), <https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html>.

128. John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 *CARDOZO L. REV.* 1805, 1836 (2020).

129. Chris Sagers, *Platforms, American Express, and the Problem of Complexity in Antitrust*, 98 *NEB. L. REV.* 389, 389 (2019).

130. *Id.* at 393 (comparing the case to Justice Thomas's "weirdly illogical *Texaco v. Dagher*" decision, which was "rendered essentially irrelevant" a few years later).

131. See Melamed *supra* note 126, at 16; Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 *COLUM. BUS. L. REV.* 35, 39–40 (2019); Sanjana Parikh, *Defining the Market for Two-Sided Platforms: The Scope of Ohio v. American Express*, 34 *BERKELEY TECH. L. J.* 1305, 1329–32 (2019) (discussing Uber as a two-sided platform at length); Erik Hovenkamp, *Platform Antitrust*, 44 *J. CORP. L.* 713, 720 (2019).

vertical price-fixing as *per se* unlawful, Uber's pricing algorithm would be indefensible because it involves one party contractually imposing upon another party the price at which the subordinate party will sell its service. However, when the Supreme Court overruled *Dr. Miles* in 2007 in *Leegin*, it rendered most federal antitrust law challenges to vertical price-fixing futile. *Leegin* dealt with RPM agreements, while the Uber Model involves price-fixing in service provision, but the underlying economic justification for the Court's neutering of the law applies equally.¹³² In perhaps the most extensive analysis of the Uber Model's potential antitrust conflicts, Mark Anderson and Max Huffman dismiss typical vertical price restraints in less than a paragraph with a citation to *Leegin* and the rule of reason.¹³³

Fed through the woodchipper of rule of reason balancing, a challenge to Uber's price-fixing would splinter. Although the pricing algorithm undoubtedly suppresses intrabrand competition—price competition between drivers—it is also the means by which Uber engages in interbrand competition—competition with other rideshare companies, taxis, and similar service providers. If Uber can find a way to suggest that this has lowered prices for consumers or contributed to innovation, which it likely has in some sense, it can demonstrate an adequate pro-competitive effect. Depending on the jurisdiction, the court will then either balance the competitive effects or simply shift the burden back to the plaintiff to present a less restrictive alternative.¹³⁴ A vertical price-fixing claim might fare better in a balancing jurisdiction, where at least there is the opportunity to argue net-negative effects, but Uber's advocates appear confident that it could

132. The district court in *Meyer v. Kalanick*, discussed *infra*, questioned whether *Leegin* covers the Uber Model but nonetheless applied the rule of reason. 174 F. Supp. 3d 817, 826–27 (S.D.N.Y. 2016).

133. Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between*, 2017 COLUM. BUS. L. REV. 859, 902–03 (2017).

134. Strangely, both the Second and Ninth Circuits have flip-flopped on whether the LRA test replaces the net-effects test or supplements it. See *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001) (dismissing a claim for failure to demonstrate an LRA without balancing anti- and pro-competitive effects); *Hairston v. Pacific 10 Conf.*, 101 F.3d 1315, 1319 (9th Cir. 1996) (affirming district court's reliance on the LRA test as dispositive without reaching net-effects). *Contra* *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008) (addressing net-effects after considering LRAs); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159–60 (9th Cir. 2001) (balancing net-effects after considering LRAs). Cases drawn from Hemphill, *supra* note 112, at 976 n.242.

demonstrate substantially pro-competitive net-effects.¹³⁵ And the ability to present a less restrictive alternative is cold comfort, as these are typically held to the onerous standard of showing efficiency equal to or greater than that of the challenged restraint.¹³⁶ Although other means of controlling drivers and setting prices exist—employee status would be the most obvious—these are necessarily less efficient, at least in terms of Uber’s bottom line. For these reasons, the rule of reason likely forecloses a Sherman Act challenge to Uber’s price-fixing algorithm.

Courts applying the rule of reason are even less likely to find Uber’s non-price vertical restraints violative of the Sherman Act. Uber and other gig platforms employ dystopian surveillance systems to regulate workers’ behavior. Surveillance can prevent workers from taking actions that would increase their profits or provide entrepreneurial opportunities. However, as a non-price vertical restraint in the post-*Sylvania* legal regime, app-based surveillance, at least of driver routes, would almost certainly survive a challenge under rule of reason analysis because of its efficiency and benefit to riders. Uber and its competitors employ non-linear pay structures both to evaluate driver performance and to incentivize exclusivity. Under the rule of reason, this also likely survives challenge under federal antitrust law because of the near impossibility of demonstrating a harm to consumers when they wield so much power over drivers.

The Uber Model relies on a battery of vertical restraints to coerce and subordinate drivers. Not only do gig workers *economically* depend on the gig platforms with whom they contract, but also the platforms dictate the means, manner, and pricing of their work in much the same way federal antitrust law once treated as unlawful. If the contract becomes onerous, the rates too low, or the hours necessary to sustain benefits too long, drivers have no recourse to federal antitrust law to challenge the principal’s controls. Gig workers are simultaneously at the mercy of antitrust law’s sword and denied its shield.

C. *The Donnelly Act, the Cartwright Act, and Vertical Restraints*

In the wake of the *Leegin* decision, academics and practitioners pondered whether state-level antitrust laws might maintain the *per se*

135. Daniel Bitton, David Pearl & Patrick Shaw, *Let Me Ride: No Short-Cuts in the Antitrust Analysis of Ride Hailing*, 29 COMPETITION: J. CAL. L. ASSOC. ANTI., UCL & PRIVACY SEC. 20, no. 2, 2019, at 20, 31.

136. Hemphill, *supra* note 112, at 943.

illegality of minimum RPM agreements.¹³⁷ The same occurred after the *State Oil* decision,¹³⁸ although no states ultimately reasserted the *per se* illegality of maximum RPM agreements.¹³⁹ However, *Leegin* crossed a line, and some states have rejected the *Leegin* decision either through state law or through the courts. Maryland promptly amended its antitrust law to make minimum RPM agreements *per se* violations.¹⁴⁰ The Kansas Supreme Court reaffirmed the *per se* rule.¹⁴¹ New York and California were the states that most vociferously opposed *Leegin*'s effective legalization of minimum RPM agreements through adoption of the rule of reason.¹⁴² Both states' attorneys general quickly took action to convince courts not to impute the rule of reason to their state antitrust laws. More than a decade later, it remains unresolved what standard of review is applied to vertical price-fixing in these states, while non-price vertical restraints are subject to the rule of reason.

State antitrust laws often track federal courts' interpretations of their federal antitrust law analogues, but the Supreme Court has upheld states' right to enact contrary interpretations of their own laws. Earlier, in the same term in which it issued the *Sylvania* decision, the Supreme Court precluded "indirect purchasers" from recovering damages for antitrust violations in *Illinois Brick Co. v. Illinois*.¹⁴³ The specifics of indirect purchaser damage recovery are irrelevant to this Note, but it is significant that the decision was so unpopular among

137. See, e.g., Robert L. Hubbard, *Protecting Consumers Post-Leegin*, 22 ANTI-TRUST, no. 1, 2007 at 41; M. Russell Wofford, Jr. & Kristen C. Limarzi, *The Reach of Leegin: Will the States Resuscitate Dr. Miles?*, ANTI-TRUST SOURCE, Oct. 2007, at 1, https://appliedantitrust.com/23_rpm/leegin/leegin_comm/wofford_states_as10_2007.pdf; Joel M. Mitnick, John L. Lavelle, William V. Reiss & Owen H. Smith, *A Commentary on Current State Enforcement Policy for RPM on Life Support from Leeginaire's Disease: Can the States Resuscitate Dr. Miles?*, 22 ANTI-TRUST 63, 63 (2008); Barr, *supra* note 113.

138. See, e.g., Robert T. Joseph, *Vertical Maximum Price Fixing after State Oil Company v. Khan*, 37 FRANCHISE L.J. 73 (1998).

139. Wofford & Limarzi, *supra* note 137, at 4–5.

140. MD. CODE ANN. § 11-204(b). See discussion in Barr, *supra* note 113, at 4–5. For a critical take on the Maryland statute, see Katherine M. Brockmeyer, *State Regulation of Resale Price Maintenance on the Internet: The Constitutional Problems with the 2009 Amendment to the Maryland Antitrust Act*, 67 WASH. & LEE L. REV. 1111 (2010).

141. *O'Brien v. Leegin Creative Leather Products, Inc.*, 277 P.3d 1062 (Kan. 2012). The Kansas Supreme Court ruling was legislatively overturned a year later. See discussion in Michael A. Lindsay, *Repatching the Quilt: An Update on State RPM Laws*, ANTI-TRUST SOURCE, Feb. 2014, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb14_lindsay_2_20f.authcheckdam.pdf.

142. Michael A. Lindsay, *A Tale of Two Coasts: Recent RPM Enforcement in New York and California*, ANTI-TRUST SOURCE, Apr. 2011, at 1, 5.

143. 431 U.S. 720, 2075–76 (1977).

the states that at least thirty-six subsequently either amended their antitrust laws or read their existing statutes to allow indirect purchasers to recover damages.¹⁴⁴ The states' broader readings of their own antitrust laws were challenged in *California v. ARC America Corp.*, and the Supreme Court ruled that federal antitrust law does not preempt stricter or broader interpretations of state antitrust laws except under specific circumstances.¹⁴⁵

The decision in *ARC America* governs federal preemption analysis for state antitrust laws, and as applied to post-*Leegin* state vertical restraint enforcement, there is no risk of preemption.¹⁴⁶ The court considers (1) whether Congress has expressly preempted the state law, (2) whether the state law violates congressional policy manifest in federal law, and (3) whether federal law prohibits an action mandated by or made possible by the state law. To begin with, Congress has never passed legislation expressly preempting state antitrust law.¹⁴⁷ Nor does federal antitrust law manifest a policy against more restrictive state antitrust laws.¹⁴⁸ For a state antitrust law to be preempted, then, it would have to mandate actions prohibited by federal antitrust law. In post-*Leegin* cases, as in post-*Illinois Brick* cases, the states have avoided preemption because they were more prohibitive than federal law, not less.

New York and California are two of the most aggressive states in challenging monopolies and cartels. The New York Office of the Attorney General's Antitrust Bureau has expanded enforcement of state and federal antitrust law since federal enforcement, particularly against vertical restraints, dropped off in the Reagan era.¹⁴⁹ When the Federal Trade Commission released overly permissive Vertical Restraint Guidelines that did not reflect the case law, New York led the National Association of Attorneys General in releasing a competing stricter set of guidelines.¹⁵⁰ More recently, New York's Senate Deputy Majority Leader Mike Gianaris has introduced a bill titled the 21st

144. Barr, *supra* note 113, at 4.

145. 490 U.S. 93, 100–102 (1989).

146. See discussion in Barr, *supra* note 113, at 7–11.

147. *ARC America Corp.*, 490 U.S. 93, at 101–02.

148. *Id.* at 102 (noting “Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies”). In a blessed irony, Bork's antitrust revolution arguably saves this prong of the preemption test; because Bork achieved the legalization of vertical restraints through judicial imposition of the rule of reason, it cannot be said that state vertical restraint prohibitions violate congressional policy.

149. Edward D. Cavanaugh, *New York Antitrust Bureau Pursues Mandate to Represent State Interests in Fostering Competitive Environment*, 72 N.Y. STATE BAR ASS'N. J. 38, 38 (2000).

150. *Id.* at 40–41.

Century Antitrust Act that would reform the Donnelly Act in the mold of the European Union's more plaintiff-friendly competition laws. Although the act does not directly affect the law of vertical restraints, it would allow private parties to bring class-action challenges against violative firms.¹⁵¹ Meanwhile, the California Supreme Court has proudly differentiated the state's antitrust law from its federal counterpart: "The Cartwright Act is broader in range and deeper in reach than the Sherman Act."¹⁵²

Even before filing enforcement actions, the New York Attorney General's Antitrust Bureau declared the Donnelly Act unaffected by *Leegin*. Immediately following the decision, Antitrust Bureau Chief Jay L. Himes and Bureau Director of Litigation Robert L. Hubbard published articles arguing that minimum RPM agreements remained illegal under the Donnelly Act.¹⁵³ Prior to *Leegin*, New York courts applying the Donnelly Act treated vertical price-fixing as a *per se* violation.¹⁵⁴ However, the New York Court of Appeals has held that New York's Donnelly Act follows federal courts' interpretation of the Sherman Act unless there are differences in policy, statutory language, or legislative history.¹⁵⁵ In order to differentiate the Donnelly Act and avoid *Leegin*'s effects, Hubbard pointed to a statutory provision outside the Donnelly Act that declares all minimum RPM agreements void.¹⁵⁶ Hubbard argued that in light of the nonrecognition of minimum RPM agreements in Gen. Bus. Law § 369-a, New York courts should impute *per se* illegality into the Donnelly Act.¹⁵⁷

The New York attorney general subsequently filed several vertical restraint cases with mixed results. The first, charging furniture manufacturer Herman Miller with a *per se* illegal vertical price re-

151. Annie McDonough, *Can New York Lead the Nation on Antitrust Enforcement? City & State*, CITY & STATE N.Y.: TECH. (Sept. 13, 2020), <https://www.cityandstateny.com/articles/policy/technology/can-new-york-lead-nation-antitrust-enforcement.html>.

152. *Cianci v. Superior Court*, 710 P.2d 375 (Cal. 1985).

153. Hubbard, *supra* note 137; Jay L. Himes, *New York's Prohibition of Vertical Price Fixing*, N.Y.L.J. (Jan. 29, 2008), <https://www.law.com/newyorklawjournal/almID/1201514746895/?slreturn=20210505212926>.

154. *George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 770 N.Y.S.2d 235, 236 (N.Y. App. Div. 2003); *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 772-74 (S.D.N.Y. 1980); *Uniroyal, Inc. v. Jetco Auto Serv., Inc.*, 461 F. Supp. 350, 357 (S.D.N.Y. 1978).

155. *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1081 (N.Y. 2007); *People v. Rattenni*, 613 N.E.2d 166, 171 (1993); *Anheuser-Busch, Inc. v. Abrams*, 520 N.E.2d 535, 539 (N.Y. 1988).

156. N.Y. Gen. Bus. Law § 369-a.

157. Hubbard, *supra* note 137, at 43. For a contrary reading of the interaction of these two statutes, see Mitnick et al., *supra* note 137, at 66.

straint,¹⁵⁸ was settled for \$750,000 almost immediately.¹⁵⁹ In a series of subsequent private suits, a federal district court interpreted the Donnelly Act to have incorporated the rule of reason but acknowledged that the standard of review will remain an open question until New York courts rule on the matter.¹⁶⁰ A New York appellate court dismissed the attorney general's later case against Tempur-Pedic in 2012, citing to *Leegin* to suggest adoption of the rule of reason but dismissing on other grounds.¹⁶¹ These cases do not resolve New York courts' stance on the test for vertical price restraint lawfulness, but they suggest that Himes's argument that § 369-a implies *per se* illegality has not proven persuasive.

The California Attorney General's Office has tried to insulate the Cartwright Act's *per se* ban on minimum RPM agreements through enforcement action. In 1978 in *Mailand*,¹⁶² the California Supreme Court aligned the Cartwright Act with federal antitrust law, finding that minimum RPMs were *per se* unlawful. Three years after *Leegin*, California Attorney General Jerry Brown filed an enforcement action against Bioelements, a skin-care company, for price-fixing agreements it negotiated with spas and Internet retailers, arguing that *Mailand* was still and should remain the law of California.¹⁶³ However, the case was resolved through a consent decree.¹⁶⁴

Private actions under the Cartwright Act suggest that *Mailand* remains good law, although the California Supreme Court has yet to weigh in. A federal district court relied on *Mailand* in applying the *per se* rule to a private action because "there is no indication that prece-

158. Complaint, *State v. Herman Miller Inc.*, No. 08-2977 (S.D.N.Y. 2008), 2008 WL 2310292.

159. John R. Foote & Ernest N. Reddick, *Resale Price Maintenance after Leegin: Defense Perspective*, 22 *Competition: J. Anti. & Unfair Comp. L. Sec. St. Bar Cal.* 95 (2013).

160. *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc.*, 851 F. Supp. 2d 494 (S.D.N.Y. 2011); *WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc.*, No. 10 Civ. 3205(BSJ), 2011 WL 2565284 (S.D.N.Y. June 22, 2011); *Worldhomecenter.com, Inc. v. KWC Am., Inc.*, No. 10 Civ. 7781 (NRB), 2011 WL 4352390 (S.D.N.Y. Sept. 15, 2011) (noting "[a]fter *Leegin*, it is uncertain whether New York courts evaluating vertical RPM claims brought under the Donnelly Act will continue to apply the *per se* rule or will follow *Leegin* in adopting the rule of reason").

161. *People v. Tempur-Pedic Int'l, Inc.*, 944 N.Y.S.2d 518 (N.Y. App. Div. 2012) (dismissing under the *Colgate* doctrine). See discussion in Michael A. Lindsay, *From the Prairie to the Ocean: More Developments in State RPM Law*, ANTITRUST SOURCE, Aug. 2012, at 1, 2–3.

162. *Mailand v. Burckle*, 572 P.2d 1142 (Cal. 1978) (finding price-fixing aspects of a drive-in dairy franchising agreement violated the Cartwright Act).

163. Complaint, *People v. Bioelements, Inc.*, File No. 10011659, 2010 WL 5821215.

164. Lindsay, *supra* note 161, at 2.

dent is changing . . . simply because the [U.S.] Supreme Court has changed course.”¹⁶⁵ In *Alsheikh*,¹⁶⁶ the plaintiffs charged their employer, a baked goods company, with wage-and-hour violations, and their employer defended that they were ineligible as independent contractors. The plaintiffs argued alternatively that if they were contractors, the defendant had violated state antitrust law by imposing on them the price at which baked goods were to be sold. The trial court had rejected their antitrust claim under rule of reason analysis, finding that “it remains unlikely that the *Mailand*’s court [sic] holding is still applicable in light of *Leegin*.”¹⁶⁷ The appellate court remanded while striking the claim for price-fixing on other grounds, but the court noted that “if there were vertical price fixing, that would, under *Mailand* . . . be a per se violation of the Cartwright Act.”¹⁶⁸

Neither Donnelly nor Cartwright has strayed from federal vertical restraint precedent since the Supreme Court’s decision in *Sylvania* reaffirmed the rule of reason standard. In several cases before *Sylvania*, New York courts found non-price vertical restraints to be legal *per se* under the Donnelly Act.¹⁶⁹ It was only in 1988 that the Court of Appeals rejected this argument, aligning the Donnelly Act with the Sherman Act in, at least, allowing for investigation of territorial exclusivity contracts.¹⁷⁰ The California Supreme Court has not weighed in, but California courts have cited to *Sylvania* in applying the Cartwright Act to non-price vertical restraints.¹⁷¹

State antitrust law is not bound to follow the economist creep in federal jurisprudence. However, in the years since *Sylvania*, New York and California courts have largely acquiesced to federal courts’ Borkian turn. State attorneys general have vigorously defended their antitrust laws’ stricter interpretations, but in neither state have they won a definitive affirmation of the *per se* rule in the twelve years

165. *Darush v. Revision LP*, No. CV 12–10296 GAF (AGRx), 2013 WL 1749539 (C.D. Cal. 2013).

166. *Alsheikh v. Superior Ct.*, No. B249822(JLJ), 2013 WL 5530508 (Cal. Ct. App. Oct. 7, 2013).

167. *Kaewsawang v. Sara Lee Fresh, Inc.*, No. BC360109(JLJ), 2013 WL 3214439 (Cal. Super. Ct. May 6, 2013).

168. *Alsheikh*, 2013 WL 5530508, *supra* note 167, at 3.

169. *Dawn to Dusk, Ltd. v. Frank Brunckhorst Co.*, 258 N.Y.S.2d 746, 748 (N.Y. App. Div. 1965) (“[A]n agreement . . . which restricts the territory within which the buyer . . . may resell . . . goods . . . does not violate [the Donnelly Act.]”); *Revlon Prod. Corp. v. Bernstein*, 119 N.Y.S.2d 60 (N.Y. Gen. Term. 1953).

170. *Anheuser-Busch, Inc.*, *supra* note 156.

171. *R.E. Spriggs Co. v. Adolph Coors Co.*, 156 Cal. Rptr. 738 (Ct. App. 1979) (citing to *Sylvania* but ruling on other grounds); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 248 Cal. Rptr. 189 (Ct. App. 1988) (applying *Sylvania* under the Cartwright Act).

since *Leegin*. It remains uncertain whether either Donnelly or Cartwright will incorporate the rule of reason.

D. Gig Work Vertical Restraints under the Donnelly and Cartwright Acts

If a suit were launched today claiming that Uber's pricing algorithm, surveillance of drivers, and non-linear driver pay structures constituted illegal vertical restraints under either the Donnelly Act or the Cartwright Act, even the strongest claim would struggle if subjected to the rule of reason. A price-fixing claim could succeed if a court accepted that the *per se* rule remains in effect, but it just as easily could solidify that state's adoption of *Leegin* if a court determined to do so. Non-price vertical restraint claims, necessarily subject to the rule of reason, are almost certainly doomed to failure.

The case of *Meyer v. Kalanick*¹⁷² illustrates how a challenge to vertical price-fixing under the Uber Model may proceed. In *Meyer*, a rider sued Uber for price-fixing through its fare-setting algorithm. The plaintiff's core claim was that Uber and its drivers had entered a hub-and-spoke agreement—essentially a horizontal agreement achieved through vertical restraints¹⁷³—in violation of the Sherman Act.¹⁷⁴ This cast the drivers as co-conspirators, and Meyer had to argue counterfactually that drivers have some influence over Uber's price-setting.¹⁷⁵ However, the *Meyer* complaint alternatively argued that Uber's price-fixing constituted an illegal vertical restraint under both the Sherman Act and the Donnelly Act.¹⁷⁶ The court documents show both parties debating whether the post-*Leegin* Donnelly Act incorporated the rule of reason or maintained a *per se* rule, with Uber citing to *Tempur-Pedic* and Meyer relying on pre-*Leegin* cases and the article by Antitrust Bureau Chief Himes.¹⁷⁷ Both the hub-and-spoke claim

172. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).

173. The complaint relied on *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

174. *Meyer*, 174 F. Supp. 3d, at 820–21.

175. *Id.* at 825 (crediting evidence that Uber had organized get-togethers for drivers and that drivers' pressure for increased pay may have contributed to a rate increase in 2014).

176. Complaint ¶¶ 103–9, *Meyer v. Kalanick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016) (No. 1:15 Civ. 9796), 2016 WL 950376.

177. Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss, § III, *Meyer v. Kalanick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016) (No. 1:15 Civ. 9796), 2016 WL 6134634; Reply Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss, § IV, *Meyer v. Kalanick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016) (No. 1:15 Civ. 9796), 2016 WL 2731512.

and the vertical restraints claims survived a motion to dismiss,¹⁷⁸ but Uber later succeeded in corralling the plaintiff into arbitration through a mandatory arbitration clause,¹⁷⁹ so the underlying issues were never fully adjudicated.¹⁸⁰

If a state attorney general or another party with standing and the ability to evade mandatory arbitration were to challenge Uber's price-fixing algorithm under either the Donnelly Act or the Cartwright Act, the outcome of the case would likely turn on the state's adoption or rejection of *Leegin*.¹⁸¹ For the reasons discussed earlier in regard to the Sherman Act, a price-fixing challenge would be unlikely to survive the rule of reason. If either state law has retained the *per se* prohibition on vertical price-fixing, however, Uber's algorithm is almost certainly unlawful. It nakedly sets the price at which a subordinate enterprise sells a service. It remains unresolved whether New York or California courts have adopted the rule of reason for vertical price restraints, but any prosecution of a gig company would have to anticipate the application of the rule's "vacuous standard."¹⁸²

State case law on non-price restraints largely forecloses challenges under the Donnelly and Cartwright Acts. The Uber Model presents at least two non-price vertical restraints: surveillance and "non-linear driver pay structures."¹⁸³ Surveillance economically and psychically subordinates drivers, while Uber's bonus system incentivizes the kinds of territorial and exclusivity restrictions once outlawed by a more faithful interpretation of the Sherman Act. However, both the Donnelly Act and the Cartwright Act have adopted the rule of reason for non-price vertical restraints. As discussed earlier in relation to the Sherman Act, non-price vertical restraints are dead in the water when subject to the rule of reason.

New York and California antitrust laws mirror federal antitrust law, but they are not bound to it. In the field of non-price vertical

178. Meyer, 174 F. Supp. 3d at 829.

179. The arbitrator, unsurprisingly, rejected the claims against Uber, and Meyer's request to vacate the arbitrator's award for partiality was denied in August 2020. Meyer v. Kalanick, 477 F. Supp. 3d 52 (S.D.N.Y. 2020).

180. The decision in Meyer also preceded the Supreme Court's "two-sided platform" decision in *Ohio v. AmEx*. If Uber had had the opportunity to define the market in those terms, Meyer's claim might not have survived a motion to dismiss.

181. State adoption of *Ohio v. AmEx*'s "two-sided platform" market definition could also be case determinative, but the decision is too recent for there to be any significant indication of state courts' response. Additionally, there is greater discretion and variation in courts' market definitions than in the standard of review.

182. Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 315 (8th Cir. 1986) (excoriating the rule of reason as "provid[ing] little concrete direction").

183. Steinbaum, *supra* note 3, at 55–56.

restraints, Donnelly and Cartwright are no more useful than Sherman for challenging Uber's means of control over drivers. Either act could still reach Uber's price-fixing, but this would be a matter of judicial non-acquiescence in the Supreme Court's interpretation of federal antitrust law. To firmly establish Uber's practices as within the prohibitions of state antitrust law, New York and California will need to consider statutory amendments.

III.

HARMONIZING LABOR AND ANTITRUST LAW

The prevailing case law under New York and California antitrust laws may not constrain gig companies' imposition of price controls—and will not stop other vertical restraints on their workers—but legislative amendments to these laws could reach these restraints. This Part discusses states' codification of pre-*Leegin* precedents, prohibitions on non-price vertical restraints, and dependent contractor-specific antitrust legislation. It concludes that antitrust amendments must be designed to harmonize antitrust with labor law. To overcome the preemption-based weakness of state labor law, state antitrust law must remove employers' incentive to misclassify employees by penalizing the feudalistic model of dependent contracting.¹⁸⁴

A. *Amending State Antitrust to Prohibit Gig Economy Vertical Restraints*

Vertical restraint reform with the purpose of restraining the gig economy could take several forms. Legislatively rejecting *Leegin* and codifying the prohibition on vertical price-fixing would frustrate the Uber Model, but this reform would also be the simplest for gig companies to evade by reverting to non-price restraints. Alternatively, states could pass expansive prohibitions on both vertical price-fixing and non-price restraints. However, such a reform would have implications far beyond the Uber Model, and powerful forces would be aligned against such a move. The ideal reform would target a distinct prohibition to vertical restraints exercised over dependent contractors, thus

184. In 2020, Paul and Steinbaum recommended similar changes to the California Future of Work Commission. They specifically suggested “[s]trengthen[ing] California state antitrust law’s scrutiny of vertical restraints, constraining firms from engaging in vertical control beyond firm boundaries in ways that are oppressive.” *Antitrust Recommendations to the California Future of Work Commission*, available at marshallsteinbaum.org/assets/paul-and-steinbaum-2020-antitrust-recommendations-to-ca-future-of-work-commission.pdf.

incorporating progressive labor law principles into the robust enforcement mechanisms of antitrust law.

States may regulate the gig economy by legislating a *per se* ban on vertical price-fixing, but this alone is inadequate. In response to *Leegin*, Maryland added a clause to its antitrust law declaring minimum RPM agreements to be unreasonable restraints on trade,¹⁸⁵ and other states could add similar clauses to their antitrust laws to more broadly prohibit all vertical price-fixing. However, in response to California's AB 5, Uber secretly launched "Project Luigi," with the goal of finding ways to maintain drivers' independent contractor status, and one factor they sought to evade was price-setting.¹⁸⁶ In December 2019, Uber gave California drivers the ability to reject rides if the fare was too low,¹⁸⁷ and a month later some drivers tested a feature that would allow them to set their own rates, with customers' assigned the lowest-rate driver available.¹⁸⁸ Now that Prop 22 has passed and the threat of employee status has faded in the Golden State, Uber has withdrawn the feature.¹⁸⁹ If price-fixing alone is prohibited, Uber could evade liability by implementing a similar feature, and not only would drivers remain economically dependent on Uber, but they also may receive even less compensation in areas where the fare-bidding system becomes a race to the bottom.

In order to deter evasion, states might legislate a return to the decade of *per se* illegality for many non-price restraints. Uber could operate without algorithmically dictating each driver's fare, but it would still require some vertical restraints in order to provide uniform and reliable service and, more fundamentally, to frustrate competition. A ban on all vertical restraints would effectively force rideshare companies to properly classify workers as employees in order to exercise the controls necessary for the business model to function. A ban on vertical restraints would implicate even Uber's most far-reaching reor-

185. MD. COM. LAW § 11-204(b).

186. Faiz Siddiqui, *Uber's Secret Project to Bolster Its Case Against AB5, California's Gig-Worker Law*, WASH. POST (Jan. 6, 2020), <https://www.washingtonpost.com/technology/2020/01/06/ubers-secret-project-bolster-its-case-against-ab-californias-gig-worker-law/>.

187. Dara Kerr, *Uber's Secret 'Project Luigi' Involved More Than Letting Drivers Reject Trips*, CNET (Jan. 6, 2020), <https://www.cnet.com/news/ubers-secret-project-luigi-involved-more-than-letting-drivers-reject-trips/>.

188. Chaim Gartenberg, *Uber Tests Letting California Drivers Set Their Own Prices*, VERGE (Jan. 21, 2020), <https://www.theverge.com/2020/1/21/21075062/uber-test-california-drivers-set-prices-bidding-ab5-law-gig-workers>.

189. Tyler Sonnemaker, *Uber to Curb California Drivers' Freedom Following Prop 22*, BUS. INSIDER (Apr. 5, 2021), <https://www.businessinsider.com/uber-california-driver-independent-contractors-pricing-destinations-prop-22-passage-2021-4>.

ganization proposals.¹⁹⁰ However, since *Sylvania*, vertical restraints have proliferated, and entire business models—particularly franchising¹⁹¹—depend on vertical coordination. Whether or not these models are equitable or efficient, legislation that would incidentally rewrite entire sectors of the economy would generate far more concern and far greater opposition than would targeted legislation. If constraining the Uber Model is the goal, there is a more direct path.

Antitrust reforms can target regulatory evasion by synchronizing antitrust law's prohibitions with labor law's classifications.¹⁹² In other words, antitrust law can be rewritten to prohibit super-ordinate firms' exercise of vertical restraints over those subordinate actors who fall outside the employee framework. In the terminology of competition law and drawing on Maryland's minimum RPM prohibition, a reform to the Donnelly or Cartwright Act might take the following form:

For purposes of [the Proscribed Conduct section of this act], a contract, combination, or conspiracy in restraint of trade or commerce between a corporation, partnership, or firm and an economically dependent worker classified as an independent contractor for purposes of state or federal labor law shall constitute a *per se* unlawful restraint of trade or commerce.

To avoid an ambiguous, under-inclusive, or overbroad application of "economic dependence," the law must define this term. Canadian courts and agencies apply a variety of multi-factor balancing tests to determine economic dependence.¹⁹³ However, like all balancing tests, this produces uncertainty, invests too much interpretive authority in adjudicators, and incentivizes evasion. The statutory definition of "economic dependence" could instead draw on the ABC test in something like the following language, rephrased from California's AB 5:

For purposes of [the clause prohibiting economic dependence contracts], a person providing labor or services for remuneration and classified as an independent contractor shall be considered to be in

190. In response to AB 5, Uber and Lyft were reportedly considering shifting to a franchising model, in which small companies commanding their own fleets of cars and drivers would contract for use of each company's app. Kate Conger, *Uber and Lyft Consider Franchise-Like Model in California*, N. Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/technology/uber-lyft-franchise-california.html>.

191. Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960–1980*, 22 ENTER. & SOC. FIRST VIEW 156 (2020).

192. Hiba Hafiz has recently argued for integrating antitrust and labor law and regulation in very different ways but toward similar goals. Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381 (2020).

193. See, e.g., Canadian Labour Congress, *Chartered Local Union No. 1689 v. Algonquin Tavern*, 1981 CanLII 811 (Can.) (setting out the 11-factor test used by the Ontario Labour Relations Board today).

a relationship of economic dependence unless the hiring entity demonstrates that all of the following conditions are met:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

As this economic dependence test is derived from the ABC test, it may need to incorporate exceptions to accommodate certain industries. California's Assembly Bill 5 was passed with exemptions for doctors, lawyers, real estate agents, hairstylists, and a number of other professions in which independent contractors are engaged with relatively strong bargaining power.¹⁹⁴ The following year, additional exemptions were added in Assembly Bill 2257 (AB 2257),¹⁹⁵ and courts were granted discretion to exempt other professions for which the test is inapposite.¹⁹⁶ Despite these exemptions, some have argued that AB 5 harmed freelance writers and editors who lost work because their clients were wary of the ABC test's applicability.¹⁹⁷ As such, in addition to exceptions for many of the same professions exempted from AB 5, the vertical restraints reform may also include a judicial discretion exemption in something like the following terms:

A court of law applying the three-part test in [the ABC test clause] may in rare circumstances determine that a particular profession should be exempt from coverage if workers in that profession exercise comparable discretion and bargaining power to the enumerated exemptions.

By exempting professions that rarely produce relationships of economic dependence and those niche industries in which freelancers enjoy meaningful freedoms in the exercise of their work, such as free-

194. CAL. LAB. CODE §§ 2780–83.

195. A.B. 2257, 2019–2020 Reg. Sess. (Cal. 2020) (filed Sept. 4, 2020).

196. CAL. LAB. CODE § 2775(a)(3).

197. Alex Press, *Why Are Freelancers Organizing Against the PRO Act?*, NEW REPUBLIC (March 26, 2021), <https://newrepublic.com/article/161820/pro-act-freelancers-union-labor-abc-test> (discussing opposition to the PRO Act, which would codify the ABC test in the NLRA, from organizations representing freelance workers). The author of this Note worked as a freelance copy editor in Massachusetts for several years, not long after that state's codification of the ABC test. I can attest anecdotally that the ABC test did not substantively change the terms of Massachusetts freelancers' contracts with Massachusetts-based clients.

lance writing and editing, this proposal can avoid some of the criticisms that have dogged previous attempts to expand the ABC test.

The purpose of this vertical restraints reform is simple: force firms that rely on exploitation of dependent contractors to reclassify their workers as employees, subject not only to state but also to federal labor and employment laws. Labor law is plagued by inadequate sanctions for noncompliant employers, and the Trump Board removed even its limited remedies for misclassified workers, but antitrust suffers no such weakness. The threat of injunctions and treble damages should suffice to induce employers to treat dependent workers as employees. Correctly classified gig employees will then enjoy the minimum standards of state and federal employment regulations as well as the protected right to organize and bargain collectively under the NLRA. Although gig employers will inevitably cry foul and threaten to abandon regulated markets, California and New York, especially when acting in tandem, can force a change in practices that extends well beyond their borders.

CONCLUSION

Labor law and employment regulations have failed gig workers, leaving this class of laborers unprotected and hyper-exploited. Entire industries have emerged reliant upon the purgatory of dependent contractor status. These workers enjoy nominal freedoms in exchange for sacrificing not only the law's minimum standards but also their right to work together to win something better. Antitrust law, despite its guarantee of labor's dignity, hangs a dark cloud over gig workers' collaboration. A decade of state and local efforts to fix labor and employment laws have amounted to little.

State antitrust laws offer an alternative. Federal antitrust law is subject to conservative courts' interpretations and is far more difficult to amend. But as federal antitrust law has withered and federal enforcers have ceded their mandate, state law and state attorneys general have held the line. A small number of states have stymied the legalization of minimum RPM agreements, taking advantage of their greater market share and extraterritorial enforcement to force compliance.¹⁹⁸

198. "[M]ost nationwide businesses are forced to remain in the pre-*Leegin* world of enforcing minimum prices through unilateral pronouncements of pricing policy while strictly avoiding any type of agreement with distributors." Foote & Reddick, *supra* note 159, at 98; see also James Mulcahy & Filemon Carrillo, *Leegin Ten Years Later: Did Vertical Agreements Remain Unlawful Per Se Where Adopted to Facilitate a Price-Fixing Horizontal Scheme?* 38 FRANCHISE L.J. 119 (2018), <http://www.mulcahyllp.com/firmnews/practicenews/leegintenyarslaterdidverticalagreementsremainunlawfulpersewhereadoptedtofacilitatepricfixinghorizontalscheme.html>. For a criti-

New York and California can achieve similar success in regulating the gig economy through targeted reforms. In the gig economy itself, the effect would not be regulation of the Uber Model but its abolition. Is the vertical restraint path then the nuclear option? It is a more extreme response than shifting definitional goalposts or taking Uber's bait and establishing an intermediate category. However, while every other legislative proposal involves making of labor law something it has never been before, this proposal in a way represents a return to what antitrust law once was. Revisions to the Donnelly and Cartwrights Acts prohibiting vertical restraints over dependent contractors may be all that is necessary to render the Uber Model untenable and require employers to classify dependent workers as employees.

cal perspective on the extraterritorial enforcement of state antitrust law, see Michael J. Ruttinger, *Is There a Dormant Extraterritoriality Principle? Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545, 546–48 (2007).

