

2021

Labor Organization in Ride-Sharing—Unionization or Cartelization?

Mark Anderson

Max Huffman

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Law Commons](#)

Recommended Citation

Mark Anderson and Max Huffman, Labor Organization in Ride-Sharing—Unionization or Cartelization?, 23 *Vanderbilt Journal of Entertainment and Technology Law* 715 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss4/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Labor Organization in Ride-Sharing—Unionization or Cartelization?

Mark Anderson & Max Huffman*

ABSTRACT

The sharing economy brings together the constituent parts of a business enterprise into a structure that, on its surface, resembles a business firm, but in crucial ways is nothing like the traditional firm. This includes the ownership of the primary capital assets used in the business, as well as one of the most fundamental features of a firm—the relationship with its labor force. Sharing economy workers are formally contractors, running small businesses as sole entrepreneurs, with the effect that they are excluded from many of the protections made available to workers across the economy. The result is a seeming disparity across the market, with consumers realizing benefits of choice and price that did not exist before and platforms possibly poised to turn profits as the hubs of massive enterprises with few of the burdens of a dependent workforce.

This Article explains how existing antitrust law would not allow labor organization by sharing economy workers. Even under a possible Rule of Reason approach, the worker protection goals that underlie collective bargaining are not cognizable efficiency justifications for collective bargaining. However, this Article also shows that existing law ignores the well-developed economic theory that supports labor organization as a response to monopsony, and how that theory supports the idea of labor organization as having pro-consumer effects.

This Article identifies two primary market structures—the fallow-assets model and the locked-in model—and shows how in the first

* Professor of Law Emeritus, University of Idaho College of Law; Professor of Law, Indiana University Robert H. McKinney School of Law. The Authors thank Pinar Akman, Eric Clark, Sebenzile Dlamini, Marina Lao, Eric Posner, Spencer W. Waller, participants in an Indiana-McKinney faculty colloquium, and participants in a University of Copenhagen-Copenhagen Business School competition law conference, for insights and suggestions. The Authors also thank Rachel Bondi, Ramon Ryan, and their colleagues for excellent editorial assistance.

structure the effect of organization would be to increase output in the labor market, leading to increased output and lower price in the consumer market, while in the second structure the effect of organization is likely to lead to harm in the consumer market. Outcome ambiguity and the novel enterprise structure militate for a Rule of Reason treatment of labor organization in ride-sharing. In operation, this produces the uncomfortable result that the workers least in need of labor protections are most likely to succeed in avoiding liability, while those most in need of protections are most likely to be subjected to damages and injunctions. As a result, non-antitrust labor protections remain essential.

TABLE OF CONTENTS

I.	INTRODUCTION.....	717
II.	CURRENT LEGAL TREATMENT OF SHARING ECONOMY DRIVERS.....	724
	A. <i>Current Legal Treatment of Agreements Among Sharing Economy Suppliers</i>	724
	1. Agreements Among Sharing Economy Suppliers Are Not Protected by the Single Entity Rule.....	725
	2. Joint Negotiations and Surge Price Manipulation Reflect Horizontal Agreements Among Drivers.....	727
	3. Is a Suppliers' Agreement Per Se Illegal?.....	728
	4. Joint Action by Sharing Economy Workers Would Be Condemned Under the Rule of Reason as Currently Applied.....	732
	B. <i>Intersection of Labor and Employment Law with Antitrust Principles</i>	736
	1. Labor and Employment Law Treatment of Ride-Sharing Enterprises	737
	2. Labor Exemption from Antitrust.....	740
III.	ECONOMIC UNDERSTANDING OF ANTITRUST IN LABOR MARKETS.....	746
	A. <i>The Concern with the Monopsonist Employer</i>	747
	1. The Effect of Monopsony in Labor Markets.....	747
	2. Do Workers and Consumers Compete for Economic Surplus?.....	751
	B. <i>Workers in the Sharing Economy Enterprise</i>	753
	1. Fallow Assets: The "Indianapolis" Market.....	755
	2. Lock-In: The "Seattle" Market.....	757
IV.	RECONCILING ANTITRUST DOCTRINE WITH SHARING ECONOMY LABOR MARKET REALITIES	759

2021]	<i>LABOR ORGANIZATION IN RIDE-SHARING</i>	717
	<i>A. Altering the Labor Exemption</i>	759
	1. Uncoupling Bargaining Rights from State Law Employment.....	760
	2. Replacing the Common Law “Control” Test with a Market Realities Test.....	763
	3. Cooperative Oversight Between Antitrust and Labor Agencies	766
	<i>B. Harnessing the Rule of Reason to Protect Some Sharing Economy Workers</i>	768
	1. Is the Drivers’ Agreement Per Se Illegal?.....	769
	2. Would a Plaintiff Satisfy Its Initial Burden Under the Rule of Reason Quickly?.....	771
	3. If the Burden Shifts to the Drivers, What Is the Nature of the Burden?.....	773
V.	CONCLUSION.....	775

I. INTRODUCTION

The sharing economy reflects an extraordinary whole-cloth creation of social welfare, allowing a seemingly infinite range of fallow assets to be exchanged in welfare-enhancing transactions.¹ Physical assets—cars, houses, bicycles, tools, couches—that previously were underutilized might now be the basis for economic exchange.² Labor assets—individuals’ time and talent—that were underused, whether because of underemployment or because individuals felt their capacity extended beyond the traditional workweek, might now support that transaction.³ On the consumption side, those individuals previously excluded from the market might now transact as output of services increases and price decreases commensurately. Trivially easy market

1. In earlier scholarship, the Authors identify key features of sharing economy enterprises across a range of sectors of the economy. See 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, 864–86. Features of sharing economy enterprises change regularly as the business model matures.

2. See generally NIAM YARAGHI & SHAMIKA RAVI, BROOKINGS INST. INDIA CTR., THE CURRENT AND FUTURE STATE OF THE SHARING ECONOMY 12–15 (2017), https://www.brookings.edu/wp-content/uploads/2016/12/sharingeconomy_032017final.pdf [<https://perma.cc/25YZ-HHZC>].

3. A recent Federal Reserve Bank study finds 3 percent of US adults are engaged in ride-sharing work, with most involved as income supplements rather than as a primary means of earning money. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 18–19 (2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf?smid=nytc0re-ios-share> [<https://perma.cc/97BW-ZJJR>].

entry and exit in industries with sharing economy enterprises free both consumers and suppliers to alter decisions based on continually shifting preferences. The ripple effects in adjacent or upstream and downstream markets also promise benefits. The possibility to use a new car to earn revenue may incentivize a value-enhancing purchase to improve outcomes in markets for automobile manufacture and sale. The opportunity to earn revenue in the sharing economy increases worker choice in other markets, potentially bidding up the price of labor for low-skill jobs.⁴ Consumers may increase their consumption of travel (using Airbnb for lodging); social engagement (using Uber to enable a night out); and home maintenance (using TaskRabbit for services).⁵ With sharing economy work able to fill the gap between long-term jobs, or potentially replace alternative employment entirely, workers have increased ability to move to economic opportunity.⁶

Sharing economy enterprises, like Uber and Airbnb, have cut a huge swath across the modern economy. However, in doing so, sharing economy enterprises have posed challenging questions for legal and regulatory regimes ranging from zoning and environmental regulation to employment law and antitrust. This Article analyzes how antitrust law should apply to attempts by workers in sharing economy enterprises to jointly negotiate the terms and conditions of their relationships with platform companies, particularly ride-sharing services. It suggests reconceptualizing Sherman Act doctrine in light of economic analysis of the market for sharing economy workers that this Article develops.

Sharing economy enterprises bear superficial similarity to one another. Whether the industry is transportation, lodging, task services, or another, the dominant mode of enterprise organization consists of individual suppliers, platforms, and consumers.⁷ However, below the surface the enterprises display more variety than consistency. Prior scholarship has explained those differences and their implications for one particular aspect of antitrust law.⁸ In part because of the complexity, this Article concentrates its argument on the ride-sharing

4. See YARAGHI & RAVI, *supra* note 2, at 20–22.

5. For websites describing sharing economy services offered, see generally AIRBNB, <https://www.airbnb.com> (last visited Mar. 8, 2021); UBER, <https://www.uber.com/> (last visited Mar. 8, 2021); TASKRABBIT, <https://www.taskrabbit.com/> (last visited Mar. 8, 2021).

6. Cf. YARAGHI & RAVI, *supra* note 2, at 20.

7. The legal relationships among these three parties is a matter of dispute. See generally *infra* Part II; Anderson & Huffman, *supra* note 1.

8. See Anderson & Huffman, *supra* note 1, at 864–81, 917–31.

industry, primarily represented in the United States by Uber and Lyft.⁹ As a matter of terminology, this Article refers to the ride-sharing workforce as “workers.” The hub around which the marketplace is organized is the “platform,” and together with the workers this is the “sharing economy enterprise.”¹⁰ The users of services are “consumers.”

Recent news reports identify two sorts of coordination on the most competitively sensitive of topics among drivers on ride-sharing platforms in the United States. One is a species of conduct sometimes called “surge-price manipulation,” in which drivers combine to strategically withdraw their services, causing the price algorithm to increase the ride price and permit individual drivers to take advantage of the increased price.¹¹ The other is an effort to engage in classic labor organization and collective bargaining with the platform, through which drivers will collectively withhold their services unless the terms at which those services are provided become more generous, perhaps even through a drivers’ strike.¹² Under classic antitrust principles, both of these should be considered cartel conduct. Such conduct is illegal per se under Section 1 of the Sherman Act¹³—invalid without any analysis of the actual possibility of an effect on the market causing harm to

9. UBER, <https://www.uber.com/>; LYFT, <https://www.lyft.com> (last visited Mar. 8, 2021). Other competitors also exist, although these are localized and do not register on nationwide market reports. See, e.g., *Market Share of the Leading Ride-Hailing Companies in the United States from September 2017 to December 2020*, STATISTA, <https://www.statista.com/statistics/910704/market-share-of-rideshare-companies-united-states/> (last visited Mar. 8, 2021) (depicting the “Other” category’s shrinkage from 4 percent to effectively 0 percent over the three years studied).

10. See Anderson & Huffman, *supra* note 1, at 870.

11. See Jacob Siegal, *Uber Drivers Are Reportedly Manipulating the App to Create Artificial Surge Pricing*, BGR (June 14, 2019, 4:16 PM), <https://bgr.com/2019/06/14/uber-surge-pricing-manipulation-drivers/> [<https://perma.cc/3U89-UCY4>].

12. See generally RIDESHARE DRIVERS UNITED, <https://drivers-united.org/about> [<https://perma.cc/46UQ-LU8G>] (last visited Aug. 21, 2020) (discussing efforts to achieve collective goals); Sara Ashley O’Brien, *Why Uber and Lyft Drivers Are Striking*, CNN BUS., <https://www.cnn.com/2019/05/07/tech/uber-driver-strike-ipo/index.html> [<https://perma.cc/5MJ2-SAY7>] (May 8, 2019, 11:34 AM); Alexia Fernández Campbell, *Thousands of Uber Drivers Are Striking in Los Angeles*, VOX (Mar. 25, 2019, 4:20 PM), <https://www.vox.com/2019/3/25/18280718/uber-lyft-drivers-strike-la-los-angeles> [<https://perma.cc/6ZG8-GMCG>]. Whether ironically or not, the success in organizing this work stoppage turned on the development of an app by Rideshare Drivers United. Noam Scheiber & Kate Conger, *Uber and Lyft Drivers Gain Labor Clout, with Help from an App*, N.Y. TIMES, <https://www.nytimes.com/2019/09/20/business/uber-lyft-drivers.html> [<https://perma.cc/L88C-LAMT>] (July 14, 2020).

13. Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1).

consumers¹⁴—and is in fact the sort of conduct that is regularly prosecuted criminally by the US Department of Justice.¹⁵

In the case of suppliers in sharing economy enterprises, however, the application of the per se rule and the possibility of criminal prosecution seem to be overkill, at a minimum.¹⁶ Some go further to argue that it is categorically inappropriate in light of the relative bargaining positions of the participants in a transaction through a sharing economy enterprise—the worker, the platform, and the consumer.¹⁷ The literature on the antitrust implications of ride-sharing enterprises is missing an analysis that takes into account the wide variety of factual scenarios present among sharing economy enterprises, the economic and other social justifications for imposing or not imposing liability for anticompetitive conduct, and the common-law development of antitrust rules in the US system. This Article fills that gap.

A sharing economy enterprise dramatically reallocates the risks and rewards of business compared to a traditional firm. This reallocation has occurred without a fundamental assessment of the legal structures in play. In a traditional firm, risks and rewards are allocated among investors, managers, and workers through legal infrastructures that have evolved over a century of legislation, common-law development, markets, and cultural norms and expectations.¹⁸ Investors provide capital and share profits or losses from the operation of the firm.¹⁹ Managers hire employees, who follow direction from managers and are owed their salaries and wages even if the firm loses money.²⁰ Employees are protected by a set of regulatory requirements regarding minimum wages, public and private retirement systems, occupational safety, antidiscrimination, unemployment

14. See *infra* Section II.A.

15. See ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION MANUAL, at I-2 (5th ed. 2012), <https://www.justice.gov/atr/file/761166/download> [<https://perma.cc/465T-4KY2>].

16. To be sure, the fact of criminal liability does not necessarily imply there will be criminal prosecution. Small scale cartel conduct can fly beneath the radar of overextended antitrust enforcers. See ANTITRUST DIV., U.S. DEP'T OF JUST., FY 2021 CONGRESSIONAL BUDGET SUBMISSION 3-11 (2020), <https://www.justice.gov/doj/page/file/1246281/download> [<https://perma.cc/6B36-SUZ2>].

17. See, e.g., Eugene K. Kim, Note, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 YALE L.J. 428 (2020).

18. See generally Anderson & Huffman, *supra* note 1, at 884-86.

19. This "residual claimant" understanding dates at least to the nineteenth century. See generally Jacob H. Hollander, *The Residual Claimant Theory of Distribution*, 17 Q.J. ECON. 261 (1903).

20. Mark Anderson, *The Enigma of the Single Entity*, 16 U. PA. J. BUS. L. 497, 515-16 (2014) (discussing R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937)).

insurance, and health insurance.²¹ Employees are also allowed to jointly negotiate wages and other terms of employment through collective bargaining without violating the antitrust laws.²²

A sharing economy enterprise reshuffles these rights and responsibilities in significant ways to which the law is only beginning to respond. Like investors in a traditional firm, workers in a sharing economy enterprise provide capital. In a ride-sharing enterprise, this is the acquisition (by purchase or lease) and maintenance of the car. However, unlike investors in a traditional firm, workers do not share in the profits generated by the enterprise as a whole. Unlike employees in a traditional firm, sharing economy workers are not guaranteed any form of compensation net of car expenses. Nothing in the driver's contract prevents their working for nothing—if, for example, capital costs exceed earnings.²³ Similarly, under the current state of US law, sharing economy workers are not provided any of the regulatory protections of employees.²⁴ Collective bargaining by sharing economy workers would be condemned as an anticompetitive cartel by the current Sherman Act doctrine.²⁵

How should the law deal with the reallocation of rights and responsibilities resulting from the creation of sharing economy enterprises? One possibility is to try to fit the new relationships into the old categories. Most discussed is trying to characterize sharing economy workers as employees, with the platform as employer.²⁶ As employees, workers would be entitled to wages, regardless of whether the enterprise was making money. They would also be protected by the employment regulatory structure. As employees, workers could

21. See, e.g., *Employee Rights*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/small-business/employee-rights> [https://perma.cc/HM7R-PX46] (last visited Mar. 8, 2021); *Employee Rights*, U.S. DEPT OF LAB., <https://www.dol.gov/general/topic/disability/employeeeights> [https://perma.cc/QU3P-B9BG] (last visited Mar. 8, 2021); *Wages and the Fair Labor Standards Act*, U.S. DEPT OF LAB., <https://www.dol.gov/agencies/whd/flsa> [https://perma.cc/4F3T-4ABR] (last visited Mar. 8, 2021); *OSHA Worker Rights and Protections*, U.S. DEPT OF LAB., <https://www.osha.gov/workers/> [https://perma.cc/WK3E-9TRE] (last visited Mar. 8, 2021); *Labor Laws and Issues*, USA.GOV, <https://www.usa.gov/labor-laws> [https://perma.cc/JPR2-HAMS] (last visited Mar. 8, 2021).

22. See *infra* Section II.B.2.

23. Cf. *infra* Section III.B.2.

24. See generally *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1123–26 (N.D. Cal. 2016) (discussing litigation risks to drivers claiming misclassification and right to employee status).

25. Cf. *Chamber of Com. v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (reversing dismissal for immunity and remanding for consideration of Sherman Act Section 1 claims in suit alleging city-mandated driver organization constituted a price-fixing agreement).

26. A theoretical alternative is to make the driver an employee of the customer. The Authors are aware of no serious arguments to that effect.

collectively bargain free from Sherman Act liability. The determination of whether sharing economy workers should be characterized as employees involves questions of doctrine and policy that make the outcome unclear. These questions have resulted in limited success for advocates of such a recharacterization.

In the absence of such a recharacterization, how should joint negotiation by sharing economy workers be treated for purposes of the Sherman Act? This Article answers that question. It analyzes the question of whether sellers of labor inputs into a sharing economy enterprise should be able to combine to gain the benefits of joint market power in their negotiations with buyers. This question implicates a host of thorny issues of antitrust law and policy, some of which are older than the Sherman Act itself and others are as modern as the recently revitalized debate over the role of “bigness” in antitrust.²⁷ These issues are knit together in this Article.

This Article shows that sharing economy enterprises present concerns for monopsony in labor markets, leading to the likelihood that suppliers of labor to sharing economy enterprises will be under-compensated relative to the competitive equilibrium. The acuteness of this problem turns on characteristics of the market and can vary based on the particular geography in which services are offered and consumed. The law’s current approach to resolving this problem—permitting organization by employees through collective bargaining under an exemption from antitrust law²⁸—does not, under the current state of federal antitrust law, help sharing economy workers, who would be classified as independent contractors rather than employees under the existing multifactor test for defining employment.²⁹ This failure may best be resolved by permitting collective bargaining activity that promises increased marketplace efficiency by correcting for monopsony effects in the labor market. Whether such increased efficiency exists depends on the characteristics of each sharing economy marketplace in question. It is therefore not properly the subject of per se rules, either condemning or exempting the collective conduct. It is best resolved through a structured application of antitrust law’s Rule of Reason. Finally, conduct that is categorically separate from collective bargaining, including the reports of surge price

27. See, e.g., Lina M. Kahn, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 741–42 (2017).

28. See *infra* Section II.B.2 (discussing antitrust’s labor exemption).

29. See *infra* Section II.A.3 (discussing antitrust litigation brought against the City of Seattle for attempting to establish a bargaining unit for ride-share drivers).

manipulation, offers no possibility of competitive benefit and should remain illegal *per se*.

This Article's analysis uncovers a perversity that may support arguments to legislate for solutions the market and exemptions from antitrust law do not provide. The procompetitive rationale for labor organization among sharing economy suppliers—establishing countervailing market power to overcome the harm caused by monopsony—arises in the case of suppliers least needing the benefits of organization. Those suppliers fit into what this Article terms the “fallow-assets” model of the sharing economy and can enter and exit the market easily. In contrast, suppliers who have made substantial commitments to their work in the particular market, meeting what this Article terms the “locked-in” model are unlikely to successfully assert a procompetitive rationale for organizing.³⁰ This Article concludes that antitrust law is not an effective tool for resolving this paradox, which instead is a basis for resolution as a matter of labor policy or a social insurance scheme. Both are beyond the scope of this Article.

The Article avoids an approach that some scholars have favored in recent years of more broadly defining the constituencies the law protects.³¹ Sometimes labeled “Neo-Brandeisian” antitrust, ideas of including workers, input suppliers, or even more tangentially impacted third parties in the set of recognized victims of market effects have substantial currency and surface appeal.³² If one could prove market effects from conduct impacting consumers, workers, and possibly others, the law might permit any affected party to remedy the harm, with benefits flowing to all market participants and others affected by the conduct. It might also be possible to identify goals, such as correcting for wealth disparities, that justify either antitrust interventions (challenging monopoly or monopsony) or antitrust exceptions (allowing monopolization or monopsonization by less wealthy market participants).³³

These arguments are subject to an acute critique that points to the incommensurability of competing goals. This threatens to reduce antitrust analysis to an “I know it when I see it” approach to defining harm.³⁴ As others have shown and the Authors explain here, worker

30. See *infra* Sections III.B, IV.B.

31. See, e.g., MARSHALL STEINBAUM & MAURICE E. STUCKE, ROOSEVELT INST., THE EFFECTIVE COMPETITION STANDARD (2018).

32. See, e.g., Tim Wu, *After Consumer Welfare, Now What? The “Protection of Competition” Standard in Practice*, ANTITRUST CHRON., Apr. 2018, at 3–7, <https://ssrn.com/abstract=3249173>.

33. See *id.* at 9–12.

34. See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1440–41 (2009); cf. Ralph K. Winter, Jr., *Collective Bargaining and Competition: The*

interests may be consistent with consumer interests or opposed to consumer interests.³⁵ In the case of the former, continuing to treat consumer protection as the goal of antitrust will serve worker interests as well. In the case of the latter—interests in opposition—it is hard to imagine a principled way to determine which outcome should be preferred or how to measure the outcomes to balance them.³⁶

Part II analyzes the impact of current antitrust doctrine on sharing economy workers who jointly negotiate with platform companies. It does so first by analyzing the current Sherman Act doctrine and then by analyzing the potential for applying the exemption for traditional collective bargaining. Part III analyzes the underlying economic structure of markets for labor. It does so first by examining markets for traditional employment. It then assesses how markets for sharing economy workers operate. In doing so, this Article identifies two different types of sharing economy workers and how markets for each type differ, as well as the perversity that the economic justification for labor organization is most likely to arise in the case of workers least needing the protections. Part IV analyzes prior scholarship regarding workers' rights and the conflict with antitrust law. It outlines three representative approaches, all of which offer ways in which antitrust law could give way to allow greater worker protections. This Article argues for a new, alternate approach under which Sherman Act doctrine might adjust to reflect the economics of the labor markets analyzed in Part III.

II. CURRENT LEGAL TREATMENT OF SHARING ECONOMY DRIVERS

A. Current Legal Treatment of Agreements Among Sharing Economy Suppliers

For almost 130 years, the Sherman Act has been the principal vehicle for federal courts to assess the competitive significance of conduct.³⁷ If sharing economy workers jointly negotiate with the

Application of Antitrust Standards to Union Activities, 73 YALE L.J. 14, 16–17, 23–24 (1963) (discussing specifically the different goals of collective bargaining and antitrust). Possible benefits from these approaches include increasing the range of potential plaintiffs (thus, better ensuring antitrust challenges to monopoly) and resolving recalcitrant social problems not adequately addressed elsewhere in law or economics.

35. See Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381, 391–92 (2020) (discussing the effect of a labor market restraint favoring workers over consumers).

36. *Id.* at 395–96.

37. The competitive effects of coordinated conduct by multiple economic actors are assessed under Section One of the Act, which outlaws “contract[s], combination[s], and conspirac[ies] . . . in restraint of trade.” 15 U.S.C. § 1. The competitive effects of conduct by a single

platforms, three questions arise under Section 1 of the Act. First, are the drivers part of a single entity and therefore incapable of conspiring for purposes of the Sherman Act? Second, if the drivers are not protected by the single entity rule, have they entered into an agreement with each other? Third, if such an agreement exists, will its competitive effect be assessed under a rule of per se illegality—illegal by virtue of the agreement itself, irrespective of its effects—or the Rule of Reason—illegal if it causes or is expected to cause harm in the market?³⁸ This Section analyzes these questions under existing authority. It concludes that collective action by drivers, even if directed to curing market imperfections from monopsony, would be treated as per se illegal and subject to automatic invalidation. Parts III and IV argue that this approach fails to take into account significant aspects of the economic relationship among the drivers, the platform companies, and consumers.

1. Agreements Among Sharing Economy Suppliers Are Not Protected by the Single Entity Rule

The first element of a Section 1 claim is that an agreement must exist among separate economic actors.³⁹ In *Copperweld Corp. v. Independence Tube Corp.*, the US Supreme Court held that a parent corporation and its wholly owned subsidiary are incapable of conspiring under Section 1 because they are not pursuing separate economic interests.⁴⁰ In *American Needle, Inc. v. National Football League*,⁴¹ the Court held that NFL teams were capable of conspiring under Section 1 because—distinct from the facts of *Copperweld*—they were organized as independent firms and not as subsidiaries of a parent corporation; they were pursuing separate economic interests.⁴² Employees of a firm are considered part of the firm for purposes of Section 1 and are incapable of conspiring with each other or the firm when they are pursuing the interests of the firm.⁴³

firm are assessed under Section Two, which outlaws “monopoliz[ing . . .] any part of the trade or commerce among the several States.” 15 U.S.C. § 2.

38. See generally KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION* 104–12 (2003) (explaining the per se rule and Rule of Reason).

39. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770–71 (1984). In prior scholarship, the Authors analyzed this question in depth with regard to coordination among suppliers and the platform through the sharing economy enterprise. Anderson & Huffman, *supra* note 1, at 898–917.

40. *Copperweld*, 467 U.S. at 777.

41. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

42. *Id.* at 200–01.

43. *Copperweld*, 467 U.S. at 770–71.

If sharing economy workers were deemed to be part of a single entity in conducting joint negotiations with the platform companies, the negotiations would be legal under Section 1 since no agreement among the workers would exist.⁴⁴ In *Copperweld* and *American Needle*, the Court focused on combined economic interest in determining whether the single entity rule applied. Suppliers jointly negotiating for better terms have a shared desire for better terms but have not combined their economic interest to a sufficient degree to qualify as a single entity.⁴⁵

Prior scholarship reconciled the rules in *Copperweld* (holding separately incorporated businesses were a single entity) and *American Needle* (holding independent football teams were not a single entity even when cooperating in a joint licensing scheme) by reference to the sharing of profits and losses that characterizes integration into a firm.⁴⁶ Owners of a business entity pool their revenues and costs to share the resulting profits or losses. This sharing of profits and losses creates incentives for efficiencies that justify single entity treatment. Sharing economy workers share neither costs nor revenues among themselves or with the platform. Each incurs their own costs and keeps the revenue generated by their rides. A mere common desire to charge more does not justify single entity treatment.⁴⁷ Indeed, such a common interest in higher prices exists in all price fixing cartels.⁴⁸

A potentially confusing part of the single entity analysis as applied to the drivers' agreement relates to the dispute over whether the drivers are employees of the platform company. Generally, employees are considered part of a single entity with the employer.⁴⁹ Therefore, one might think that the question of whether drivers are employees of Uber would control the single entity question. However, that is not the case. Employees are considered part of the same entity as the employer only when they are pursuing the employer's interest.⁵⁰ This is why the labor exemption is so important for employees who belong to a union.⁵¹ Without an exemption, their collective demands for higher pay, which are not in pursuit of the employer's interest, would merely be an illegal cartel.⁵²

44. Anderson & Huffman, *supra* note 1, at 888–89.

45. *See id.* at 900.

46. Anderson, *supra* note 20, at 527–34.

47. *Id.* at 537.

48. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 201–02 (2010).

49. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984).

50. *See id.* at 769 n.15; *see also* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1471 (3d ed. 2010).

51. *See infra* Section II.B.

52. 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 255 (4th ed. 2013).

2. Joint Negotiations and Surge Price Manipulation Reflect Horizontal Agreements Among Drivers

If separate economic actors exist, the second step in analyzing the agreement element asks whether those actors have coordinated their conduct. Sometimes this question is easy to answer. Actors sometimes meet, talk to each other, and enter into express agreements. This is true when firms enter into distribution agreements,⁵³ joint venture agreements,⁵⁴ or form trade associations.⁵⁵ Similarly, cartelists enter into express agreements fixing prices. However, sometimes actors are alleged to have horizontally coordinated their behavior without express horizontal agreement. In *Interstate Circuit v. United States*,⁵⁶ the Supreme Court determined that a communicated agreement among horizontal competitors was not necessary for finding an agreement under Section 1. The Court relied on the coordination of horizontal conduct through a “hub” oriented vertically to the competitors, creating a hub-and-spoke agreement that existed despite the lack of express agreement among individual competitors.⁵⁷ However, the *Interstate Circuit* rule is narrow. In *Bell Atlantic Corp. v. Twombly*, the Court held that mere interdependent parallel conduct, in the absence of allegations of a hub coordinating the horizontal activity and creating implicit mutual understandings among the horizontal competitors, was not sufficient for an agreement under Section 1.⁵⁸

If drivers communicate with each other in order to bargain collectively over the terms of their relationship with the platform companies, whether coordination is through express coordination among drivers or through a hub—perhaps a single representative, or a communication app⁵⁹—this collective decision will constitute an agreement under Section 1. They will have expressed their commitment to each other that they will coordinate their conduct in jointly negotiating with the platform company. Their behavior is not merely consciously parallel. It is the product of a communicated agreement.⁶⁰

53. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 883 (2007).

54. *Texaco Inc. v. Dagher*, 547 U.S. 1, 4 (2006).

55. *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 565 (1925).

56. *Interstate Cir. v. United States*, 306 U.S. 208 (1939).

57. *Id.* at 226–27 (identifying a hub-and-spoke agreement as sufficient to represent a horizontal agreement, despite a lack of allegations of communications between horizontal competitors). The Authors analyze the hub-and-spoke nature of the sharing economy enterprise agreement in Anderson & Huffman, *supra* note 1, at 900–07.

58. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007).

59. *See, e.g., supra* note 12.

60. *See* William H. Page, *Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act*, in *ANTITRUST LAW & ECONOMICS* 23, 29–30 (Keith N. Hylton ed., 2010).

Other species of actual or alleged coordination would be treated similarly. The May 8, 2019, “work stoppage” or “drivers’ strike”⁶¹ represented collective action by drivers reached by agreement. Reports of surge price manipulation, which is believed to have been widespread in localized markets, also would reflect express agreements among drivers to game the pricing algorithm.⁶²

If an agreement exists for purposes of Section 1, what is the nature of that agreement? This question of characterization will be important for purposes of determining whether the agreement is per se illegal and, if not, determining how it will be assessed under the Rule of Reason.⁶³ The agreement to jointly negotiate with the platform company includes a commitment to accept the price and other terms that the negotiations produce. The drivers might authorize representatives to agree with the platform company on their behalf. Alternatively, the drivers might have a vote to accept the negotiated terms. Either way, a communicated agreement among the drivers is present.

3. Is a Suppliers’ Agreement Per Se Illegal?

If an agreement among separate economic actors is found, the competitive effects of that agreement would be assessed under the second element of the Section 1 claim.⁶⁴ Some agreements are subject to rules of per se illegality, condemned without any consideration of possible beneficial effects from the conduct.⁶⁵ In 1940, the Supreme Court adopted a per se rule for price fixing by competitors.⁶⁶ In 1972, the Court applied a per se rule to agreements among competitors allocating customers.⁶⁷ Over several decades the Court has discussed

61. See *supra* note 12.

62. Siegal, *supra* note 11. One description of a changed surge-pricing algorithm may reduce the incentive to engage in manipulation and could possibly explain the lack of recent reports of the conduct. Aaron Gordon & Dhruv Mehrotra, *We Think Uber and Lyft’s New Surge Fares Screw Drivers and Riders. Help Us Prove It*, JALOPNIK (July 1, 2019, 2:01 PM), <https://jalopnik.com/we-think-uber-and-lyfts-new-surge-fares-screw-drivers-a-1835952856> [https://perma.cc/5HA9-DQLJ].

63. See *infra* Sections II.A.3, II.A.4.

64. 15 U.S.C. § 1 (stating that an agreement must reflect a “restraint of trade”).

65. See 2 WILLIAM H. PAGE, JOHN E. LOPATKA & MAX HUFFMAN, *KINTNER’S FEDERAL ANTITRUST LAW* §§ 9.5, 9.6 (2013 & Supp. 2020).

66. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

67. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (“One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.”).

the potential for applying a per se rule to boycotts.⁶⁸ The Supreme Court has also overturned various per se rules.⁶⁹ Whenever the law adopts a categorical rule, like a rule of per se illegality, it must determine the boundaries of the forbidden category. For example, the Supreme Court spent decades adjusting the boundaries of the per se rule against price fixing by competitors.⁷⁰ Likewise, defining the boundaries of conduct demonstrating a per se illegal group boycott remains challenging.⁷¹ Analysis of the application of these rules in the context of joint action by sharing workers requires a determination of the parameters of the per se rules.

The per se rule most likely to apply to an agreement among workers is the rule against price fixing by competitors.⁷² The parameters of the rule have been frequently litigated. At its simplest, price fixing is easy to identify, but as the following paragraphs show,

68. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (“Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.”); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985) (“This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act.”); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458 (1986) (“[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor”); *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 433 (1990) (“Moreover, while the *per se* rule against price fixing and boycotts is indeed justified in part by ‘administrative convenience,’ the Court of Appeals erred in describing the prohibition as justified only by such concerns. The *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have ‘a substantial potential for impact on competition.’”).

69. *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (minimum resale price maintenance subject to the Rule of Reason); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price maintenance subject to the Rule of Reason); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled by* *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical non-price restrictions subject to the Rule of Reason).

70. *Compare* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), *with* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 18–22 (1979), *and* *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 351–56 (1982).

71. *See Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 432–36 (holding per se illegal group boycott although effect was vertical in nature); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (holding no application of the per se rule to a boycott in the absence of a horizontal agreement).

72. The rule against group boycotts is frequently applied to horizontal agreements that are aimed at competitors or someone party to the agreement. *Compare Ind. Fed’n of Dentists*, 476 U.S. at 458–59, *with Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 432–36. The victims of the drivers’ agreement are the platform companies, and possibly the riders, neither of whom are competitors of the drivers. Therefore, the victims of the drivers’ agreement are not competitors of the drivers and the per se rule against boycotts would not apply.

the Supreme Court has both applied the rule when the challenged agreement did not involve a literal price fix and has declined to apply the rule when the challenged agreement did involve a literal price fix.⁷³ In *United States v. Socony-Vacuum Oil Co.*,⁷⁴ the defendant oil companies agreed to engage in coordinated purchases of oil in the spot market in an effort to raise the market price.⁷⁵ The Court condemned the agreement as a per se violation of Section 1 in the classic statement of the rule: “[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”⁷⁶ Thus, the per se rule against price fixing derives from a case in which the defendants did not fix a literal price. Consistent with this broad approach, the Court condemned as per se illegal price fixing an agreement among competitors to refuse to sell on credit.⁷⁷

The per se rule against horizontal group boycotts has substantial overlaps with price fixing, as the boycott can serve as an enforcement mechanism to support the price fix. The clearest analogy to a potential drivers’ agreement is a group boycott case involving individual attorneys practicing in the same courthouse in Washington, DC called *FTC v. Superior Court Trial Lawyers Ass’n*.⁷⁸ Specifically, this case significantly parallels a horizontal agreement among drivers designed to improve their bargaining position with the platform. In *Superior Court Trial Lawyers*, the defendants were lawyers who provided indigent criminal defense services by court appointment in the District of Columbia.⁷⁹ The government paid the court-appointed counsel by the hour. Members of the association formed a strike committee and ultimately voted to refuse to take any more court appointments until the hourly rates were raised.⁸⁰ This refusal resulted in substantial difficulty in the administration of justice and the District ultimately raised the hourly rates, bringing the strike to an end.⁸¹

73. Cf. *Socony-Vacuum Oil Co.*, 310 U.S. at 222–23 (applying price fixing rule to agreement better classified as market manipulation); *Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 432–36 (declining to treat a price fix among lawyers as such, instead classifying it as a group boycott).

74. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

75. *Id.* at 167–68.

76. *Id.* at 223.

77. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam).

78. *Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 432–36.

79. *Id.* at 415.

80. *Id.* at 416–17.

81. *Id.* at 417–18.

The Supreme Court held that the strike constituted a *per se* illegal boycott.⁸² Justice Brennan, joined by Justice Marshall, concurred in part and dissented in part critiquing the boycott rationale.⁸³ The majority responded to the criticism by noting that the defendants' conduct included not only a refusal to deal but also price fixing by competitors.⁸⁴ How does *Superior Court Trial Lawyers* help to analyze the drivers' agreement? The lawyers' purpose in entering into their agreement was to take a joint position regarding price. This purpose was dispositive and led to the application of the *per se* rule. The drivers, of course, have a purpose to affect the price, and their agreement to achieve that purpose would be *per se* illegal under *Superior Court Trial Lawyers*.⁸⁵

Despite the substantial parallels to these authorities applying the *per se* rule, the Section 1 analysis is complicated by a number of cases in which the Supreme Court has declined to apply the *per se* rule to agreements among competitors that were intended to affect the market price. In *National Society of Professional Engineers v. United States*, the defendants had agreed that they would not engage in competitive bidding.⁸⁶ The Court viewed the agreement as aimed at maintaining prices.⁸⁷ Nevertheless, the Court declined to apply the *per se* rule, nominally applying the Rule of Reason.⁸⁸ In *NCAA v. Board of Regents of the University of Oklahoma*, the defendant universities had limited the number of football games that could be broadcast on

82. *Id.* at 432. The Court's conclusion that the agreement among the lawyers was a *per se* illegal boycott is in tension with *Indiana Federation of Dentists*, which declined to apply the *per se* rule against boycotts because the victim of the boycott was not a competitor of anyone party to the agreement. 476 U.S. 447, 457–58 (1986).

83. *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 452 n.9 (Brennan, J., concurring in part and dissenting in part).

84. *Id.* at 436 n.19 (majority opinion) ("In response to Justice BRENNAN's opinion, and particularly to its observation that some concerted arrangements that might be characterized as 'group boycotts' may not merit *per se* condemnation, see *post*, at 790–791, n. 9, we emphasize that this case involves not only a boycott but also a horizontal price-fixing arrangement—a type of conspiracy that has been consistently analyzed as a *per se* violation for many decades. All of the 'group boycott' cases cited in Justice BRENNAN's footnote involved nonprice restraints. There was likewise no price-fixing component in any of the boycotts listed on pages 787–788 of Justice BRENNAN's opinion. Indeed, the text of the opinion virtually ignores the price-fixing component of respondents' concerted action.").

85. See 2 PAGE ET AL., *supra* note 65, §§ 9.5, 9.6.

86. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 683 (1978).

87. *Id.* at 693 (footnote omitted) ("The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health. The logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose.").

88. *Id.* at 696.

television and put a price on the broadcast rights for the games.⁸⁹ Despite acknowledging that the agreement looked like per se illegal price fixing, the Court decided to apply the Rule of Reason because “this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”⁹⁰ The best explanation for the holdings in *Professional Engineers* and *Board of Regents* is the Supreme Court’s discomfort with applying the per se rule to more complex business structures, including professions and sports leagues, for which unrestrained competition might be inconsistent with providing the product at all.⁹¹ This reticence might provide a basis for an argument on behalf of the drivers that the per se rule against price fixing does not apply to their conduct.

The US Chamber of Commerce sued the city of Seattle in 2017, challenging an ordinance providing for collective bargaining by ride-sharing drivers. The Chamber won a preliminary injunction and, on appeal, succeeded in the US Court of Appeals for the Ninth Circuit against a state-action immunity argument. The Chamber alleged price fixing in violation of Section 1.⁹² While the case was on remand, the city of Seattle amended its ordinance to remove the provisions allowing collective bargaining about price, causing the Chamber to dismiss its Sherman Act claims.⁹³

In summary, there are strong arguments that the drivers’ strike is per se illegal as price fixing and a group boycott by competitors under existing Supreme Court authority. Parts III and IV argue that this authority fails to take into account significant economic aspects of the drivers’ relationship with the platform companies and consumers.

4. Joint Action by Sharing Economy Workers Would Be Condemned Under the Rule of Reason as Currently Applied

Under the current Section 1 doctrine, most agreements are assessed under the Rule of Reason, rather than deemed per se illegal.⁹⁴ Originating in Judge Taft’s opinion in *United States v. Addyston*

89. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 91–93 (1984).

90. *Id.* at 101.

91. Cf. HYLTON, *supra* note 38, at 125–29 (discussing *Professional Engineers* and *Board of Regents* as reflecting “[p]ressure on [the] Rule of Reason [b]oundary”).

92. Complaint at 17, Chamber of Com. v. City of Seattle, 274 F. Supp. 3d 1155 (W.D. Wash. 2017) (No. 2:17-cv-00370-RSL) (first citing *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 422 (1990); then citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 457–58 (1986); and then citing *Nat’l Soc’y of Pro. Eng’rs*, 435 U.S. at 693–95).

93. Stipulation and Order for Dismissal Without Prejudice, Chamber of Com. v. City of Seattle, 274 F. Supp. 3d 1155 (W.D. Wash. 2017) (No. 2:17-cv-00370-RSL).

94. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

*Pipe & Steel Co.*⁹⁵ and most clearly explained by Justice Brandeis in *Chicago Board of Trade v. United States*,⁹⁶ the Rule of Reason treats agreements that regulate competition, thereby promoting rather than suppressing competition, through an evaluation of the effects of those agreements.⁹⁷ Courts have provided a structured approach to the Rule of Reason by separating the analysis into a series of questions and allocating burdens to the plaintiff and defendant on each question, reflecting both the parties' respective access to evidence and the danger of false positive or false negative results. The threshold question is whether the plaintiff has presented sufficient evidence of the likelihood that the agreement has an anticompetitive effect. For example, in *Professional Engineers*,⁹⁸ the Court concluded that an agreement among the members of an association of engineers to refrain from competitive bidding posed sufficient anticompetitive potential to meet this threshold.⁹⁹ Similarly, in *Board of Regents*,¹⁰⁰ the Court held that an agreement among universities to limit the number of football games broadcast on television and pricing the games that were broadcast met the threshold.¹⁰¹ In *FTC v. Indiana Federation of Dentists*,¹⁰² the Court reached the same conclusion regarding an agreement among dentists to refuse to supply x-rays to insurance companies.¹⁰³

In each of these cases, the Court permitted the case to proceed under the Rule of Reason without requiring the plaintiff to engage in a sophisticated analysis of the market and the likely competitive effects of the conduct.¹⁰⁴ This approach is sometimes characterized as a "quick look" version of the Rule of Reason.¹⁰⁵ The Court has not always been willing to apply this quick look approach. In *California Dental Ass'n v. FTC*,¹⁰⁶ the Court declined to apply this approach to an agreement

95. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

96. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918).

97. See *id.* at 238–39; see also 2 PAGE ET AL., *supra* note 65, §§ 9.5–9.7.

98. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978).

99. *Id.* at 692.

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

101. *Id.* at 113.

102. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

103. *Id.* at 459.

104. See *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 693–96 (rejecting purported efficiency justification as non-cognizable); *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 113–20 (considering but not accepting purported efficiency justifications).

105. See *Anderson & Huffman*, *supra* note 1, at 914–16 (arguing for application of the quick look to the Uber pricing algorithm); 2 PAGE ET AL., *supra* note 65, § 9.7.

106. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

among dentists that limited the type of advertising by dentists.¹⁰⁷ Justice Souter, writing for the Court, determined that the Commission had not presented enough evidence of the likelihood of anticompetitive effects to meet the threshold question under the Rule of Reason.¹⁰⁸

If a plaintiff meets the initial burden of presenting sufficient evidence of the likelihood of anticompetitive effects of an agreement, the burden shifts to the defendant to offer evidence of a procompetitive justification for the agreement.¹⁰⁹ To be considered, the justification must serve the goal of enhancing competition. In *Professional Engineers*, the Court rejected the defendants' attempt to justify a ban on competitive bidding based on the assertion that bidding would lead to poor-quality engineering. The Court held that "[t]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."¹¹⁰ Similarly, in *Indiana Federation of Dentists*, the Court rejected the defendants' attempt to justify an agreement to refuse to supply insurance companies with x-rays by asserting that doing so would be bad for patients.¹¹¹ The Court characterized the argument as an attack on the basic policy of the Sherman Act.¹¹² If the defendant makes an adequate showing of a procompetitive justification, the burden shifts back to the plaintiff to show that the anticompetitive effects outweigh the procompetitive effects.¹¹³ *Goldfarb v. Virginia State Bar* also treated an agreement not to lower the price for a particular form of legal services as price fixing and subjected it to the per se rule.¹¹⁴

The quick look approach to the initial question of the likelihood of anticompetitive effects is likely applying the Rule of Reason to a drivers' agreement under current authority. Assuming the goal of the drivers' agreement is to raise driver compensation, whether in

107. *Id.* at 778.

108. *Id.* at 775–76; see also Stephen Calkins, *California Dental Association: Not a Quick Look but Not the Full Monty*, 67 ANTITRUST L.J. 495, 504 (2000). Justice Breyer's dissent in *California Dental Ass'n* argued that the obviousness of the competitive harm from the agreement should have served to shift the burden to the defendant. *Cal. Dental Ass'n*, 526 U.S. at 784–85 (Breyer, J., dissenting).

109. Whether this burden is one of persuasion or mere production of evidence is addressed below. See *infra* Section IV.B.

110. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 696 (1978).

111. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986).

112. *Id.*

113. See Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 103–04 (2018).

114. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). There is an interesting question to what degree these cases involving learned professions, which frequently involve individuals providing services somewhat autonomously (either as solo practitioners or as employees with ethical obligations to exercise independent judgment), are good analogs to the ride-sharing market. Many of the rationales for individual autonomy for professionals might apply with similar force to workers in a ride-sharing enterprise.

monetary terms or in terms of a requirement of nonmonetary benefits, a plaintiff challenging the drivers' agreement would be able to quickly demonstrate the likelihood of anticompetitive effects—an increase in the price of services provided and commensurate reduction in the quantity demanded. Because of the clear impact on price and output from such an agreement, the dissent by Justice Breyer in *California Dental*—rather than the majority opinion by Justice Souter—is likely to control the decision of the applicable standard.¹¹⁵

Under existing authority, there do not seem to be any procompetitive justifications for a strike, collective bargaining, or any other horizontal agreement designed to raise worker pay in a ride-sharing enterprise. Workers' earnings from providing ride-sharing services are a function of competition among them, which likely impacts their compensation in two ways. First, the willingness of workers to drive in a ride-sharing enterprise reduces the platform's need to offer generous terms as part of the driver agreement. Second, in day-to-day driving, competitive entry (turning on the app) leads to lower revenues per ride given. But, consistent with *Professional Engineers, Indiana Federation of Dentists*, and *Goldfarb*, unhappiness with the results of competition is not a cognizable justification for an agreement not to compete.¹¹⁶ In the absence of a procompetitive justification, an agreement among the workers would be condemned under the current Rule of Reason authority.

Current Sherman Act authority would deny the drivers the protection of the single entity rule and find a horizontal agreement among the drivers. The most likely treatment of such an agreement is under the inflexible per se rule, resulting in automatic illegality. Even if not per se illegal, existing authority would condemn the agreement under a quick look version of the Rule of Reason. Part IV recommends an evolution of doctrine that would subject negotiation by the drivers to the Rule of Reason and open the possibility of it being permitted under prescribed circumstances in which it produced outcomes that, on net, benefitted consumers.¹¹⁷

115. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 784–86 (1999) (Breyer, J., dissenting); HYLTON, *supra* note 38, at 128–29; Calkins, *supra* note 108, at 504–05.

116. See *supra* notes 92–96 and accompanying text.

117. Surge price manipulation would remain per se illegal under the Author's approach.

B. Intersection of Labor and Employment Law with Antitrust Principles

Taken to its literal extreme, the prohibition of restraints on trade in Section 1 of the Sherman Act produces untenable results, preventing the coordination of entrepreneurship with capital, the aggregation of capital, agreements that on their own might be harmful but are necessary to support beneficial agreements, among other examples.¹¹⁸ As a result, both at common law and soon after the enactment of the Sherman Act, courts recognized the necessity of interpreting the prohibitions of restraints to apply only to unreasonable restraints.¹¹⁹ The “reasonableness” limitation—the basis for the Rule of Reason in antitrust—has a labor exemption at its core. In the examples of reasonable restraints that then-Judge William Howard Taft outlined in *Addyston Pipe & Steel*, several spoke to combinations of workers (for example, in a partnership) or agreements among small entrepreneurs (for example, a noncompete agreement in the sale of a business) that restrain competition in the labor market.¹²⁰ Judge Taft drew these examples from common law authorities, some long predating the Sherman Act.¹²¹

However, consistent with the principles outlined in the prior Section, early applications of the Sherman Act in labor markets treated labor-organizing conduct as a wage-fixing cartel, with employers the direct victims.¹²² The labor exemption, a partially statutory, partially common-law carve-out for union organizing by employees, gave legal sanction to certain exercises of labor market power without regard to the effect on consumers.¹²³ This exemption developed as a preference for social policy favoring labor interests over competing consumer interests.¹²⁴ This Section outlines the development of non-antitrust labor policy as applied to ride-sharing enterprises before analyzing the labor exemption in the ride-sharing context.

118. Any such coordination both prevents competition between the parties and prevents each of the parties from cooperating with others—each of which represents a restraint that read literally would be prohibited by the Sherman Act.

119. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

120. *Id.*

121. *Id.* at 279–82.

122. See, e.g., *Loewe v. Lawlor*, 208 U.S. 274, 304–09 (1908) (overruling demurrer entered for defendant United Hatters of North America in a suit by plaintiff manufacturers of hats).

123. See *infra* Section II.B.2.

124. See generally 9 EARL W. KINTNER, JOSEPH BAUER & WILLIAM PAGE, KINTNER'S FEDERAL ANTITRUST LAW § 72.1 (1989 & Supp. 2020).

1. Labor and Employment Law Treatment of Ride-Sharing Enterprises

A substantial body of law has developed, challenging ride-sharing enterprises' efforts to designate drivers as independent contractors, thus avoiding employment law protections that would apply if employee status was proved. These cases primarily reflect efforts by ride-sharing drivers, or their purported representatives, to be treated as employees rather than independent contractors for purposes of legal protections and benefits.¹²⁵ Both federal and state law protections are available to employees but not to contractors.¹²⁶ The employment status of workers in ride-sharing enterprises bears an important relationship to the antitrust consequences of organizing by these workers for collective bargaining purposes.¹²⁷

The employment question requires courts to distinguish between an "employee" and an "independent contractor."¹²⁸ In its

125. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (class representing Uber drivers seeking treatment as employees).

126. See *Razak v. Uber Techs., Inc.*, No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *19–20 (E.D. Pa. Apr. 11, 2018) (citing Fair Labor Standards Act, 29 U.S.C. §§ 203, 206–207), *vacated*, 951 F.3d 137 (3d Cir. 2020); *id.* at *20 (noting that Pennsylvania's Minimum Wage Act looks to Federal law for the definition of employee).

127. See *infra* Section II.B.2, Part III.

128. See *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. 1 (July 2008) [hereinafter *Fact Sheet 13*], <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/whdfs13.pdf> [<https://perma.cc/NZ57-M5DS>]. The distinction between employee and contractor is old. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)) (noting the "broad" definition of employ, with its genesis in child-labor statutes, that was "not so broad as to include those 'who, without any express or implied compensation agreement, might work for their own advantage on the premises of another'"). The modern statement of the employee-contractor distinction is fact dependent, turning on application of a multifactor test broadly recognized by the courts and the Department of Labor. See *Fact Sheet 13, supra*, at 1. The Third Circuit's representative formulation of the test, applied by the Eastern District of Pennsylvania in *Razak v. Uber*, requires a court to consider:

- (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanence of the working relationship; and
- (6) whether the service rendered is an integral part of the alleged employer's business.

Razak, 2018 U.S. Dist. LEXIS 61230, at *21 (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985)). The US Department of Labor has recently followed a seven-factor test,

now-withdrawn April 2019 opinion letter, the Department of Labor’s Wage and Hour Division stated a variation of the several-factor control test.¹²⁹ And state laws on the question are similar. California law, interpreted in *O’Connor v. Uber Technologies*, notes the preeminence of “control” but also considers “several ‘secondary’ indicia” including:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.¹³⁰

In *O’Connor*, a putative class of Uber drivers sued Uber, contending the plaintiffs were employees, not independent contractors, and thus were entitled to legal protections including full pass-through of gratuities.¹³¹ On an application of the “control plus” test from California law, the *O’Connor* court determined that ride-sharing drivers were presumptively employees and refused Uber’s motion for summary judgment.¹³² Comparable cases have been brought on both US coasts and against both Uber and Lyft,¹³³ seeking protections including

which tracks the judicial formulae, in applying its own definition of employee. *See Fact Sheet 13, supra*, at 1. According to the DOL:

[a]n employee, as distinguished from a person who is engaged in business for himself or herself, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent upon the business to which he or she renders service. The employer-employee relationship under the FLSA is tested by economic reality rather than technical concepts. It is not determined by common law standards relating to master and servant.

U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Sept. 5, 2002), 2002 WL 32406602, at *2. Under that test, the DOL applies seven factors that substantially mirror the six factors from *Razak*. *See Fact Sheet 13, supra*, at 1.

129. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Apr. 29, 2019), 2019 WL 1977301, at *4 (withdrawn Feb. 19, 2021). The Federal employee-contractor distinction is in flux as of this publication. *See Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date*, 86 Fed. Reg. 8326 (Feb. 5, 2021).

130. *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Rels.*, 48 Cal. 3d 341, 350–51 (1989) (cited in *O’Connor*, 82 F. Supp. 3d at 1138).

131. *O’Connor*, 82 F. Supp. 3d at 1135, 1137–38. Both federal- and state-law protections turn on the common law employer-contractor distinction. *See id.* at 1138–40.

132. *See id.* at 1135, 1138–40 (California, putative class action against Uber).

133. *See Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 288 (D. Mass. 2016) (Massachusetts, putative class action against Lyft); *Razak*, 2018 U.S. Dist. LEXIS 61230, at *2, *8 (Pennsylvania, putative class action against Uber).

minimum wages and overtime pay,¹³⁴ and coverage of vehicle maintenance, ownership, and insurance expenses.¹³⁵ Despite such favorable reception in some courts, ride-sharing drivers have uniformly failed to achieve successful outcomes in lawsuits seeking treatment as employees for purposes of wage-and-hour and benefits obligations. In several cases, including *O'Connor*, the drivers have been subjected to mandatory arbitration provisions in their contracts with the platforms.¹³⁶ In others, courts have granted summary judgment to Uber on the question of employee status.¹³⁷

For a short period, California served as a substantial exception to this trend, with a state-law amendment classifying sharing economy workers as employees more readily than at common law or under federal law.¹³⁸ California's "gig-economy bill" took effect in January 2020 and responded to the perceived "misclassification of workers as independent contractors."¹³⁹ It placed the burden on the "hiring entity" to show (1) freedom from control and direction, (2) work performed outside the hiring entity's usual business, and (3) the person is customarily engaged in independently established trade of the same nature.¹⁴⁰ It would be difficult for a ride-sharing platform to demonstrate the third element in particular. In a lawsuit by the California attorney general to enforce AB-5, a trial court preliminarily enjoined Uber and Lyft to reclassify ride-sharing drivers as employees, relying instead on the second element of the statutory test.¹⁴¹ The preliminary injunction was stayed on appeal.¹⁴² However, in November

134. See *Razak*, 2018 U.S. Dist. LEXIS 61230, at *2, *19 ("Plaintiffs contend that they are 'employees' under the FLSA, and therefore entitled to overtime pay and other benefits").

135. See *Bekele*, 199 F. Supp. 3d at 289 ("The complaint alleges that . . . drivers must pay for expenses that their employer Lyft should pay for, including costs of vehicle ownership and maintenance, gas, and insurance.").

136. See *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094–95 (9th Cir. 2018) (reversing the district court's refusal to compel arbitration).

137. See *Razak*, 2018 U.S. Dist. LEXIS 61230, at *3.

138. See Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

139. *Id.* § 1.

140. *Id.* § 2. These elements were initially stated by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1, 42 (Cal. 2018).

141. *People v. Uber Techs., Inc.*, No. CGC-20-584402, 2020 WL 5440308, *3, *18 (Cal. Super. Ct. Aug. 10, 2020) (issuing a preliminary injunction because "[d]efendants' drivers do not perform work that is 'outside the usual course' of their businesses"), *aff'd*, 270 Cal. Rptr. 3d 290 (Ct. App. 2020).

142. Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/technology/uber-lyft-california-shut-down.html> [<https://perma.cc/A627-TU4V>]. Scholarly commentary largely condemns the outcomes dismissing cases that seek to classify drivers as employees, as leading to irredeemable bargaining-power disparities between centralized employers and highly diffuse independent contractors. See, e.g., Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1851,

2020, California voters broadly supported an Uber and Lyft-sponsored proposition, Proposition 22, which reversed the impact of AB-5. Proposition 22 declared app-based drivers as independent contractors, so long as the platform (called “network company” in the terms of Proposition 22) did not establish a work schedule or minimum hours requirement, did not require the driver to accept a ride request, did not restrict driving with competing services, and did not restrict engaging in other employment.¹⁴³

Both federal and state law broadly treat ride-share drivers as contractors, rather than employees. Efforts have been made to change that definition, both through increasingly broad definitions of “employment” in court and legislative change in California.¹⁴⁴ Those efforts have not succeeded, in one case due to a popular referendum reversing an attempted legislative change in California. Next, this Article approaches the interplay between labor law and antitrust law from the antitrust perspective. The next Subsection demonstrates that the labor law exemption from antitrust cannot be relied on to protect workers in a ride-sharing enterprise against liability from likely illegal coordinated activity.

2. Labor Exemption from Antitrust

The labor market is, on the one hand, merely an upstream market for inputs into the production process no different from a market for raw materials, capital, or any other factor of production. Such a reductive explanation of labor markets might justify subjecting

1886–89 (2018) (calling for increased picketing options to mitigate bargaining disparity). In a potent critique of the bargaining-power disparities facing workers in a “fissured business arrangement,” Professor Paul identifies an inconsistency between treatment of a ride-sharing firm as an application company supplying an input to individual service providers, for purposes of labor law; as a disruptive force in a stagnant industry, for purposes of escaping regulatory oversight; and as a centralized enterprise, for purposes of escaping antitrust liability. *See* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65, 66, 72–74 (2019). Paul sees a historic symmetry between the single entity exemption and the labor exemption to liability for coordinated activity under Section 1 of the Sherman Act. *See id.* at 67, 72. She suggests that if one gives way—for example, the workers in a ride-sharing enterprise are treated as independent contractors—the other should as well, potentially subjecting the ride-sharing enterprise to price fixing and related liability. *See id.* at 85–86. Professor Paul’s symmetry is elegant, though it appears unsupported by case law or commentary. Nonetheless, the Authors’ argument in this Article is not in real tension with Professor Paul’s approach. *See infra* Section IV.B.

143. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) [https://perma.cc/J7NE-8XH7] (last visited Mar. 10, 2020).

144. *See supra* notes 125–26, 131–34; *see also* Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

labor organization to the same antitrust prohibitions that are applied to product markets. This is a fair summary of the judicial treatment of labor strikes throughout the nineteenth and early twentieth centuries. For example, in *People v. Fisher*, a state court interpreted a statute prohibiting conspiracies “[t]o commit any act injurious . . . to trade or commerce” to apply to a strike of cobblers in Geneva, New York.¹⁴⁵ The *Fisher* court explained the economic effect of such a labor organization:

If journeymen bootmakers, by extravagant demands for wages, so enhance the price of boots made in Geneva, for instance, that boots made elsewhere, in Auburn, for example, can be sold cheaper, is not such an act injurious to trade? It is surely so to the trade of Geneva in that particular article, and that I apprehend is all that is necessary to bring the offense within the statute.¹⁴⁶

But labor differs from other inputs in important ways. First, labor may be locked into relationships with one employer or a small number of employers due to specialized investment, education, training, and experience that does not have value outside of the particular industry. Having made that investment, or acquired that education, training, or experience, an individual supplier of labor loses bargaining power vis-à-vis the firm. In a ride-sharing market, an example is an Uber driver who purchased a vehicle specifically for her sole proprietorship driving in the Uber enterprise—what is dubbed in this Article as the lock-in model. Second, the labor force, like the population of consumers, is highly diffuse.¹⁴⁷ In the absence of coordination, individual workers face a horizontal demand curve for their services just as any supplier in perfect competition does. Atomistic supply is a definitional feature of sharing economy enterprises and certainly characterizes ride-sharing enterprises.¹⁴⁸

In this way, labor markets are the mirror image of markets for the sale of products to consumers, although there is another aggravating factor unique to input markets: consumers can frequently opt not to participate because few consumer transactions reflect

145. *People v. Fisher*, 14 Wend. 9, 12, 14–15 (N.Y. Sup. Ct. 1835) (quoting 2 N.Y. Rev. Stat. 691, § 8 (1829)).

146. *Id.* at 17–18.

147. See Anderson & Huffman, *supra* note 1, at 863. These two features aggregate to the benefit of the buyer of labor and to the detriment of the seller. See Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563, 566–69 (2005). While on the one hand the specialized training and experience might impact both sides of the transaction equally (replacing a worker’s experience is as difficult as the worker finding an alternate use for that experience), the atomistic nature of the labor market ensures an alternate source of supply for the buyer of labor. See *id.*

148. See Anderson & Huffman, *supra* note 1, at 883.

necessities.¹⁴⁹ Workers less frequently have the option of declining to participate in the market because employment is essential to a large portion of the workforce.¹⁵⁰ Labor markets thus exhibit bargaining disparities that may lead to underpricing labor inputs relative to arms-length transactions, perhaps even to a greater degree than consumer markets may experience overpricing.¹⁵¹

Analyses of the legislative history of the Sherman Act, the original and primary US antitrust statute, suggest that the statute was not meant to cover activity by labor unions.¹⁵² Nonetheless, early challengers to labor organizing using antitrust laws interpreted Section 1 of the Sherman Act to apply to and prohibit some activities by organized labor. In 1908, the Supreme Court held in *Loewe v. Lawlor* that a nationwide scheme of boycotts meant to facilitate the unionization of manufacturers of fur hats constituted a conspiracy in violation of Section 1.¹⁵³

Congress responded in 1914 with the Clayton Act, adding two sections meant to reverse the outcomes in cases like *Loewe*. In Section

149. See Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 538 (2018). This reality is depicted graphically with a downward-sloping demand curve, with a less steep slope indicating easier opt-out for consumers.

150. The labor market supply curve reflecting this reality would be a steeply sloping curve, indicating the supply will remain static even as wages are reduced.

151. See Naidu et al., *supra* note 149, at 546–47. The characteristics described here are not unique to labor markets. See *id.* at 538–39. They arise in any market where one side of the transaction has greater market power than the other, which is frequently the case when one side supplies a commodity input (product or service) and the other has a specialized use for that input. See *id.* In other such cases, exceptions to the antitrust laws may exist to allow collective action to correct for the bargaining disparity. See Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1559 (2018). An example is the Capper-Volstead Act, which since 1922 has given a limited exemption for agricultural marketing associations. See Capper-Volstead Act, ch. 57, § 1, 42 Stat. 388, 388 (1922) (codified as amended at 7 U.S.C. § 291).

152. See *United Mine Workers v. Pennington*, 381 U.S. 676, 700–01 (1965) (Goldberg, J., concurring and dissenting) (“[A] careful reading of the legislative history shows that the interdiction of ‘every’ contract, combination or conspiracy in restraint of trade was not intended to apply to labor unions and the activities of labor unions in their own interests, aimed at promotion of the labor conditions of their members.”). Much of the discussion in this Section draws from the treatise, 9 KINTNER ET AL., *supra* note 124, § 72.

153. *Loewe v. Lawlor*, 208 U.S. 274, 304, 306–09 (1908) (holding that the motion to dismiss (demurrer) should have been overruled based on the facts alleged). In one of the earliest cases, *United States v. Workingmen’s Amalgamated Council*, 54 F. 994 (C.C.E.D. La. 1893), the Federal Circuit Court in New Orleans held that allegations of a warehouseman’s strike with substantial impact on trade through the port of New Orleans stated a claim under the Sherman Act. *Id.* at 999–1000. The court recognized that the concerns leading to the Sherman Act spoke to industrial combinations rather than labor organization, but held that the broad language of the statute as enacted covered labor activity as well. *Id.* at 996.

6 of the Clayton Act,¹⁵⁴ Congress sought to define labor organization out of the Sherman Act prohibitions: “[t]he labor of a human being is not a commodity or article of commerce,” language that on its face seems to preclude the application of the Sherman Act, which prohibits conduct with regard to “trade or commerce.”¹⁵⁵ In Section 20 of the Clayton Act,¹⁵⁶ Congress prohibited the use of the remedy of injunction in the context of labor disputes.

Supreme Court authorities throughout the second and third decades of the twentieth century frustrated “[t]hese Congressional provisions,”¹⁵⁷ narrowly reading Section 6 to apply only if labor organizations held to “normal and legitimate objects.”¹⁵⁸ But beginning in the 1930s, Congress and a changed Supreme Court breathed new life into an exemption from antitrust for labor organizations.¹⁵⁹

The modern labor exemption developed in two parallel and occasionally intersecting lines of authority—one, the congressional enactments and case law establishing the “statutory exemption,” and the other, a series of cases constituting the “non-statutory exemption.”¹⁶⁰ More recent case law has established three requirements for the statutory exemption: (1) conduct of the union in the course of a labor dispute; (2) the union acting in its own self-interest; and (3) the union acting unilaterally and not in combination with nonunions.¹⁶¹

154. Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 17). 15 U.S.C. § 17 reads in full:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id.

155. *See id.*; 15 U.S.C. §§ 1–2. Courts had long interpreted “trade” and “commerce” as functional synonyms. *See, e.g.*, *United States v. Patterson*, 55 F. 605, 639 (C.C.D. Mass. 1893) (interpreting Sherman Act, Section 1).

156. § 20, 38 Stat. at 738 (codified at 29 U.S.C. § 52).

157. *Pennington*, 381 U.S. at 702 (Goldberg, J., concurring and dissenting).

158. *Duplex Co. v. Deering*, 254 U.S. 443, 469 (1921).

159. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–15); *United States v. Hutcheson*, 312 U.S. 219, 227–28, 231 (1941). (“Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.”).

160. *See generally* 9 KINTNER ET AL., *supra* note 124, §§ 72.3, 72.7.

161. *Id.* § 72.3; *H. A. Artists & Assocs. v. Actors’ Equity Ass’n*, 451 U.S. 704, 714–15 (1981) (quoting *Hutcheson*, 312 U.S. at 232).

The non-statutory labor exemption may immunize conduct even where the statutory exemption does not apply.¹⁶² This doctrine can be analogized to the Rule of Reason in antitrust, requiring a weighing of the competitive harm against benefits—the advancement of the public policy favoring labor organization—and a determination of which policy overbears the other.¹⁶³ A holistic read of the cases establishing the non-statutory exemption renders the doctrine of limited use inapplicable to labor organization in ride-sharing.

The crux question in the application of the statutory exemption in the context of sharing economy enterprises is that of the labor organization or union acting in the course of a labor dispute, which has led to holdings requiring an employment relationship.¹⁶⁴ For example, the US Court of Appeals for the Third Circuit, in *Conley Motor Express v. Russell*, refused to apply the statutory labor exemption to immunize picketing by a purported labor union of independent contractor truckers against the trucking enterprise to which they leased and for whom they drove their trucks. The court concluded the lack of the employer-employee relationship prevented the application of the labor exemption.¹⁶⁵

Seemingly conflicting cases leave ambiguity as to whether employee status definitely determines the application of the exemption. The Supreme Court's 1942 decision in *Columbia River Packers Ass'n v. Hinton*¹⁶⁶ establishes the dominant view that independent contractors do not have the requisite employment relationship to be eligible for the exemption. The plaintiff was an owner-operator of canneries in the Pacific Northwest. The defendants were a union of independent fishermen, its officers, its members, and two other fish cannery operations. The Court noted that the union members were independent

162. See generally 9 KINTNER ET AL., *supra* note 124, § 72.7; *Apex Hosiery v. Leader*, 310 U.S. 469, 512–13 (1940) (assuming without explanation the inapplicability of the statutory exemption). In *Apex Hosiery*, the defendant union had sought to organize plaintiff's employees and conducted a violent strike, causing substantial economic harm—conduct the Court compared to purely tortious or criminal action, such as “a conspiracy to derail and rob an interstate train, even though it were laden with 100,000 dozen pairs of stockings,” which would not implicate the antitrust laws despite causing the same economic harm as the strike. *Id.* at 482–83, 486–87.

163. See FED. TRADE COMM'N & U.S. DEPT' OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.3 (2000), <https://www.justice.gov/atr/page/file/1098461/download> [<https://perma.cc/BJ8D-SEEA>].

164. See *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124, 126–27 (3d Cir. 1974) (citing *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145–47 (1942)) (holding that independent contractor truckers could not avail themselves of the statutory labor exemption because of the lack of an employer-employee relationship).

165. *Conley Motor Express*, 500 F.2d at 127 (“[A]ppellants have failed to show that the employer-employee relationship forms the matrix of their controversy with Conley.”).

166. *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942).

fishermen, who owned or leased their boats and pursued their work without oversight or control by the canneries. The fishermen did not seek employment with the plaintiff cannery operator but instead sought to collectively impose on the plaintiff a contract term in which the plaintiff agreed to only purchase fish from union members. Characterizing this as a “dispute among businessmen over the terms of a contract for the sale of fish” and not a “controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment,” the Court determined the statutory exemption did not apply.¹⁶⁷

The fishermen in *Columbia River Packers* and workers in a sharing economy enterprise are highly analogous. Both service providers own the primary capital asset used in their work—whether boat or car. Both conduct their work with limited or no oversight or control by the enterprise with which they regularly contract.¹⁶⁸ This close analogy leaves little doubt that, under the current state of the law, the ambiguity would be resolved against applying the labor exemption to organization efforts by sharing economy workers. But there is an important *disanalogy* that informs the analysis in Part V. In leading cases treating suppliers as contractors rather than employees, and therefore refusing to apply the labor exemption, the market in which the suppliers operate is one for the provision of goods—fish, in *Columbia River Packers*, or grease, in *L.A. Meat & Provision Drivers Union, Local 626 v. United States*—as opposed to the services at issue in much of the sharing economy.¹⁶⁹

167. *Id.* at 144–45 (quoting 29 U.S.C. § 113(c)). Courts following *Columbia River Packers* have interpreted the holding to prevent independent contractors from taking advantage of the statutory labor exemption. See *H. A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 & n.20 (1981) (citing *Columbia River Packers*, 315 U.S. 143) (“Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur.”). An alternative approach is found in *American Federation of Musicians v. Carroll*, 391 U.S. 99 (1968), where the Court considered the case of independent musicians establishing a set of bylaws and regulations by which they set minimum prices and other common contract terms for performances. The Court treated the union of musicians and orchestra leaders as a “labor group,” based on the “presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors.” *Id.* at 105–06. The Court found the requisite competition among the orchestra leaders and other musicians to establish the economic relationship needed for labor group status. *Id.* at 109–11.

168. Compare *supra* text accompanying notes 148–49, with *Anderson & Huffman, supra* note 1, at 884–85 (discussing the structure of the sharing economy enterprise).

169. *L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962)). *L.A. Meat & Provision Drivers Union* involved facts strikingly similar to *Columbia River Packers*. Independent “grease peddlers,” working as middlemen in purchasing grease from restaurants and selling it primarily overseas, joined forces under the auspices of the defendant union to establish fixed purchase and sale prices for grease “for the purpose of increasing the margin between the

The next Part turns to an analysis of the economics underlying ride-sharing labor markets and how that economic story impacts workers and consumers. This Article reaches somewhat surprising conclusions that lead to the argument in Part IV for an efficiency defense for some ride-share-worker organizing.

III. ECONOMIC UNDERSTANDING OF ANTITRUST IN LABOR MARKETS

The dominant understanding of antitrust law identifies its goal as protecting consumers from the effects flowing from limits on competition, whether by the unilateral exercise of market power or by concerted conduct.¹⁷⁰ However, recent commentary has challenged that understanding of the goals of antitrust law.¹⁷¹ Such alternate approaches have not generally been adopted.¹⁷² There is some question as to whether the consumer protection goal is inconsistent with worker protections. One perspective is that workers and consumers compete for surplus welfare created by voluntary transactions. Economic theory supports another perspective, that worker protections increase output in labor markets, leading to greater output and lower prices in consumer-facing product markets. This perspective puts both workers and consumers on the same side of a contest against producers.¹⁷³ The first perspective would suggest that worker protections are inconsistent with antitrust law's goal of consumer protection. The second perspective suggests worker protections advance those goals.

prices they paid for grease and the prices at which they sold it to the processors." *Id.* at 96–97. The defendants did not make a showing of “actual or potential wage or job competition, or of any other economic interrelationship, between the grease peddlers and the other members of the union.” *Id.* at 98. The Court noted: “It is also beyond question that nothing in the anti-injunction provisions of the Norris-LaGuardia Act, nor in the labor exemption provisions of the Clayton Act, insulates a combination in illegal restraint of trade between businessmen and a labor union from the sanctions of the antitrust laws.” *Id.* at 99–100 (footnotes omitted) (citations omitted). A dissent by Justice Douglas argued that the union had an interest in increasing the profits to the competing independent grease peddlers. *Id.* at 110–12 (Douglas, J., dissenting).

170. Herbert Hovenkamp, *Antitrust's Borderline* 2, 10–11 (Aug. 11, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3656702>; ROBERT H. BORK, *THE ANTITRUST PARADOX* 107–12 (1978).

171. See, e.g., STEINBAUM & STUCKE, *supra* note 31; Wu, *supra* note 32.

172. See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Monopsony and the Meaning of “Consumer Welfare”: A Closer Look at Weyerhaeuser*, Address Before the 2006 Milton Handler Annual Antitrust Review (Dec. 7, 2006), in 2007 COLUM. BUS. L. REV. 353, 359–60 (stating view that antitrust protects consumer welfare and that challenges to monopsony must be justified by the effects on consumers).

173. See ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* 45–46 (2010) (arguing that a monopsonist buyer of labor faces higher marginal cost of labor than competitive buyer, reducing purchases, leading to reduced output in the downstream product or service market and higher consumer prices).

The economic effects of worker protections, including collective action by workers, depend in reality on market structure questions, including the shape of the labor market supply curve and the level of competition in the downstream market for sales to consumers.¹⁷⁴ A labor market with an upward-sloping supply curve will respond to increased wage rates with increased labor output, leading to greater output in the consumer market. A labor market with a flat or downward-sloping supply curve will not respond to increased wage rates or may, perversely, lead to *decreased* labor output. In such a market, worker protections would lead to consumer harm. Likewise, if the buyer of labor lacks downstream market power it will be unable to pass higher costs on to consumers, while if it possesses downstream market power, pass-through may be possible.¹⁷⁵ The result is that a sell-side exercise of labor market power may or may not offend a consumer-focused antitrust policy.

This Part further examines the factors that tie labor market characteristics to effects in consumer markets. It begins with a closer look at the economic theory that explains when worker interests do and do not ally with consumer interests. It then discusses two types of ride-sharing markets, showing how different facts can influence the effect of worker coordination on consumers.

A. *The Concern with the Monopsonist Employer*

1. The Effect of Monopsony in Labor Markets

A monopsony is a buyer-side monopoly.¹⁷⁶ Monopsony power is the ability of a buyer to impose transaction terms that deviate from the competitive equilibrium.¹⁷⁷ The monopsonist would ordinarily exercise market power by depressing prices.¹⁷⁸ The ordinary effect of such reduced purchase prices is to reduce the quantity purchased, reducing in turn the production capacity and output in the consumer market.¹⁷⁹ This is particularly the case where the monopsonist also possesses

174. See Jonathan M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric*, ANTITRUST SOURCE, Dec. 2013, at 3–5 (flat or downward-sloping input supply curves may decouple exercises of monopsony power from price increases to consumers).

175. See *infra* Sections III.A.2, IV.B.

176. BLAIR & HARRISON, *supra* note 173, at 41.

177. *Id.* at 48.

178. Roger G. Noll, “Buyer Power” and Economic Policy, 72 ANTITRUST L.J. 589, 589 (2005).

179. BLAIR & HARRISON, *supra* note 173. Blair and Harrison note that the demand elasticity of other purchasers may be asymmetrical in any given industry depending on competing manufacturers’ cost structures. *Id.* at 59. For example, if a competing manufacturer was near its maximum efficient production capacity, it would have low elasticity of demand.

monopoly power in the consumer market, so reduced output and increased prices to consumers do not attract competitive entry.¹⁸⁰

A traditional conception of a vertically structured supply chain might involve a diffuse input market for labor or raw materials, a concentrated production market with a single or a few large factories, and diffuse downstream markets for distribution and consumption—a bell curve of relative concentration that involves both monopsony purchasing and monopoly selling. Such a vertical supply chain would theoretically result in greater profits for the monopsonist or monopolist at the shared expense of the input sellers (who are paid less than the competitive price) and the consumers (who are charged more than the competitive price).¹⁸¹

Not every vertical supply chain bears those characteristics. Initially, a buyer of inputs, such as an employer purchasing labor or a sharing economy platform contracting with workers, may or may not have monopsony power due to several possible counterweights. These include elasticity of supply: the more easily supply inputs can be repurposed to other industries, the less likely high concentration in manufacture will confer monopsony power.¹⁸² There is also the possibility of countervailing seller power, whether unilateral or collusive: concentration or coordination in the input (or labor) market can create bilateral monopoly power, offsetting monopsony power that might otherwise exist.¹⁸³ A third possible corrective might be regulatory protections in the input market, such as minimum price legislation.

180. *Id.* at 48.

181. See Catherine C. de Fontenay & Joshua S. Gans, *Can Vertical Integration by a Monopsonist Harm Consumer Welfare?*, 22 INT'L J. INDUS. ORG. 821, 822 (2004); see also *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019). In an industry with these characteristics, consumers' and workers' interests are aligned.

182. BLAIR & HARRISON, *supra* note 173, at 58.

183. See *generally id.* at 123–45. Paradoxically, collective action by workers can increase the benefit to consumers. Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction* 15–16 (June 6, 2020) (unpublished manuscript), https://papers.ssrn.com/abstract_id=3582673. If a buyer of labor has monopsony power, it will reduce the quantity it purchases in order to drive down the price it pays. *Id.* at 12–13. This reduction in the price of labor does not help consumers since it coincides with a reduction in quantity. This reduction in quantity may or may not hurt consumers. If the labor buyer has market power as a seller, the reduction in quantity will hurt consumers since the quantity reduction will increase prices in the sale market. See Naidu et al., *supra* note 149, at 559–60. If the monopsonist buyer of labor does not have power in the selling market, quantity in the selling market will be made up by other sellers increasing quantity. This strategy can still be profitable to the monopsonist since the reduction in its purchase price of labor can be sufficient to more than offset the reduction in quantity sold. See *id.* at 556.

Regulatory protections (minimum wages, health care requirements) are a frequent characteristic of labor markets.¹⁸⁴

Second, even in the case of a buyer with monopsony power, such power may or may not coincide with monopoly in the downstream market. In its most recent antitrust monopsony decision, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Court recognized the possibility of upstream market power for the purchase of logs, the most elementary input into wood product processing, due to the localized nature of that market. Downstream sales for processed lumber, however, are more likely to be made in national markets.¹⁸⁵ Another example might be markets with differing elasticities, with inelastic supply for inputs supporting monopsony power but elastic demand for products undermining monopoly power.¹⁸⁶ A lack of monopoly power reduces the likelihood that exercise of monopsony power can harm consumers. If exercise of buyer power reduces input costs, downstream competition may ensure those cost reductions benefit consumers.¹⁸⁷

The general economic principles hold whether inputs are widgets or labor. A monopsonist employer, or a firm that contracts with labor inputs and enjoys the requisite concentration and supply-side inelasticity necessary to produce monopsony power, may negotiate below-equilibrium wages.¹⁸⁸ There is some evidence that the degree of concentration required for monopsony may be less than that usually required in the case of monopoly.¹⁸⁹ Monopsony in labor markets can be market-wide, such as a sole employer in a given geographic market—the company town. It can also be specific to the working relationship. Eric Posner describes the phenomenon of “relational work,” where the laborer makes relationship-specific investments in the buyer of labor and bears a substantial opportunity cost of shifting to

184. See Lao, *supra* note 151, at 1575–76.

185. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321 & n.2 (2007). Logs, which are expensive to transport, are sold in localized geographic markets, while lumber is more likely to be sold in national markets. See BLAIR & HARRISON, *supra* note 173, at 58 (buyer power partly determined by market share).

186. See BLAIR & HARRISON, *supra* note 173, at 58–59 (“[A]s the elasticity of supply increases, the [buyer power index] falls.”).

187. This is not true in all circumstances if, for example, competing producers are already manufacturing at efficient levels, such that marginal production is more expensive. BLAIR & HARRISON, *supra* note 173; see also *infra* Section III.A.2.

188. Posner, *supra* note 183, at 12.

189. See *Monopsony Issues in Agriculture: Buying Power of Processors in Our Nation’s Agricultural Markets: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 70 (2003) [hereinafter *Hearing on Monopsony Issues in Agriculture*] (statement of Peter C. Carstensen, George Young-Bascom Professor of Law, University of Wisconsin Law School) (identifying 10 percent or more as sufficient share to have market impacts); see generally PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE (2017).

another buyer. Posner describes a worker who, through concentrating efforts on a particular job with a particular buyer of labor, acquires skills that are more valuable to that buyer than to any other. Such a laborer is “locked in” to the relationship with that buyer, granting the buyer some amount of monopsony power.¹⁹⁰

The lock-in concept that Posner identifies in labor markets has analogs in input markets across the economy. Any large, single-purpose investment in an input will lock the investor into a long-term relationship with the buyer. This is frequent in the case of an industrial parts supplier, who might make, for example, a specific automobile part designed to specifications provided by the buyer, an automobile manufacturer. The supplier’s entire enterprise, including the factory, machinery, training of employees, and contracts for inputs, may well be specific to the relationship with the automobile manufacturer. That supplier has no realistic exit option from its relationship with the manufacturer. Another example is a railroad, which—once having laid tracks—is committed to relationships with geographically proximate users of its track. Both of these are in contrast to the supplier of a commodity input, such as raw materials, that can easily be repurposed for other uses and shipped to other buyers. Posner identifies a labor-market analog to the commodity input in the form of a worker with easily repurposed skills.¹⁹¹

There are two primary differences between labor-market monopsonies and those found in other input markets. Initially, the possibility of lock-in due to relationship-specific investments is more likely to occur in labor markets, as education, experience, regulatory barriers such as occupational licensing, and barriers to exit make mobility for workers more difficult than for commodity inputs. In addition, labor-market monopsony differs from other input markets in terms of a perception of the human cost.¹⁹² Complementary legal schemes operate to correct for real or perceived monopsony power in labor markets. These include federal and state wage-and-hour

190. Posner, *supra* note 183, at 12. This Article expands on the concept of “lock-in” in Section III.B, *infra*, and its implications for antitrust analysis in Section IV.B.

191. Posner, *supra* note 183, at 10.

192. Discussions of labor rights consistently reflect greater concern for individuals selling labor as distinct from individuals selling products produced by their labor. It is not obvious that one is more or less deserving or needing of legal protection in transactions with a monopsonist than the other.

protections,¹⁹³ federal labor law granting rights to organize,¹⁹⁴ and exemptions from antitrust prohibitions that permit labor organization without it being treated as cartel conduct.¹⁹⁵

2. Do Workers and Consumers Compete for Economic Surplus?

Worker protections initially seem to conflict with antitrust law's goal of consumer protection. Under one view, a welfare gain realized in a voluntary transaction can be divided among three competing claimants: owners, workers, and consumers. In the case of the sharing economy the claimants are the platform, the workers, and the consumers. Surplus captured by the workers would reduce wealth available for consumers.¹⁹⁶

An alternative view is that worker protections go hand in hand with consumer welfare. This argument turns on the belief that increases in pay or benefits to workers bring supply into the market. The increase in inputs changes the profit-maximizing output decisions by the employer or platform, leading to an increase in output and a commensurate decrease in the price paid by consumers.¹⁹⁷ An extreme statement of this view concludes that worker protections serve both labor protection and antitrust goals at once, while also keeping costs in check for owners.¹⁹⁸

193. See Fair Labor Standards Act of 1938, ch. 676, § 6, 52 Stat. 1060, 1062–63 (codified as amended at 29 U.S.C. § 206) (establishing federal minimum wage); e.g. Minimum Wage Act, ch. 294, § 2, 1959 Wash. Sess. Laws 1411, 1413 (codified as amended at WASH. REV. CODE § 49.46.020 (2020)) (establishing Washington State minimum wage).

194. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69).

195. Clayton Act § 6, 15 U.S.C. § 17.

196. See *Balmoral Cinema v. Allied Artists Pictures*, 885 F.2d 313, 316–17 (6th Cir. 1989) (suggesting that a buyer-side agreement not to engage in competitive bidding “may lower prices to moviegoers at the box office”); cf. Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 HASTINGS BUS. L.J. 223, 230–31 (2007) (quoting *Hearing on Monopsony Issues in Agriculture*, *supra* note 189, at 159 (statement of R. Hewitt Pate, Assistant Att’y Gen., Antitrust Division, Department of Justice)). Jacobson points out that a number of courts have relied on this heuristic when declining to apply antitrust laws with equal force in the context of monopsony power as in the context of monopoly power. Jacobson, *supra* note 174, at 1–2, 6.

197. This effect is not unique to labor inputs. For example, the 2010 Horizontal Merger Guidelines describe a possibly harmful merger as one that creates a monopsony, “inefficiently reducing supply . . . even if the merger will not lead to any increase in the price charged by the merged firm for its output.” U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 33 (2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> [<https://perma.cc/NZ35-6G8P>].

198. Cf. Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST., at 2–3, 2 n.5 (July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf [<https://perma.cc/QG34-SKR9>] (interpreting scholarship to conclude that

Neither view is categorically correct. Workers bargain with the firm (or the platform) over wages. If the labor market is characterized by an upward-sloping supply curve, the profit-maximizing decision by the firm (or platform) is to reduce the price paid for labor, which, in turn, reduces the amount of labor supplied. A reduction in labor inputs to the firm (or platform) reduces the amount of product or service it can create. This, in turn, leads to consumer harm with reduced output and commensurately increased prices to consumers. Under such market conditions, protections for workers, whether regulated transaction terms such as minimum wages or rights to engage in collective action such as unionizing, can—by moving the price closer to the competitive level, bringing more supply into the market, and increasing the output in consumer markets—benefit consumers as well as workers.¹⁹⁹

In contrast, if the labor supply curve is vertical or even downward sloping in the relevant price range, increasing the price of labor would not increase the quantity supplied in the input market.²⁰⁰ Instead, with supply static, or perhaps decreasing in the rare circumstance of a downward-sloping labor supply curve, increasing the price of labor would increase production costs but not increase output in the consumer market.²⁰¹ This leads to consumer harm, though competition in the downstream market may mitigate that harm by limiting the firm's (or platform's) ability to increase prices to consumers.²⁰² Some reason exists to believe this is the more likely description of labor markets across broad swaths of the US economy.²⁰³

bargaining power exerted on the buyer side can reduce price paid for inputs, thereby reducing the quantity of inputs supplied, thus *raising* the marginal cost of production, leading to increased prices for consumers). In fact, the result Stutz identifies can only arise in the presence of a number of assumptions about the market, including an upward-sloping labor supply curve and lack of market power in the consumer market. *See* Devlin, *supra* note 196, at 232.

199. *See* Posner, *supra* note 183. In most real-world industries, this impact will exist regardless of monopoly power or its lack in the consumer market because the increase in output will displace higher-cost competitors.

200. There is some question whether one would ever identify a vertical labor supply curve in a real-world setting. The Authors note below the possibility of a C-shaped curve, which has been identified in scholarship on subsistence-wage markets, and under this condition the middle of the curve reflects a state in which marginal supply is on net inelastic (likely represented by low-wage workers exiting as their capacity is exhausted while new entrants enter in response to price increases). *See infra* Section III.B.2.

201. *See* Jacobson, *supra* note 174, at 5 (citing ROBERT PINDYCK & DANIEL RUBINFELD, MICROECONOMICS 377–78 (7th ed. 2009)).

202. Unless the consumer-facing market is perfectly competitive, the Authors would expect an increase in the price charged by the manufacturer to lead to higher cost competitors entering the market, with the overall effect being higher prices and lower output.

203. *See infra* Section IV.A.3.

B. Workers in the Sharing Economy Enterprise

The sharing economy enterprise structure, through which consumers and workers contract over a platform, means that erstwhile competitors for consumer transactions may fail to compete while also not joining forces in a traditional antitrust firm.²⁰⁴ In addition to workers transacting with consumers, they enter into transactions with the platform itself. Those transactions entail an allocation of responsibility for the supply side of the ride-sharing transaction. Workers provide labor and capital in the form of a compliant automobile. Platforms provide a host of services, most notably the software—the “app” through which workers encounter consumers in what is normally an efficient, safe, and reliable manner—as well as services including (1) safe and efficient payment processing; (2) the management of the pricing algorithm; (3) rentals or leases of the automobile;²⁰⁵ and (4) access to insurance.²⁰⁶

At its core, the sharing economy enterprise integrates workers and the platform through which they collectively offer services to consumers.²⁰⁷ As Part II discusses above, from the beginning, this has presented labor and employment issues, with the firms providing the app seeking to avoid employing the workers and providing attendant benefits and protections and the workers seeking those benefits and protections. Seen through the lens of labor economics outlined immediately above, workers’ status as employees or contractors is less important than the shape of the labor-market supply curve and the degree of competition in the downstream market for providing rides to consumers.²⁰⁸

Those questions, in turn, are fact bound and depend on the specifics of a particular geographic market. At one extreme, one can

204. Anderson & Huffman, *supra* note 1, at 291.

205. At one time Uber financed auto purchases, although that service is no longer identified on the Uber website. See Molly Wood, *Uber Drivers Struggle to Pay Subprime Auto Loans*, MARKETPLACE (May 13, 2015), <https://www.marketplace.org/2015/05/13/uber-drivers-struggle-pay-subprime-auto-loans/> [<https://perma.cc/38D7-4RPA>].

206. See John Egan & Amy Danise, *Rideshare Insurance for Uber and Lyft Drivers*, FORBES ADVISOR (Dec. 18, 2020, 7:00 AM), <https://www.forbes.com/advisor/car-insurance/rideshare-insurance/> [<https://perma.cc/T8ED-3M3M>].

207. Anderson & Huffman, *supra* note 1, at 870 (defining “sharing economy enterprise”). The Authors’ characterization is not entirely uncontroversial. Ride-sharing platforms more often describe themselves as independent of both sides of the match, no more integrated with the drivers than with the riders.

208. There is an alternative understanding of the platform-driver relationship that may command a different result. Professor Akman has analyzed the platform enterprise through the lens of agency law, treating the platform as a service provider. Pinar Akman, *Online Platforms, Agency, and Competition Law: Mind the Gap*, 43 FORDHAM INT’L L.J. 209, 277–78 (2019).

imagine a market in which ride-sharing workers are best described by the fallow-assets model, with otherwise employed individuals, students, or retirees, who already own their vehicles, using spare time before or after work to earn extra money. Speaking based on personal anecdote, Huffman has described the ride-sharing market in Indianapolis, Indiana, in this way. The fallow assets these workers contribute to the enterprise are their existing automobiles and their leisure time. Reports of the entrepreneurial idea underlying the sharing economy suggest this was what the worker platform developers envisioned.

At the other extreme, one can imagine a market in which ride-sharing workers are best described by the locked-in model, with individuals who have made nearly irrevocable commitments to ride-sharing as a source of revenue.²⁰⁹ Those individuals are likely otherwise unemployed or marginally employed. They may have relocated geographically in reliance on the opportunity to earn money as a ride-sharing driver. They frequently have not previously owned a compliant automobile and have financed their automobile—perhaps even through Uber—based on the expectation of its use in ride-sharing.²¹⁰ Anderson, based on personal anecdote, has described the ride-sharing market in Seattle, Washington, in this way. More recent empirical studies of large ride-sharing markets suggest the locked-in model is more characteristic of the industry as it has developed over the past decade.²¹¹

In reality, of course, any given geographic market is populated by a range of drivers, with some markets predominated by one model and others predominated by the other. Which model accurately

209. The Authors concentrate in this Article on ride-sharing as both the best-known and the purest expression of a sharing economy enterprise. The lessons the Authors draw in their research also inform other sharing economy enterprises. Lodging services through Airbnb, <https://www.airbnb.com/> (last visited Aug. 14, 2020), and task services through TaskRabbit, <https://www.taskrabbit.com/> (last visited Aug. 14, 2020), both are most likely to fit the fallow-assets model rather than the locked-in model. Two fundamental differences drive the analysis of these alternative platforms. First, in both cases the services offered are substantially less commodified than in the case of ride-sharing. Second, in both cases suppliers in the respective enterprises are substantially less likely to have made irrevocable commitments. These two together place home-sharing and task services in the fallow-assets, rather than lock-in, model. The result is that organization among suppliers to these enterprises is likely to present an efficiency if there is a concern for monopsony on the part of the platform. The Authors do not investigate that question further, but intuition suggests the existence of monopsony in those industries is unlikely.

210. *Drive*, UBER, <https://www.uber.com/in/en/drive/vehicle-solutions/> [<https://perma.cc/9X97-LDSK>] (last visited Mar. 11, 2021) (describing options for purchasing a car, leasing a car, or joining a fleet of cars owned by others).

211. See Jaelyn Severance, *NYC Ridesharing Study Has Implications for Policymakers*, UCONN TODAY (July 8, 2019), <https://today.uconn.edu/2019/07/surprising-nyc-ridesharing-study-findings-transit-climate-implications-policymakers-uconn-researchers-say/#> [<https://perma.cc/UZ86-FHU8>].

characterizes a particular enterprise in a particular geographic market depends on which model predominates. This, in turn, informs the antitrust question of worker organization. Relevant facts to distinguish between the model to be applied include the size of the investment or other commitment required to enter the market; the revocability of the investment or other commitment required to enter the market; and alternative choices available to workers in the market. Of course, any geographic market includes drivers who fit each model. The difference between markets is which type of driver predominates at the margin. The remainder of this Section analyzes these two hypothetical ride-sharing markets in terms of their likely structure and the expected economic impact of conduct at the level of the workers and at the level of the platform. It concludes that, perversely, the strongest economic case for labor protections arises in markets defined by the fallow-assets model, although the greatest need for labor protections appears to arise in markets defined by the lock-in model.

1. Fallow Assets: The “Indianapolis” Market

Workers in a fallow-assets model use existing property and free time to provide services in exchange for revenue. The main costs to the workers are gas, wear and tear on their cars, and the value of their leisure time. This worker enters the market only when the revenue to be gained exceeds those costs and exits as soon as the calculus changes. Early descriptions of ride-sharing as an economic innovation tended to highlight the fallow-assets model as describing likely suppliers in the enterprises.²¹² Based on anecdotal observations by the Authors, ride-sharing workers in Indianapolis seem to fit this model—frequently driving cars that they previously owned and driving before or after work or on the weekends.

A fallow-assets worker has made only limited commitment to the ride-sharing enterprise as a source of income.²¹³ The assets to be deployed—the car and the leisure time—are “discrete,” in Professor Posner’s words,²¹⁴ and can either be repurposed for other uses or can be

212. See Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States* 9 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22843, 2016).

213. A recent study of IRS tax returns concludes that the sharing economy has not increased the incidence of individuals earning their primary income as a contractor. Brett Collins, Andrew Garin, Emilie Jackson, Dmitri Koustas & Mark Payne, *Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns* 13 (Mar. 25, 2019) (unpublished manuscript), <https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf?smid=nytcore-ios-share> [<https://perma.cc/TA39-JXJZ>].

214. Posner, *supra* note 183, at 4.

returned to the prior state of nonuse. Fallow-assets workers can enter and exit the sharing economy marketplace as their needs and interests change. In particular, the value of the automobile and the leisure time changes on the basis of competing events for these workers. For example, when a fallow-assets worker wishes to schedule a family road trip, the car and leisure time become more valuable, and the worker can step out of the sharing economy marketplace until the road trip is complete. In contrast, when the fallow-assets driver gains unexpected leisure time or finds the car unexpectedly unused, the driver can enter the sharing economy market. Likewise, when the earnings available by driving increase, perhaps because the number of consumers outpaces the number of drivers at a particular time, the fallow-assets worker can enter the market for as long as doing so is valuable.²¹⁵

In a fallow-assets model, the output of driving services is highly susceptible to the available earnings. If the platform adjusts the payment algorithm to shift a greater percentage of the earnings to the workers, one would expect to see a larger number of fallow-assets workers participate in the market, each devoting a larger proportion of their leisure time. This effect occurs because the driver has an upward-sloping supply curve. Aggregating those individual curves into a market curve would likewise produce a relatively smooth upward slope, comparable to textbook examples of labor markets.²¹⁶

As Section III.A explains, in this market, in the absence of wage discrimination, a buyer with monopsony power will offer less than the competitive equilibrium wage rate and buy less than the competitive equilibrium output, leading to output reductions in the consumer market as well.²¹⁷ Collective action by the workers creates countervailing power which can raise the price and increase the output of labor provided back toward the competitive level. This scenario can justify joint negotiation by the drivers with the platforms over the terms of their working relationship—in particular, over the price charged for the rides and over the share of the price received by the drivers.

Section IV.B applies these lessons about the fallow-assets model to show that organization by drivers in such a market, with the effect of increasing the earnings for drivers, could reflect an efficiency that might justify an agreement to organize under an application of the structured Rule of Reason. This recognition might provide some

215. The Authors note above that other sharing economy enterprises, including Airbnb and TaskRabbit, are most likely to be characterized by the fallow-assets model. *See supra* text accompanying note 209. This is due to the lesser likelihood of irrevocable commitments.

216. *See generally* ROBERT PINDYCK & DANIEL RUBINFELD, MICROECONOMICS (9th ed. 2018).

217. BLAIR & HARRISON, *supra* note 173, at 45–46. *See also supra* Section III.A.1.

optimism about the possibility of labor organization in the ride-sharing context, but this optimism is muted. The drivers best able to make such an efficiency argument are also those least likely to depend on organizing because of their lack of lock-in.

2. Lock-In: The “Seattle” Market

The second model is the “locked-in” model, with workers that have made irrevocable, relationship-specific investments or other commitments to providing their services.²¹⁸ For example, a locked-in worker might likely have purchased a car specifically for ride-sharing use, may have left other work that was believed to be less remunerative, and, at the extreme, may have relocated to a market where sharing economy work was likely to be more remunerative. This worker meets Professor Posner’s definition of a “relational worker.”²¹⁹ Anecdotal observations by the authors are that the Seattle ride-sharing market is populated by locked-in drivers.²²⁰

These workers are committed to ride-sharing both as a means for support and as a means for discharging obligations incurred in order to enter the marketplace. The clearest illustration of the lock-in is the car, which both depreciates rapidly and has a lower value in other uses. Exiting the marketplace by selling the car would, at a minimum, cause a substantial loss to the worker and might well leave the worker with a deficiency obligation to the auto lender and no means to make payment. Recent popular press accounts of purchase transactions tied to service contracts support the hypothesis. An NPR report on Uber’s now-defunct financing program suggests a car sale to facilitate driving on the Uber

218. The phenomenon of “lock-in” is not uncommon on the buyer side in consumer markets, with consumers locked in to a relationship with a particular seller creating some degree of monopoly power. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 476–77 (1992) (reasoning that locked-in buyers, due to the large and unrecoverable investment in office photocopy equipment, create market power in the aftermarket).

219. *See Posner, supra* note 183, at 4.

220. Other largely urban markets also seem to bear these characteristics. *See, e.g., Kalmanovitz Initiative for Lab. & the Working Poor, The Uber Workplace in D.C.*, GEO. UNIV. 7–9 (2020) (identifying debt burden to enter the marketplace in 33 percent of drivers in Washington, DC), <https://lwp.georgetown.edu/wp-content/uploads/sites/319/uploads/Uber-Workplace.pdf> [<https://perma.cc/9PED-QFHK>]. Competing studies offer different analyses of the actual outcomes for ride-sharing workers in Seattle, and it is possible a different geographic market is a better exemplar. *See Tina Bellon, Study Suggests Most Uber, Lyft Drivers in Seattle Not Poorly Paid*, REUTERS (July 8, 2020), <https://www.reuters.com/article/us-uber-seattle-pay/study-suggests-most-uber-lyft-drivers-in-seattle-not-poorly-paid-idUSKBN2493CG> [<https://perma.cc/32EE-P3LH>] (citing Louis Hyman et al., *Platform Driving in Seattle*, CORNELL ILR SCH. INST. FOR WORKPLACE STUD. (July 6, 2020) (finding median earnings after expenses of \$23.95 hourly, with 92 percent of drivers making more than the city minimum wage for Seattle of \$16.39)). The most recent study was funded by a grant from Uber and Lyft.

platform resulted in the driver being locked into driving, at risk of defaulting on the loan.²²¹

After the up-front investment to enter the marketplace, the locked-in worker's opportunity cost of providing services is limited to their leisure time. This worker is price insensitive, participating in the market so long as the amount to be earned exceeds the value of an hour of leisure time. The effect of this price insensitivity is that an algorithmic reduction in compensation is unlikely to dramatically reduce the amount of work offered either by the individual or across the market. Instead, reducing the amount earned by the driver may reduce the platform's cost of offering services without reducing the volume of output by workers, benefitting consumers of ride-sharing services.

It is even possible to theorize a below-break-even effect in which output increases. Below the break-even price point, the first action for locked-in drivers is to increase their output as needed to cover fixed costs, producing a C-shaped supply curve, previously identified in developing economies with earnings below the subsistence level.²²² This increased output in response to reduced prices would continue to a point defined by limits on drivers' capacity. This effect would hold for more than the short term because of the irrevocable commitment to the enterprise, driven largely by the payoff price of the automobile.²²³

The lesson from this description of the locked-in model is that there is no consumer benefit to be gained from coordination among drivers to raise the price of their services. Any such coordination would not dramatically increase output, but it would raise the costs of their services to consumers. Locked-in workers would have lesser success in demonstrating the efficiency of coordination to raise the price of services.

221. Wood, *supra* note 205. A similar example, also reported by NPR, relates to lease-to-own transactions in long-haul trucking. Keith Romer & Sarah Gonzalez, *Big Rigged*, PLANET MONEY (Aug. 14, 2020, 3:31 PM), <https://www.npr.org/transcripts/901110994> [<https://perma.cc/L3KL-LSRB>].

222. Cf. Purnamita Dasgupta & Bishwanath Goldar, *Female Labor Supply in Rural India: An Econometric Analysis*, 49 INDIAN J. LAB. ECON. 293, 294 (2006) ("The bottom segment of the curve is downward sloping (or forward falling), which implies that if the wage level is low, then any further decline in wage rate may lead to increase in the supply of labour.").

223. At some price level, any irrevocable commitment will induce individuals to increase output of labor as needed to cover committed expenses. Across a particular labor market, it will be unusual to find sufficient uniformity to produce an aggregate response that reflects a market supply curve with this characteristic. The commonality of enterprise-specific investments in a ride-sharing market increases the likelihood that such a market will be represented by a supply curve with a rightward downward slope below a certain minimum labor price point.

IV. RECONCILING ANTITRUST DOCTRINE WITH SHARING ECONOMY LABOR MARKET REALITIES

Section 1 of the Sherman Act has been interpreted to give rise to both categorical rules and matter of degree rules.²²⁴ The per se rule against price fixing, the single entity rule, and the labor exemption are all categorical. They attempt to define a factual category that leads to a legal outcome. The Rule of Reason, with its complex allocation of burdens, focuses on the degree to which competition has been restrained or advanced. As the Supreme Court has eliminated or limited per se rules, it has stated a preference for the matter of degree approach embodied in the Rule of Reason.²²⁵

In addressing whether drivers should be allowed to jointly negotiate with platform companies, the law could rely on a categorical rule such as the labor exemption or the matter of degree rules embodied in the Rule of Reason. Using the labor exemption would require defining the category of workers who are entitled to the exemption and may require altering the current definition of that category. Using the Rule of Reason would require determining that the per se rule against price fixing should not apply, as well as determining how the multistep analysis of the Rule of Reason should be applied in this situation. Section IV.A examines several attempts by other scholars to apply a categorical rule in this context. Section IV.B argues that the matter of degree rules embodied in the Rule of Reason are better suited to the task of determining when drivers should be allowed to jointly negotiate since it can apply the economic insight that is developed in Part III.

A. Altering the Labor Exemption

Recent analyses of the problem presented here produce three divergent approaches to accommodating collective bargaining by

224. A categorical rule defines a legal outcome based on a set of elements that are fixed. A matter of degree rule defines a legal outcome based on one or more variables that vary on a spectrum. Some policies are advanced by rules of each type. For example, a policy of traffic safety is advanced by categorical rules like speed limits. A sixty mile-per-hour speed limit promotes traffic safety with one fixed, easily defined element. The policy of traffic safety is also promoted by a matter of degree rule such as a prohibition on driving too fast for the conditions. One advantage of a categorical rule is that it is easy to apply. A disadvantage of a categorical rule is that it can be both over- and underinclusive. Rules focused on matters of degree attempt to sort those different actors out based on a multiplicity of factors. The disadvantages of the matter of degree rules are that they are difficult to apply and to predict.

225. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007) (overruling prior per se rule for resale price maintenance in favor of a Rule of Reason analysis); *Cont'l T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (same for vertical market allocation agreements).

sharing economy workers over the terms of their relationships with the platform. One approach, best stated in a 2018 article by Marina Lao, is to uncouple the concept of employment for the labor exemption from that used in state law for other purposes.²²⁶ This would continue to treat sharing economy workers as contractors for purposes of state employment law but treat them as employees for purposes of the labor exemption governing collective bargaining.²²⁷ A second approach, best outlined in a forthcoming article by Eric Posner, recognizes that the historic control test for employee status is inconsistent with modern economic realities, which can reduce or eliminate the practical distinctions between contractors and employees.²²⁸ Hiba Hafiz outlines a third approach, which touches largely tangentially on the unique circumstance of the sharing economy, seeking to integrate labor protections with antitrust law through an agency cooperation scheme, as well as the development of substantive presumptions requiring attention to worker interests.²²⁹ For different reasons, the Authors do not believe any of these three approaches appropriately resolve the problems of how antitrust law should apply to sharing economy workers.

1. Uncoupling Bargaining Rights from State Law Employment

Professor Marina Lao argues for two legal outcomes for drivers in ride-sharing enterprises. First, Professor Lao argues that drivers for ride-share companies should not be treated as employees for all purposes.²³⁰ Second, she argues that the drivers should be covered by the labor exemption to the Sherman Act and allowed to collectively negotiate with the platform companies.²³¹ Professor Lao begins her analysis by recognizing the efficiency-enhancing potential of sharing economy platforms.²³² Her conclusion that drivers should not be treated as employees for all purposes is based on her assessment that granting drivers all of the rights of employees could destroy the platform companies and their efficiencies by imposing excessively rigid

226. Lao, *supra* note 151, at 1583–86.

227. *Id.*

228. Posner, *supra* note 183, at 27.

229. See Hafiz, *supra* note 35.

230. Lao, *supra* note 151, at 1574.

231. *Id.* at 1567–68.

232. *Id.* at 1550–51.

requirements related to compensation and scheduling, as well as other terms of employment.²³³

Professor Lao's second conclusion, that the drivers should be covered by the labor exemption, requires more discussion. Professor Lao begins by characterizing gig economy workers as straddling the line between employees and independent contractors.²³⁴ In doing so, she states the importance of the control that one party has over the other.²³⁵ Ride-share drivers control when and how much they work and whether they have other jobs or work for other ride-sharing enterprises.²³⁶ Professor Lao concludes that this level of control by the driver is inconsistent with characterization as an employee.²³⁷ However, she points out that drivers do not have control over the price that they charge.²³⁸ Price is, of course, a crucial aspect of any sale transaction.

Professor Lao discusses four situations in which the Supreme Court or antitrust enforcement authorities concluded that the Sherman Act should apply to workers facing powerful buyers. In *Columbia River Packers*,²³⁹ the Court applied the Sherman Act to fishermen who sold fish to packers and claimed to have formed a union to negotiate on their behalf.²⁴⁰ In *L.A. Meat & Provision Drivers Union*,²⁴¹ the Court similarly applied the Sherman Act to sellers of reclaimed cooking grease who claimed to have formed a union to jointly negotiate with purchasers.²⁴² The Court faced a similar combination of workers in *Superior Court Trial Lawyers*,²⁴³ where attorneys providing indigent criminal defense in the District of Columbia went on strike for higher compensation. The Court had no trouble concluding that this combination was illegal price fixing.²⁴⁴ Finally, Professor Lao discusses the long-standing position of federal antitrust enforcement authorities condemning combinations of physicians formed to collectively negotiate with health insurance

233. *Id.* at 1575–76. Professor Lao's argument about the reality of imposing obligations to comply with employment laws on the ride-sharing platforms is given support by the announcement by Uber that it would leave the California market in response to state legislation defining its drivers as employees. See Conger, *supra* note 142.

234. Lao, *supra* note 151, at 1553–58.

235. *Id.* at 1554–56.

236. *Id.* at 1555–56.

237. *Id.* at 1556.

238. *Id.*

239. *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942).

240. *Id.* at 145.

241. *L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962).

242. *Id.* at 98–101.

243. *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 414–18 (1990).

244. *Id.* at 436 n.19.

plans.²⁴⁵ Professor Lao argues that granting antitrust immunity to drivers for ride-sharing enterprises is consistent with the rationales of these cases.²⁴⁶

According to Lao, Congress enacted the labor exemption to protect the economic interests of workers who would suffer in a pure market economy:

The premise of the antitrust law is that competition is generally best for the economy, as competition is expected to “produce not only lower prices, but also better goods and services.” The role of the Sherman Act, then, is to protect the marketplace from unreasonable interference, whether through price fixing or other forms of restraints on competition. Since collective bargaining by workers for higher pay and better working conditions does interfere with the ordinary workings of the labor market and is a form of price-fixing, it would seem to fall within the antitrust law’s prohibitions.

However, society obviously has other values, in addition to marketplace competition, that are worthy of protection—such as the fair treatment of workers

. . . .

. . . Essentially, the exemption expresses a philosophy that labor markets are different from other types of markets, and that the value of competition underlying our antitrust laws must accommodate the value of empowering workers in seeking fair wages and good working conditions.²⁴⁷

She argues that the sellers of fish and kitchen grease were more like independent businesspeople than drivers in ride-sharing enterprises because they have more autonomy than the drivers and, further, in the absence of the challenged collusion, would be market participants competing with each other.²⁴⁸

Professor Lao distinguishes the doctors’ situation first by noting that doctors have substantial incomes so a policy allowing collusion to achieve better income does not apply.²⁴⁹ She also notes that while doctors often complain about control asserted by insurance companies, that control does not equal that of an employer over an employee.²⁵⁰ Further, Professor Lao notes that demand for medical services is more inelastic than that for rides, giving doctors more market power than drivers.²⁵¹ Thus, Professor Lao concludes that drivers in ride-sharing

245. Lao, *supra* note 151, at 1563–65.

246. *Id.* at 1571–72.

247. *Id.* at 1565–66 (footnotes omitted).

248. *Id.* at 1567.

249. *Id.* at 1568–69. *Cf.* Kim, *supra* note 17, 435–40 (identifying income disparities as a justification for antitrust exceptions). One challenge to the income disparity argument is that the characteristics of sharing economy workers are not uniform. *See generally* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 3, at 18–20.

250. Lao, *supra* note 151, at 1569.

251. *Id.* at 1570–73.

enterprises should be given an exemption from the Sherman Act because they are subject to more control than the actors in the other situations and are poorer than doctors.²⁵²

Professor Lao views the question of whether sharing economy workers should be allowed to jointly negotiate as one of sacrificing the procompetition policy of the Sherman Act for the economic benefit of sharing economy workers. She is willing to extend the labor exemption to achieve that goal. The clearest limitation on Lao's approach is its failure to accommodate differing facts regarding market dynamics based on geography. This risks trading off harm to workers against harm to consumers in a way the solution outlined in this Article does not.²⁵³

2. Replacing the Common Law "Control" Test with a Market Realities Test

Eric Posner takes issue with the control test for employment, developed at common law and adopted by statute, to establish the divide between those entitled to employment protections, including collective bargaining.²⁵⁴ Arguing that "contractor or employee status, properly understood, depends on market structure—whether workers operate in a competitive labor market or not,"²⁵⁵ Professor Posner outlines the economic difference between employment and contracting as a distinction between labor markets better characterized as competitive from those better characterized as monopsonistic.²⁵⁶ The character of the market, in turn, is influenced by the nature of the work, whether it is "discrete" or "relational."²⁵⁷

The more discrete the work, the easier it is for the worker to find alternative buyers willing to bid for services, and therefore the less monopsony power enjoyed by any one buyer with whom the worker does business.²⁵⁸ In contrast, work that is highly relational reflects buyer-specific investments by the worker, whether it be particular tools, education, skills, or licensure.²⁵⁹ The relationship-specific investment ties the worker to the employment relationship and makes alternative

252. *Id.* at 1573.

253. Section IV.B argues that in some circumstances allowing sharing economy workers to jointly negotiate furthers the underlying Sherman Act policies. *See infra* Section IV.B.

254. Posner, *supra* note 183, at 3–4.

255. *Id.* at 3.

256. *Id.*

257. *Id.* at 4.

258. *Id.* at 9–10.

259. *Id.*

buyers less attractive to the particular worker.²⁶⁰ This fact gives the buyer some degree of monopsony power.²⁶¹ The effect is that the contractor, the worker engaged in discrete work, can rely on market forces for basic employment protections including wages and benefits, while the employee, the worker engaged in relational work, cannot.²⁶² Posner applies this economic lens—which, he argues, describes the economic relationship in labor markets better than the common-law “control” test—to the question of legal regulation of the labor market, with a specific focus on minimum wage laws.²⁶³

As Professor Posner recognizes, the same argument applies to the question of bargaining rights.²⁶⁴ In the case of discrete work, workers amply protected by market forces should be precluded from collective bargaining, which would have the effect of establishing a monopoly labor price, reducing output, and thereby harming consumers.²⁶⁵ In contrast, workers performing relational work bear significant opportunity costs in pursuing other buyers for their labor, and the extent of these opportunity costs coincides with the amount of bargaining power the buyer has over them. Permitting these workers to bargain collectively, thus giving countervailing monopoly power, can shift the price paid closer to the theoretical competitive equilibrium.²⁶⁶ By thus bringing workers into the market to invest in and perform this relational work, the buyer’s output is increased and consumers benefit.²⁶⁷

Finally, Professor Posner engages the difficult intersection between worker protections either through regulation or bargaining and antitrust law, which in ordinary cases objects to aggregating power at any one level of a distribution chain—whether among workers or buyers of labor.²⁶⁸ He reaches the necessary conclusion that organization by sharing economy workers who are contractors violates Section 1, while organization among employees is immunized by the labor exemption.²⁶⁹ His analysis falls short when he critiques the argument that if sharing economy suppliers are not permitted to

260. *Id.* at 4.

261. *Id.*

262. *Id.* at 16.

263. *Id.* at 14–16.

264. *Cf. id.* at 16 (“Employment law and labor law counter labor monopsony, which should generate wealth.”).

265. *Id.* at 15.

266. *Id.*

267. *See supra* note 158 and accompanying text.

268. Posner, *supra* note 183, at 22–24.

269. *Id.* at 23; *cf. supra* Section II.A.

combine for purposes of setting prices, the platform should not be permitted to do so either.²⁷⁰ Professor Posner argues that “lawsuits against Uber for cartelizing the market have failed because Uber faces competition” and driver price fixing without market power would violate the Sherman Act “only because of the crude *per se* ban on price fixing.”²⁷¹ The first proposition misstates the resolution of lawsuits against Uber in US federal courts, which are dismissed due to competition only in the case of a monopolization claim.²⁷² The second proposition too hastily rejects the value of *per se* rules in ensuring ease of administrability for challenges to conduct with obvious harm and limited or no social value. Section IV.B, argues that avoiding the application of the *per se* rule to joint negotiation by sharing economy workers requires greater justification than merely rejecting *per se* rules.

Professor Posner’s application of his economic lens to the circumstance of sharing economy workers is necessarily stylized and does not provide a satisfying resolution of the labor rights-antitrust conflict the sharing economy presents. The observation that “[g]ig-economy workers float somewhere between the traditional employee and the traditional contractor”²⁷³ is an effective shorthand, which explains legislative efforts around the globe toward a third classification, as well as Professor Lao’s suggestion for uncoupling labor law from state employment law.²⁷⁴ It is unclear that this approach is generalizable across sharing economy enterprises, however. It also may ignore important distinctions among workers in any one enterprise. The structured analysis in Section IV.B builds on Professor Posner’s economic lens and his challenge to the control test, while attempting a more nuanced treatment of the circumstance of organizing by workers on sharing economy enterprises.

270. Posner, *supra* note 183, at 23 (critiquing Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 236–39 (2017)); *cf.* Anderson & Huffman, *supra* note 1, at 862 (Uber agreement reflects a hub-and-spoke cartel in the absence of a unilateral conduct argument).

271. Posner, *supra* note 183, at 23.

272. *See, e.g.*, *Desoto Cab. Co. v. Uber Techs., Inc.*, No. 16-cv-06385-JSW, slip op. at 5–8 (N.D. Cal. Mar. 25, 2020) (dismissing predation claims against Uber due to the plaintiff’s failure to sufficiently allege a monopoly position).

273. Posner, *supra* note 183, at 21.

274. *See* IUS LABORIS, THE BYWORD: THE GIG ECONOMY 8–9 (2018), https://iuslaboris-assets.s3.amazonaws.com/media/filer_public/9f/d5/9fd5b984-cb21-42fb-8445-cb0a28eedc2a/iuslaboris_the_byword_the_gig_economy_web.pdf [<https://perma.cc/86M8-TQ7U>]; Lao, *supra* note 151, at 1583–86; *see also supra* Section IV.A.1.

3. Cooperative Oversight Between Antitrust and Labor Agencies

Hiba Hafiz acknowledges the connection between labor market buyer power and harms felt in the consumer market but argues that, empirically, this connection does not play out in most cases.²⁷⁵ “[C]ommentators concede that prices to consumers will not increase” from exercises of labor market monopsony power “if product markets are competitive or when ‘reduced sales . . . will be *offset*’ by new firms’ sales.”²⁷⁶ The possibility (and empirical frequency) of wage discrimination also allows exercises of monopsony power without reducing labor inputs, thus not affecting output or prices to consumers.²⁷⁷ In Part III, the Authors analyze these realities in the context of the sharing economy and ride-sharing specifically.²⁷⁸

Because of this empirical reality, a purely consumer-focused antitrust law is unlikely to protect against monopsony power in labor markets. Professor Hafiz identifies places where enforcement may operate to the benefit of workers, including in the context of horizontal agreements with clear impacts on wages or worker movement.²⁷⁹ Other instances, including mergers and labor market restraints not subject to the *per se* rule, are ambiguous concerning likely enforcement decisions and litigation outcomes.²⁸⁰ Professor Hafiz identifies examples of monopsony conduct in labor markets that are permitted based on benefits to consumers.²⁸¹ Additionally, “when labor market restraints benefit workers and not consumers, the consumer welfare standard trumps.”²⁸²

Professor Hafiz suggests a regulatory-sharing approach in which the National Labor Relations Board and the Department of Labor would share responsibility for antitrust review of mergers, which under current law is conducted by either the Justice Department or Federal Trade Commission without input from the Department of Labor.²⁸³ The labor agencies would serve a fact-finding function and would have power separately to review efficiency defenses.²⁸⁴ Under Professor Hafiz’s approach, the labor agencies would follow a public interest

275. Hafiz, *supra* note 35, 397–98.

276. *Id.* at 391 (quoting Naidu et al., *supra* note 149, at 559 n.93).

277. *Id.* at 391–92.

278. *See supra* Section III.B (describing characteristics of ride-sharing markets).

279. Hafiz, *supra* note 35, at 389 (horizontal no-poach and wage-fixing agreements).

280. *Id.* at 393–94.

281. *Id.* at 394–96.

282. *Id.* at 398.

283. *Id.* at 407.

284. *See id.* at 407–09.

standard, akin to that followed by other agencies with concurrent jurisdiction over sector-specific mergers.²⁸⁵ Most pertinent to the labor market problems in sharing economy enterprises, Professor Hafiz argues that the classification of workers as contractors or employees should take into account monopsony power held by buyers of labor inputs.²⁸⁶

Among the three approaches outlined here, Hafiz's approach does the least to alter existing substantive legal standards and theories of antitrust law. A consultative role and concurrent oversight authority by labor agencies of conduct and mergers implicating worker interests would permit antitrust to operate, and the law to develop, as it currently does. It would only require additional cooperation among agencies, with the most likely impact being a slowdown of the oversight function. In the context of mergers, this may present particular concerns. The most potent critique of Professor Hafiz's approach is its failure to acknowledge the political challenges inherent in agency cooperation. An important difference with the cooperation suggested here is the divergent goals of the agencies' work. One might expect substantial conflict to arise, ultimately requiring courts to determine which approach to favor in a particular case. In this way, Hafiz's argument may be thought to offer little improvement over pure incorporation of divergent goals through the common-law process.

Professor Hafiz seeks to address the potential tension between the interests of consumers and workers by allocating differing responsibilities to antitrust and labor law and authorities. Antitrust would advance the interests of consumers and labor law would advance the interests of workers. Section IV.B argues that the interests of consumers and workers are consistent when the buyer of workers' services has monopsony power. It also analyzes when such monopsony power is likely to exist in the sharing economy context.

In summary, Professors Lao, Posner, and Hafiz use different approaches to examine the potential tension between the interests of consumers and workers. They each turn to the labor exemption or labor law to answer the question. Professor Lao concludes that the labor exemption should apply to sharing economy workers to advance their interest. Professor Posner concludes that the labor exemption is consistent with consumer interests since it allows workers to overcome monopsony power of buyers of labor. Professor Hafiz concludes that labor law should collaborate with antitrust law, with labor law pursuing workers' interests and antitrust law pursuing consumer interests.

285. *Id.* at 408.

286. *See id.* at 406.

Section IV.B argues that the Sherman Act's Rule of Reason should be used to permit joint negotiation by sharing economy workers when it is consistent with the interests of consumers.

B. Harnessing the Rule of Reason to Protect Some Sharing Economy Workers

This Section identifies two possible understandings of the market for ride-share driving. In the first, which this Article calls the fallow-assets model of the market, the predominant suppliers have the option to enter and exit at their leisure. The effect is that at higher labor prices the output of driving services would be higher and at lower prices the output would be lower, represented by the classic upward-sloping supply curve for labor. A single buyer of labor in this market has some degree of monopsony power, enabling it to reduce the price for labor and accept the reduced output. In the second, which this Article calls the locked-in model of the market, the predominant suppliers have made irrevocable commitments to their work in ride-sharing. In this market, higher prices may bring others into the market, increasing output, but lower prices would not necessarily reduce output—in fact, below a break-even price point, lower prices may *increase* output as locked-in drivers work to ensure they can meet expenses. This C-shaped supply curve ensures the monopsonist buyer of driving services has extraordinary monopsony power, enabling it to reduce prices for labor substantially.²⁸⁷

The effect of these two exercises of monopoly power on consumers differs. With an upward-sloping supply curve more characteristic of ordinary input markets, the reduced labor price reduces output, in turn reducing output and raising the price in consumer markets. In this market, collective action by drivers that pushed the price for labor back toward the competitive equilibrium would increase output both in the labor and in the consumer markets.

In contrast, with a C-shaped supply curve, which is near vertical at some price point and downward sloping at lower prices, the effect of organization by drivers in the locked-in market to raise prices depends on where in the range prices are in the absence of organization. At very low prices, below the break-even point for locked-in drivers, an increase would *reduce* output, as overworked drivers take advantage of the ability to experience leisure time after reaching their earnings threshold. At this low end of the price range, the effect of organization to increase prices would be to increase price and reduce output for

287. See *supra* Section III.B; see also *supra* note 164.

consumers. In the middle of the price range, a price increase would not impact output meaningfully because the vertical supply curve implies price insensitivity for drivers covering costs.²⁸⁸ In this range, the effect of organization would be to increase prices and reduce output in the consumer market. Finally, at a high enough price point, the effect in the locked-in market would mirror the effect in the fallow-assets market, as drivers increase output, incentivized by higher prices. Like in the fallow assets case, in this range, collective action would benefit consumers by increasing output and reducing prices to consumers. Intuition suggests that across the realistic price ranges for ride-share driving, locked-in markets would see worker interests and consumer interests in tension, rather than in concert.

The divergent effects on consumers of an agreement among drivers, depending on which model of the market prevails, could impact the answers to at least three legal questions under Section 1. First, should an agreement among drivers to jointly negotiate with the platform company be per se illegal? Second, would a plaintiff asserting a claim against the drivers under the Rule of Reason satisfy its threshold burden to show the likelihood of anticompetitive effects quickly, without a thorough analysis of the market? Third, if a plaintiff makes such a showing, would the possible pro-consumer outcome of an agreement among the drivers if traditional monopsony power is present, constitute a procompetitive justification available to the drivers under the second question of the Rule of Reason?

1. Is the Drivers' Agreement Per Se Illegal?

As Section II.A demonstrates, it is ordinarily easy to conclude that an agreement among competitors affecting price is per se illegal. In ordinary circumstances, such an agreement raising prices reduces output and hurts consumers. However, the Supreme Court has sometimes declined to apply the per se rule to horizontal agreements directly or indirectly impacting price. In both *Professional Engineers*²⁸⁹ and *Board of Regents*,²⁹⁰ the Court declined to apply the per se rule to a no-bid agreement and an output restriction, both of which could be expected to raise the price of the services. Likewise, in *Broadcast Music Inc. v. CBS*,²⁹¹ the Court interpreted a blanket license offered by

288. The price insensitivity is in the aggregate across the market. New entrants will make up for reduction in output as locked-in workers reduce hours once their expenses are covered.

289. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 694–95 (1978).

290. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984).

291. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9–10 (1979).

competing performing artists, which stated that an agreed price point for respective music offerings was not a per se illegal price fix.²⁹²

The per se rule against price fixing is aimed at agreements that reduce output and hurt consumers. An assertion that drivers' joint negotiation with the platforms would increase output and reduce prices to consumers by overcoming the output-reducing effects of monopsony power is aimed at the theoretical core of this rule. If the drivers' agreement could increase output, leading to an output increase and commensurate price decrease in the consumer market, there is a good argument that the per se rule should not apply.

In deciding whether a per se rule should apply, the Supreme Court has focused on two criteria. First, per se rules should be invoked only when the restraints being assessed would almost always be found to be anticompetitive upon further scrutiny:

Resort to per se rules is confined to restraints . . . "that would always or almost always tend to restrict competition *and decrease output*" . . . To justify a per se prohibition a restraint must have "manifestly anticompetitive" effects . . . and "lack . . . any redeeming virtue."²⁹³

A drivers' agreement to jointly negotiate with the platform companies might decrease output or it might increase output, depending on the nature of the market in question and in particular whether the supply curve is upward sloping, vertical, or downward sloping in the relevant range.²⁹⁴ Under a plausible, and likely extant in some geographical areas, model of the labor market in ride-sharing, the drivers' agreement could lead to a procompetitive increase in output. Thus, the per se rule should not apply to driver organizing behavior.

A second criterion the Court considers in deciding whether to apply a rule of per se illegality is the extent of experience courts have with restraints of this type. "[T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."²⁹⁵ Of course, a drivers' agreement to jointly negotiate with the platforms would arise in the context of the sharing economy, which the Authors have described as disrupting existing commercial structures in

292. Largely on an application of *Broadcast Music*, in prior scholarship, the Authors argued that the hub-and-spoke agreement between the platform and the workers in a ride-sharing enterprise should not be treated under the per se rule. See Anderson & Huffman, *supra* note 1, at 911.

293. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (emphasis added).

294. See *supra* Section III.B.

295. *Leegin*, 551 U.S. at 886–87 (citations omitted).

meaningful, and not fully understood, ways.²⁹⁶ Due to the novelty of the sharing economy, courts continue to have very little experience applying the Sherman Act to these relationships. This lack of experience urges caution in applying per se rules.

This Article has demonstrated that organization by ride-share drivers is not protected by the labor exemption from antitrust and would under traditional antitrust doctrine represent a per se illegal price fix.²⁹⁷ However, unique features of the ride-sharing labor market and its impact on consumers renders the per se rule a bad fit for this industry, likely to produce an intolerable level of false positives in the presence of uncertainty about the actual effects of labor market organization.

2. Would a Plaintiff Satisfy Its Initial Burden Under the Rule of Reason Quickly?

In the absence of the simple per se rule, the complex burden-shifting analysis of the Rule of Reason would be invoked. The threshold question under the Rule of Reason is whether the plaintiff can demonstrate a likelihood that the challenged agreement has anticompetitive effects.²⁹⁸ In both *Board of Regents* and *Professional Engineers*, the Court concluded that the plaintiff had made such a showing without engaging in a thorough analysis of the market, establishing the quick look Rule of Reason. Prior scholarship has argued that the hub-and-spoke agreement among the platform and ride-share drivers was appropriately considered under the quick look approach.²⁹⁹ That agreement touches on the most competitively sensitive of transaction terms—price—and is directed at the consumer market. It is not a per se illegal price fix because the agreement supports the existence of ride-sharing as a business model, enabling instantaneous contracting without real-time negotiation.³⁰⁰

An agreement among competing drivers aimed at increasing the price of their services, likewise targeting the most competitively sensitive of transaction terms, might seem to be worthy of quick look treatment under the first question of the Rule of Reason for the same reason that the platforms' agreements with ride-share drivers are. However, in the analogous case of *California Dental*,³⁰¹ the Supreme

296. Anderson & Huffman, *supra* note 1.

297. *See supra* Part II.

298. *See supra* text accompanying notes 98–108.

299. Anderson & Huffman, *supra* note 1, at 914–16.

300. *Id.*

301. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Court declined to apply the quick look approach. The Commission alleged that the dental association had restricted truthful advertising regarding prices and quality. The Ninth Circuit had applied the quick look approach in condemning the agreement.³⁰² The Supreme Court reversed since it thought that the quick look approach applied in *Board of Regents* and *Professional Engineers* put too lenient a burden on the plaintiff.³⁰³ Justice Souter's majority opinion noted that the advertising restrictions might have procompetitive effects by avoiding misleading advertising.³⁰⁴ He also acknowledged that the restrictions might have anticompetitive effects.³⁰⁵ The ambiguity of outcomes precluded a quick look approach to the threshold question of the Rule of Reason. "[T]he plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown."³⁰⁶ Given competing claims about the effects of the agreement, the plaintiff bore the burden of a more thorough market analysis, demonstrating the conduct presented a likelihood of harm to consumers.³⁰⁷

In light of the two equally plausible states of the labor market in question and the uncertainty regarding which state prevails in a particular geographic market, an agreement among drivers in ride-sharing enterprises to jointly negotiate with the platform company could be subject to a similar analysis. As in *California Dental*, there are two possibilities concerning the competitive effects of the agreement. In a locked-in model, over the most likely price range, the vertical or downward-sloping supply curve implies joint negotiation to raise prices would reduce output and raise prices in the labor market, ultimately harming consumers. In a fallow-assets model, characterized by the classic upward-sloping supply curve, the agreement could counteract the effects of monopsony power, thereby raising labor prices, increasing labor output, and leading to an output increase in the consumer market.

The crucial question distinguishing the quick look from the "full blown Rule of Reason" is who bears the burden of resolving this question.³⁰⁸ In *California Dental*, a similar uncertainty as to the effect on consumers from observed conduct was present. The Court held that the burden was on the plaintiff to address this question under the first

302. *Id.* at 763.

303. *Id.* at 769–71.

304. *Id.* at 771–73.

305. *Id.* at 778.

306. *Id.*

307. *See id.* at 776.

308. Hovenkamp, *supra* note 113, at 101–02.

step of the Rule of Reason. The allocation of the burden is important since, as in *California Dental*, the facts might make the question hard to resolve.³⁰⁹ In such a circumstance, the party bearing the burden will lose in the presence of uncertainty.

As a practical matter, bearing this burden would require a plaintiff to challenge collective action by ride-sharing workers to establish key facts about the nature of the market. Whether the plaintiff is the platform, a government enforcer, or possibly a class of consumers,³¹⁰ the Rule of Reason would require that plaintiff to show that labor organization threatens increased prices or reduced output in the consumer market. This, in turn, requires a showing of the nature of the labor market and the likely effect on output from an increased price for labor. In the presence of uncertainty, this is a heavy burden.

3. If the Burden Shifts to the Drivers, What Is the Nature of the Burden?

The second question under the Rule of Reason would be whether the drivers could point to a procompetitive justification for their agreement.³¹¹ The drivers would assert the possibility of procompetitive effects from an agreement counteracting a platform's exercise of monopsony power. A procompetitive effect from this agreement would be to increase the output of labor and thereby increase output in the consumer market. The practical requirement would be, in effect, to counteract the market analysis required of the plaintiff, demonstrating the market in this case saw or would see, increased labor output in response to a price increase.

The exact nature of the burden on the defendant drivers is important. Do the drivers bear the burden of persuasion on this question, or merely a burden of producing evidence? Here an agreement among drivers may have procompetitive effects or anticompetitive effects, depending on whether the supply curve for driving is upward sloping or downward sloping in the relevant range, which is itself a challenging fact to establish. Do the drivers need to persuade the trier of fact that the drivers' agreement is overcoming platform monopsony power to the benefit of consumers? Alternatively, do the drivers merely need to produce evidence that this is occurring?

309. *Id.*

310. Whether consumers would have standing to sue over a price agreement among drivers depends on the application of the direct purchaser rule in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 738–39 (1977).

311. See *supra* Section II.A; Hovenkamp, *supra* note 113, at 103; *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

The exact nature of the burden on the defendants for the second question of the Rule of Reason is uncertain. Professor Hovenkamp defines this burden as one of producing evidence: “If the defendant is unable to defeat the prima facie case and offers no justification, then the plaintiff is entitled to prevail. By contrast, if the defendant does provide evidence of a procompetitive justification the burden may shift a second time.”³¹² Another source interprets *Board of Regents* to impose a higher burden of persuasion, rather than mere production in some circumstances.³¹³ Because *Board of Regents* involved inherently problematic conduct and subjected it to the quick look, the better approach to the full-blown Rule of Reason is that articulated by Professor Hovenkamp. The effect is to impose a relatively light obligation on ride-share drivers defending a claim for organizing to show the possibility of procompetitive effects from that organization.

The analysis here leads to an important and somewhat uncomfortable conclusion. The market-structure scenario that leads to the conclusion that procompetitive effects are likely is the fallow-asset model, with its upward-sloping supply curve. In such a market, an agreement among drivers would counteract monopsony power, raise price, and increase output in the labor market, leading to a reasonable likelihood of consumer benefit. The Rule of Reason could identify these cases and legalize the agreement among drivers. However, these are least likely to be the workers in real need of labor organization, in light of their economic choices.

In contrast, in the locked-in model, no such procompetitive effect would flow from a drivers’ agreement to jointly negotiate if prices are in a low range. In the locked-in scenario, the supply curve, over the range of prices expected to prevail, is vertical or downward sloping. An agreement among the drivers to jointly negotiate could increase price, but that would lead to a decrease, or perhaps no change, in labor-market output. This reduction in output could be expected to hurt consumers. Therefore, the Rule of Reason would condemn an agreement among locked-in drivers, who have the fewest economic choices. This leaves the necessity of regulatory interventions in the form of wage-and-hour and other protections that exist for employees throughout the economy.³¹⁴

312. Hovenkamp, *supra* note 113, at 103–04.

313. 1 AM. BAR ASS’N, ANTITRUST LAW DEVELOPMENTS 74 n.440 (8th ed. 2017) (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984)).

314. See sources cited *supra* note 21.

V. CONCLUSION

For more than a century, courts have interpreted the Sherman Act to apply to an economy constantly transforming in response to changes in technology and business structures. In doing so, courts have been informed by an evolving understanding of the economics of different relationships among market participants. The focus of this process has been on the welfare of consumers. The categorical approaches of the *per se* rules and the matter of degree approach of the Rule of Reason, with its shifting burdens, have been the primary tools in this process. Occasionally, Congress has altered the results of this judicial process by creating exemptions from the Sherman Act such as the labor exemption. The creation of the sharing economy has posed major challenges for this process of evolution. The law is only beginning to respond to these challenges.

As workers in the sharing economy look to the possibility of jointly negotiating with sharing economy platform companies for better compensation, the legal structures created for participants in traditional firms pose grave risks for the workers. Such joint negotiations look like a price-fixing cartel of suppliers subject to the *per se* rule against price fixing by competitors. Even if the *per se* rule does not apply, the joint negotiations look illegal under the quick look version of the Rule of Reason. If the sharing economy workers try to raise the shield of the labor exemption, they are met with the likely conclusion that they are independent contractors, not employees, and are therefore not exempt.

However, courts have long been open to new understandings of the economics underlying the antitrust laws. This is especially the case in new enterprise structures, like those in the sharing economy. Cartels are treated harshly because they hurt consumers by raising prices and reducing output. If a monopsonist buyer of labor has reduced output in an effort to lower the prices it pays for labor, consumers could be hurt by that reduction in output. An agreement among workers could raise their compensation which would increase output and help consumers. This applies both to employees and to workers in the sharing economy. How should the law take this into account for workers in the sharing economy? One possibility is to extend the labor exemption to sharing economy workers. Another is to use the Rule of Reason.

In the case of sharing economy workers who are drivers for ride-sharing enterprises, there are two models of drivers. In the fallow-assets model, drivers have not made a relationship-specific investment in their car. They own the car for other purposes and use it to supplement their income by driving. By contrast, in the locked-in

model, drivers bought the car to drive for the ride-sharing enterprise. This relationship-specific investment has important ramifications. Locked-in drivers need to drive enough to pay for their car expenses, as well as their other living expenses. Fallow-asset drivers have typical reactions to compensation. They are incentivized to drive more when price is high than when it is low. Therefore, when a monopsonist buyer lowers price, quantity goes down. This reduction in quantity can injure consumers. On the other hand, locked-in drivers have a different response to reductions in price. They cannot drive less, since they need to make the payments on the car that they bought so they could be drivers for the platform (as well as their other expenses). In response to a price reduction by a powerful seller, the locked-in driver will not drive less, and might drive more. Therefore, there is not quantity reduction to hurt consumers.

The differing reactions by fallow-asset drivers and locked-in drivers to price reductions by powerful buyers has important implications for how the law should respond to agreements among drivers designed to increase their compensation by jointly negotiating with platform companies. Such a joint negotiation agreement among fallow-asset drivers could increase price toward the competitive level. This higher price would lead to an increase in quantity produced, serving to benefit consumers. However, an agreement among locked-in drivers designed to increase their compensation could reduce quantity and hurt consumers. A consumer-oriented antitrust law should allow the agreement among fallow-asset drivers and condemn the agreement among locked-in drivers. A structured application of the Rule of Reason could accomplish this set of outcomes. However, how should the law deal with uncertainty about whether fallow-asset drivers or locked-in drivers predominate at the margin in any particular geographic market? The burden-shifting structure of the Rule of Reason answers this question by imposing the initial burden of characterizing the market on a plaintiff challenging an agreement among drivers. This is a substantial burden.

This analysis leaves open the possibility that a plaintiff challenging an agreement among drivers might successfully establish that the predominate drivers at the margin in the market are locked-in and that the agreement has reduced quantity to the detriment of consumers. In such a case, the Rule of Reason would conclude that the agreement is illegal. This conclusion is potentially troubling for reasons unrelated to a consumer-focused antitrust law. Locked-in drivers are locked in because they are economically disadvantaged. For an antitrust law focused on consumers, this is irrelevant. However, society has other values. Achieving those values across the entirety of the

ride-sharing labor market will require some alternative solution, which might emerge by legislation or by aggressive extension of the labor exemption through the common-law process.