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# Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption

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*Consumers are the clear winners in the fast-growing sharing economy (and, more specifically, the “gig” economy), as are the technology companies that conceived and developed the digital platform models and that serve as the intermediaries. Though workers on the platforms have also benefited, particularly those who value flexibility, there is a sense that they are not receiving an appropriate share of the joint surplus that their “partnership” with the platforms produces. For those troubled by this disparity, the challenge is to find a principled solution that would allow the benefits to be distributed more equitably, but would not upend the innovative business model and thereby lose the associated efficiencies and other benefits.*

*In this Article, I argue for the extension of the antitrust labor exemption, currently limited to labor activities of employees, to encompass gig economy workers. That would allow them to negotiate collectively with the platform/intermediary over compensation and benefits issues without exposure to antitrust liability. Gig economy workers straddle the line between employee and independent contractor and do not currently receive the benefits and protections that are tied to employment. I explain why it would be consistent with the philosophies underlying the antitrust law and*

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\* Copyright © 2018 Marina Lao. Professor of Law, Seton Hall University School of Law; former Director, Office of Policy Planning, Federal Trade Commission. The ideas and opinions expressed herein are my own and do not necessarily reflect those of the Federal Trade Commission. I thank the U.S. Department of Justice, Antitrust Division, for the invitation to present this proposal in a Competition Law & Policy Seminar, and for the insights of the Division professionals who attended. I also thank Bill Adkinson, Carl Coleman, Ed Hartnett, Derek Moore, Michael Risinger, and Charles Sullivan for their insightful feedback. Finally, I am grateful to Christopher Leslie, John M. Newman, Tony Reese, Danny Sokol, Spencer Waller and other participants at the Antitrust Scholars Roundtable, CALIF, UC Irvine, for their helpful questions and comments.

*the exemption to extend the exemption to gig economy workers, and why that can be reconciled with more recent refusals to apply the exemption to non-employee professionals — mostly independent physicians.*

*The Article additionally addresses the drawbacks of different solutions proposed by others also concerned about the precarious circumstances of gig economy workers, focusing in particular on a proposal to legislatively redefine “employment” broadly to cover gig economy workers. My concern with this proposal is that it risks jeopardizing the very business model that has facilitated online intermediated work, and could also have the unintended effect of diminishing platform competition, which is troubling from a competition policy perspective. Given the uncertainties and risks, the simpler approach of extending the antitrust labor exemption to permit collective action by gig economy workers, proposed in this Article, seems to be the better path.*

*The exemption is not a perfect solution, and I address its weaknesses. But it is a means to advance the workers’ interests in securing an appropriate share of the surplus that has been jointly created by the platform and the workers, without as much risk of dismantling the business model in the process.*

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INTRODUCTION

The emergence and explosive growth of the “sharing” economy, and more specifically the “gig” economy, has triggered passionate debate regarding the status of its workers — those who provide services in a triangular relationship where an online platform serves as an intermediary linking the workers to potential customers.<sup>1</sup> Are they independent contractors working with the platform/intermediary that matches them to customers, or are they the platform’s employees? At the heart of this debate is probably the intuition that while the gig economy has unleashed economic efficiencies greatly benefiting consumers and others, gains to the workers are more ambiguous.<sup>2</sup>

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<sup>1</sup> See, e.g., James Sherk, *The Rise of the “Gig” Economy: Good for Workers and Consumers*, HERITAGE FOUND. (Oct. 7, 2016), <https://www.heritage.org/jobs-and-labor/report/the-rise-the-gig-economy-good-workers-and-consumers> (advocating against the reclassification of gig workers as employees). See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014) (describing how the trend away from traditional employer-employee relationships has negatively impacted workers); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 UC DAVIS L. REV. 1511 (2016) (arguing that whether individuals are classified as employees or independent contractors should depend on their level of flexibility); Liam Dillon, *The Question That Continues to Loom over Uber and Lyft — and Vex Lawyers*, L.A. TIMES (Apr. 2, 2017, 12:05 AM), <http://www.latimes.com/politics/la-pol-sac-uber-unionization-bill-20170402-htmstory.html> (summarizing the debate over the status of Uber and Lyft drivers). The Federal Trade Commission held a workshop in 2015 and issued a Staff Report in 2016 focusing on competition, consumer protection, and economic issues arising from the sharing economy. It chose not to address the employee/independent contractor issue either at the workshop or in the Report, however, as that topic lies outside of the agency’s areas of expertise and authority. FED. TRADE COMM’N, *THE “SHARING” ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS* 2 n.7 (2016), [https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200\\_ftc\\_staff\\_report\\_on\\_the\\_sharing\\_economy.pdf](https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf) [hereinafter FTC STAFF REPORT].

<sup>2</sup> See, e.g., Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States* 25 (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), <http://arks.princeton.edu/ark:/88435/dsp010z708z67d> (noting that some have argued that “the sharing economy is weakening worker bargaining power” and contributing to the rise in inequality, but asserting that “the actual effect is much more complicated and less clear”); Andy

Workers, in fact, have also benefited from the new online platforms, which are able to harness Internet, smartphone, and other technologies in ways that create flexibility for workers and new opportunities to earn additional income.<sup>3</sup> However, in the United States, a wide range of social benefits and legal protections are tied to employment available only to employees, not independent contractors, and gig economy work relationships are hybrids that do not fit well within the legal definition of either classification.

To the extent that workers in these relationships fall outside the employee classification, they are not entitled to these benefits. Thus, they are not covered by certain wage and hour guarantees,<sup>4</sup> the right to bargain collectively through recognized unions under the National Labor Relations Act (“NLRA”),<sup>5</sup> and the right to engage in labor strikes and other concerted labor activities shielded from application of the antitrust laws.<sup>6</sup> Yet, the circumstances of gig economy workers are similar in many respects to that of low-wage employees in typical employment relationships. And though they enjoy more autonomy than employees, they lack individual bargaining power vis-à-vis the platform companies and face bargaining disadvantages similar to those faced by employees in typical employment relationships. The totality of these circumstances is troubling, given the widely acknowledged increasing disparities in income and wealth among Americans. The

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Medici, *U.S. Sen. Mark Warner: Here’s Why We Must Rethink Employment, Benefits in the Uber ‘Gig’ Economy*, WASH. BUS. J. (Nov. 9, 2015, 10:50 AM), <http://www.bizjournals.com/washington/news/2015/11/06/u-s-sen-mark-warner-heres-why-we-must-rethink.html> (highlighting Senator Mark Warner’s position that policymakers must “find a way to support innovation and new technologies while making sure workers are not left out in the cold”); *Workers on Tap — The On-Demand Economy*, ECONOMIST (Dec. 30, 2014), <http://www.economist.com/node/21637393/print> [hereinafter *Workers on Tap*] (arguing that the winners in the rise of the on-demand economy are society, consumers, and “workers who value flexibility over security,” but that “workers who value security over flexibility . . . feel justifiably threatened”).

<sup>3</sup> See RUDY TELLES, JR., U.S. DEP’T OF COMMERCE, ESA ISSUE BRIEF NO. 01-16, DIGITAL MATCHING FIRMS: A NEW DEFINITION IN THE “SHARING ECONOMY” SPACE 12-13 (2016), <http://www.esa.gov/sites/default/files/digital-matching-firms-new-definition-sharing-economy-space.pdf>; Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* 5 (Hamilton Project, Discussion Paper No. 2015-10, 2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

<sup>4</sup> See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1)(C) (2018) (setting the federal minimum wage); *id.* § 207(a)(1) (2018) (setting premium pay of time and a half for work hours exceeding forty hours per week).

<sup>5</sup> See National Labor Relations Act, 29 U.S.C. §§ 152(2)-(3), 157 (2018).

<sup>6</sup> See 15 U.S.C. § 17 (2018); see also discussion *infra* Section II.A.

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challenge for policymakers is to find a way for gig economy workers to enjoy a fairer share of the benefits created by the sharing economy model, without undermining the business model itself.

One way to accomplish this goal would be to extend the antitrust labor exemption to encompass gig economy workers, by legislation or possibly through interpretation, which would allow them to take collective action in dealing with the platform/intermediary without violating antitrust laws. Broadly, the antitrust law prohibits concert of action that unreasonably restrains competition. Theoretically, collective action by workers seeking higher pay falls within its scope and could be condemned, absent an exemption. While a labor exemption to the antitrust law was indeed passed in 1914, it excluded independent contractors in its application.<sup>7</sup>

I argue that extending the exemption to shield collective action by gig economy workers, though they may be non-employees, is consistent with the provision’s underlying philosophy. The exemption was premised on the notion that human labor is not a commodity or an article of commerce and, therefore, restraints in the labor market should not be treated as an antitrust violation as would similar restraints in other markets. While the labor exemption excluded independent contractors in its application, this exclusion emerged in an era that did not contemplate the new hybrid work relationships that are characteristic of the gig economy.<sup>8</sup> Today’s gig economy workers are not as autonomous as the individual “businessmen” and entrepreneurs that courts had in mind when they drew the distinction between employees and independent contractors. Nor are gig economy workers truly competitors with each other such that permitting them to engage in collective bargaining would be somewhat comparable to approving a cartel of competing suppliers.

There have been more recent refusals to apply the labor exemption to non-employees, which mostly involved independent physicians engaged in collective bargaining with health plans for higher fees and other favorable contract terms. As the circumstances of gig economy workers and independent physicians — along with the potential effects of their respective collective action — are very different, extending the exemption as I propose can be reconciled with these physician cases.<sup>9</sup>

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<sup>7</sup> See 15 U.S.C. § 17; discussion *infra* Section II.A.

<sup>8</sup> See discussion *infra* Section II.B.

<sup>9</sup> See discussion *infra* Section II.C.

Others concerned about the precarious circumstances of gig economy workers have suggested different solutions. One solution calls for legislatively redefining the term “employment” very broadly under all relevant laws to bring gig economy workers under the employee classification in all contexts.<sup>10</sup> Another proposal, made by two former senior Obama officials, Seth Harris and Alan Krueger, suggests that Congress pass a law to create a separate classification for “independent workers” who would be given certain specified employee rights, but not all of them.<sup>11</sup>

A potential problem with the first suggestion, as will be further discussed, is that it could threaten the online platform model that relies heavily on fluid, non-traditional work relationships. Compliance with certain mandates for employees might make the flexible model that typifies gig economy businesses infeasible. In that case, instead of empowering workers to seek a fairer share of the pie, the solution could well result in diminishing the size of the pie itself or, in the words of Professor Richard Epstein, “killing . . . the goose that lays the golden egg.”<sup>12</sup> It could also have the unintended effect of diminishing platform competition, which is troubling from a competition policy perspective.<sup>13</sup> As for the separate “independent worker” classification proposal, while the idea is appealing, the political feasibility of passing legislation that would entail the wholesale revision of existing practices across multiple areas is open to question, as even Harris and Krueger acknowledge.<sup>14</sup> Aside from the feasibility issue, comprehensive reforms tend to have unintended consequences if their implications are not fully explored. At least until all the potential implications of such a major undertaking are thoroughly considered, simply extending the antitrust labor exemption, as proposed here, may be the better approach.

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<sup>10</sup> See, e.g., BRISHEN ROGERS, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, REDEFINING EMPLOYMENT FOR THE MODERN ECONOMY 2 (2016), [https://www.acslaw.org/sites/default/files/Redefining\\_Employment\\_for\\_the\\_Modern\\_Economy.pdf](https://www.acslaw.org/sites/default/files/Redefining_Employment_for_the_Modern_Economy.pdf) (proposing that “Congress expand the test for employment status under wage/hour, discrimination, and collective bargaining laws”).

<sup>11</sup> Harris & Krueger, *supra* note 3, at 5.

<sup>12</sup> Richard Epstein, *Uber and Lyft in California: How to Use Employment Law to Wreck an Industry*, FORBES (Mar. 16, 2015, 10:57 AM), <http://www.forbes.com/sites/richardepstein/2015/03/16/uber-and-lyft-in-california-how-to-use-employment-law-to-wreck-an-industry> (describing the efficiency of the innovative Uber/Lyft platform technology and making the case that imposing an employee status on rideshare drivers would “kill[] . . . the goose that lays the golden egg”).

<sup>13</sup> See discussion *infra* Section III.A.2.

<sup>14</sup> See Harris & Krueger, *supra* note 3, at 15.

Admittedly, this proposal is not a perfect solution. For instance, without the enforcement mechanisms of the labor laws, extending the exemption alone cannot compel platform companies to negotiate in good faith with gig economy workers. Nor does it affirmatively provide a safety net for gig economy workers similar to that afforded employees. Despite this and other possible limitations, there is reason for some optimism. With the benefit of antitrust immunity, workers would be free to engage in group boycotts (strikes), which are an effective tool to secure economic concessions. It may also be in the platforms’ self-interests to be open to compromising on demands, in an effort to increase morale and productivity. Furthermore, the popularity of social media makes it easier for contemporary workers to organize and influence public opinion, which could in turn put pressure on platform companies to negotiate in good faith and act reasonably. In short, the proposal should help gig economy workers secure a fairer share of the surplus made possible by the technologies of the sharing economy, but with less risk of dismantling the model in the process.

In Part I, I discuss the benefits and challenges of the sharing economy, and describe how gig economy work relationships straddle the line between employee and independent contractor statuses. In Part II, I make the case for expanding the antitrust labor exemption to insulate collective action by gig economy workers from the antitrust law. Part III discusses the drawbacks of alternative proposals, particularly those involving shoehorning gig economy workers into an employee classification. Finally, in Part IV, I acknowledge the limitations of my proposal but suggest that it has the advantage of empowering gig economy workers to act collectively to advance their economic interests, without jeopardizing the business model that has clearly benefited consumers.

## I. “GIG” ECONOMY WORKERS

### A. *Benefits and Challenges of the “Sharing” Economy*

The proliferation of the so-called “sharing economy” platforms in the past decade has given rise to a still small,<sup>15</sup> but rapidly increasing, gig economy workforce.<sup>16</sup> Though there is no universally accepted

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<sup>15</sup> See *id.* at 2 (reporting that approximately 600,000 workers, or 0.4% of total U.S. employment, work with an online platform in the gig economy).

<sup>16</sup> See *id.* at 10-12 (showing the scope and growth of the online gig economy); Sherk, *supra* note 1, at 2-3 (concluding that the number of Americans working in the gig economy

definition, the term “sharing economy” generally refers to marketplaces created by companies that take advantage of broadband internet, mobile phones, and other technologies to develop new online platform models that efficiently link potential suppliers and customers on a large scale.<sup>17</sup> While some of these platforms facilitate the sale or leasing of assets — for example, AirBnb links homeowners interested in renting their homes or spare rooms and those seeking short-term accommodations — other platforms match those who provide personal services with customers.<sup>18</sup> It is this latter group of sharing economy businesses — essentially a subset of the sharing economy dubbed the “gig economy” — and the work arrangements arising out of them that is the focus of this Article.

The economic benefits of the gig economy, and the sharing economy more generally, are widely acknowledged.<sup>19</sup> They stem mostly from low transaction costs made possible by modern technological advances that enable online platforms to match participants on different sides of multisided platforms (suppliers and

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grew by a factor of 50 between 2012 and 2015); see also Mark R. Warner, *Asking Tough Questions About the Gig Economy*, WASH. POST (June 18, 2015), [https://www.washingtonpost.com/opinions/asking-tough-questions-about-the-gig-economy/2015/06/18/b43f2d0a-1461-11e5-9ddc-e3353542100c\\_story.html?utm\\_term=.a7d395ed46f9](https://www.washingtonpost.com/opinions/asking-tough-questions-about-the-gig-economy/2015/06/18/b43f2d0a-1461-11e5-9ddc-e3353542100c_story.html?utm_term=.a7d395ed46f9) (noting the gig economy’s transformation of the workforce and urging Washington to “encourage these innovations and work to create more opportunities and upward economic mobility for everybody” instead of “trying to make the new economy look more like the old”). A similar development is occurring in the European Union. For studies on the gig economy in Europe, see, for example, VALERIO DE STEFANO, INT’L LABOUR OFFICE — GENEVA, CONDITIONS OF WORK AND EMPLOYMENT SER. NO. 71, THE RISE OF THE “JUST-IN-TIME WORKFORCE”: ON-DEMAND WORK, CROWDWORK AND LABOUR PROTECTION IN THE “GIG-ECONOMY” (2016), [http://www.ilo.org/wcmsp5/groups/public/—ed\\_protect/—protrav/—travail/documents/publication/wcms\\_443267.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_443267.pdf); HOUSE OF COMMONS WORK AND PENSIONS COMMITTEE, SELF-EMPLOYMENT AND THE GIG ECONOMY, 2016-7, HC 847 (UK); Willem Pieter De Groen & Ilaria Maselli, *The Impact of the Collaborative Economy on the Labour Market*, CEPS SPECIAL REP. (Centre for European Policy Studies, Brussels, Belg.), June 2016, at 1, [https://www.ceps.eu/system/files/SR138CollaborativeEconomy\\_0.pdf](https://www.ceps.eu/system/files/SR138CollaborativeEconomy_0.pdf).

<sup>17</sup> See FTC STAFF REPORT, *supra* note 1, at 10; Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 531 (2015) (describing the sharing economy as “any marketplace that brings together distributed networks of individuals to share or exchange otherwise underutilized assets”). In fact, the sharing economy is only one of many terms used to refer to these platform-enabled marketplaces; others include “on-demand” economy, “collaborative” economy, or “digital matching firms.” See FTC STAFF REPORT, *supra* note 1, at 11; TELLES, *supra* note 3, at 4, 7.

<sup>18</sup> See Harris & Krueger, *supra* note 3, at 28-33 (listing the most prominent platforms in the gig economy and the types of services that are supplied).

<sup>19</sup> See, e.g., FTC STAFF REPORT, *supra* note 1, at 23-25; TELLES, *supra* note 3, at 11-14.



customers) efficiently and on a scale that was not possible before.<sup>20</sup> The sharing economy business model also allows underutilized assets to be put to more productive use, thus reducing entry costs on the supplier side. For example, an individual who owns an underused car can relatively easily, and without incurring many fixed costs, enter the market to drive passengers at times of her own choosing to generate income.<sup>21</sup> And the innovations introduced by platforms increase consumer welfare by improving the consumer experience and offering more options.<sup>22</sup> In short, online platforms clearly provide significant benefits to consumers and society.

The benefits, however, are more mixed for gig economy workers, such as Uber or Lyft drivers, and TaskRabbit, Handy, Thumbtack, or Mechanical Turk workers. For individuals who need or value flexibility or who want to earn additional income, the gig economy certainly offers flexibility and work opportunities that are not readily available in traditional employment.<sup>23</sup> They may choose when they work, if at all, and how much or how little they wish to work; they are free to have additional jobs or work relationships, including with competing online platforms.<sup>24</sup> Even traditional part-time employment typically does not offer these options.<sup>25</sup>

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<sup>20</sup> See FTC STAFF REPORT, *supra* note 1, at 11. For example, the platform technology of Uber and Lyft allows a rider to easily request service on an app, automatically communicating her location. The rider is then matched very quickly with an available driver physically closest to the customer willing to accept the ride request. At the completion of the trip, the fare is automatically deducted from the rider's credit card linked to her account with the platform and, minus the platform's fee, transmitted to the driver. See *id.* at 67. For a description of how other gig economy firms (Mechanical Turk and Thumbtack) connect workers with those needing services, see Sherk, *supra* note 1, at 2. For a discussion of the different technologies that have propelled platform innovations, see DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS 40-45 (2016).

<sup>21</sup> See FTC STAFF REPORT, *supra* note 1, at 19, 24; TELLES, *supra* note 3, at 13; Koopman, Mitchell & Thierer, *supra* note 17, at 531 (“By giving people an opportunity to use others’ cars, . . . it allows underutilized assets or ‘dead capital’ to be put to more productive use.”).

<sup>22</sup> See TELLES, *supra* note 3, at 11-14 (detailing the benefits of digital matching platforms).

<sup>23</sup> See *id.* at 12-13 (describing the flexible work schedules and the opportunity for additional income provided by digital matching platforms).

<sup>24</sup> See Harris & Krueger, *supra* note 3, at 9-10; Sherk, *supra* note 1, at 6.

<sup>25</sup> Traditional part-time employees are generally not free to work whenever (and only when) it suits them, or to vary their number of work hours and work schedule at will from day-to-day and week-to-week.

The downside to gig economy work, however, is that much of the social safety net in the United States is tied to the employment relationship, available only to employees, not independent contractors.<sup>26</sup> For example, under various federal and state laws, employers must pay employees — but not independent contractors — at least the minimum wage,<sup>27</sup> and overtime premium pay for excess workhours;<sup>28</sup> contribute toward an employee's Social Security, Disability Insurance, and Medicare payroll taxes;<sup>29</sup> pay a state's unemployment insurance and workers' compensation insurance;<sup>30</sup> and so forth.<sup>31</sup> Additionally, employees but not contractors are covered by the NLRA, a comprehensive web of labor laws that protects employees' right to unionize and to engage in collective bargaining through recognized unions.<sup>32</sup> Employer infringements of these employee labor rights are deemed "unfair labor practice[s],"<sup>33</sup> which may be prosecuted by the National Labor Relations Board ("NLRB"), the agency created to implement the NLRA.<sup>34</sup> The NLRA, however,

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<sup>26</sup> See STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* ch. 2(A) (5th ed. 2012) (discussing differences in treatment of employees and independent contractors); Harris & Krueger, *supra* note 3, at 7 (discussing the benefits and protections that benefit employees, but not independent contractors).

<sup>27</sup> See Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1) (2018).

<sup>28</sup> See *id.* § 207(a)(1) (2018).

<sup>29</sup> See 26 U.S.C. § 3111(a) (2018) (setting forth the tax rate on employers for old-age, survivor, and disability insurance); INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. 1779, INDEPENDENT CONTRACTOR OR EMPLOYEE (2012), <https://www.irs.gov/pub/irs-pdf/p1779.pdf> (differentiating between independent contractor and employee for federal tax purposes).

<sup>30</sup> See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) (referencing protections for California employees, such as workers' compensation and unemployment insurance).

<sup>31</sup> For other federal labor and employment laws protecting employees, but not independent contractors, see, for example, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2018); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2018); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2018); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2018).

<sup>32</sup> See 29 U.S.C. § 157 (2018) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .").

<sup>33</sup> *Id.* § 158 (2018).

<sup>34</sup> The NLRB is tasked with prosecuting and adjudicating unfair labor practices, and administering union elections. See *What We Do*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/what-we-do> (last visited Jan. 3, 2018). See generally National Labor Relations Act, 29 U.S.C. §§ 153-156 (2018) (creating the NLRB and establishing

specifically excludes independent contractors from the definition of employees,<sup>35</sup> and thus the protections afforded employees for collective bargaining do not extend to them.<sup>36</sup> Additionally, as will be discussed in further detail later, the labor exemption to the federal antitrust laws enacted by Congress in 1914<sup>37</sup> is limited in its application to employees.

B. *Gig Economy Work Relationships Straddle the Line Between Employee and Independent Contractor Status*

In the gig economy sector that has generated the most legal challenges on this issue — the rideshare business — no traditional American court has yet found Uber or Lyft drivers to be employees,<sup>38</sup>

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its duties). If a majority of an identified group of employees vote in favor of representation by a union, or the union is voluntarily recognized by an employer with majority support from a specified group of employees, the union becomes the exclusive representative of all employees in that “bargaining unit.” *See id.* § 159(b) (2018).

<sup>35</sup> 29 U.S.C. § 152(3) (2018) (“The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor . . .”).

<sup>36</sup> *See* Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143, 146-47 (2005) (discussing the Taft-Hartley amendments to the NLRA, passed in 1947, which excluded independent contractors from NLRA coverage).

<sup>37</sup> 15 U.S.C. § 17 (2018); 29 U.S.C. § 52 (2018); *see* discussion *infra* Section II.A.

<sup>38</sup> *See, e.g.,* Saleem v. Corp. Transp. Grp., 854 F.3d 131, 134 (2d Cir. 2017) (ruling that black-car drivers for a car service platform were independent contractors, not employees); McGillis v. Dep’t of Econ. Opportunity, 210 So. 3d 220, 226 (Fla. Dist. Ct. App. 2017) (ruling that Uber drivers are independent contractors, not employees); *cf.* Ben Hancock, *Uber Driver Is Independent Contractor, Arbitrator Rules*, RECORDER (Jan. 11, 2017, 9:33 PM), <http://www.therecorder.com/id=1202776655398/Uber-Driver-Is-Independent-Contractor-Arbitrator-Rules>. *But see* Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at \*6 (Cal. Dep’t Labor June 3, 2015) (finding in a case before a state Labor Commissioner that a former Uber driver was an employee); Noam Scheiber, *Uber Drivers Ruled Eligible for Jobless Payments in New York State*, N.Y. TIMES (Oct. 12, 2016), <https://nyti.ms/2jGQFyf> (discussing a ruling by the New York State Department of Labor that two former Uber drivers should be treated as employees entitled to unemployment payments). A few class actions brought by rideshare drivers against Uber or Lyft alleging their misclassification as independent contractors, class certified for settlement purposes only, have either held Uber’s arbitration agreement with drivers to be enforceable, settled without reclassification of the class as employees, or are pending appeal as to the arbitration issue. *See, e.g.,* Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1207, 1216 (9th Cir. 2016) (holding that Uber’s arbitration agreements with drivers are enforceable and thus plaintiffs’ claim regarding misclassification as independent contractor should be determined through arbitration); Cotter v. Lyft, Inc., 193 F. Supp. 3d 1030, 1033-34, 1040 (N.D. Cal. 2016) (approving settlement that retained

though a few international agencies or tribunals have made such findings.<sup>39</sup> Gig economy workers, in fact, do not fit well within the definition of either “employee” or “independent contractor.”<sup>40</sup> Instead, they straddle the line between the two because there are features in their relationship with the platform/intermediary that suggest an independent contractor status, and others that suggest an employee status.<sup>41</sup> While no uniform test is employed in determining a worker’s status under the various applicable labor, employment, and tax laws, there is a commonality in the core factors that are considered.<sup>42</sup> The

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independent contractor status for Lyft drivers); *O’Connor v. Uber Techs., Inc.*, 150 F. Supp. 3d 1095, 1106-07 (N.D. Cal. 2015) (holding that Uber’s arbitration agreements with drivers are unenforceable). The district court opinion in *O’Connor* is on appeal to the Ninth Circuit Court of Appeals. See Cara Bayles, *Uber, Drivers Play ‘Hopscotch,’ and 9th Circ. Not Amused*, LAW360 (Mar. 23, 2017, 10:56 PM), <https://www.law360.com/articles/905384/uber-drivers-play-hopscotch-and-9th-circ-not-amuse>.

<sup>39</sup> Rideshare platforms have not fared as well on the employee/independent contractor issue in other countries. A British employment tribunal recently affirmed a tribunal ruling that Uber drivers are not self-employed. See Prashant S. Rao, *Uber Hit with New Blow in London as Panel Says Drivers Aren’t Self-Employed*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/business/uk-uber-london.html>; Jon Weinberg, *Gig News: October 28, 2016*, ONLABOR (Oct. 28, 2016), <https://onlabor.wordpress.com/2016/10/28/gig-news-october-28-2016> (reporting on the original U.K. employment tribunal’s ruling that Uber drivers are not self-employed independent contractors, but Uber employees). Other agencies or tribunals in Brazil and Switzerland have made similar findings. See Jon Weinberg, *Gig News: Brazilian Judge Finds Uber Driver Is Employee*, ONLABOR (Feb. 14, 2017), <http://onlabor.org/gig-news-brazilian-judge-finds-uber-driver-is-employee>; Jon Weinberg, *Gig News: Swiss Agency Finds Uber Driver Is Employee*, ONLABOR (Jan. 6, 2017), <http://onlabor.org/gig-news-swiss-agency-finds-uber-driver-is-employee>.

<sup>40</sup> See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (noting that “Lyft drivers don’t seem much like employees,” while at the same time they “don’t seem much like independent contractors either”). While a 2014 Ninth Circuit Court of Appeals decision holding that FedEx delivery drivers should have been classified as employees is often cited by those supporting similar treatment for rideshare drivers, the FedEx drivers’ circumstances were very different and it is difficult to see the case as comparable to the rideshare context. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 984-87, 997 (9th Cir. 2014). Unlike Uber and Lyft drivers, FedEx drivers were very much subject to the control of the company: they had to work between 9.5 and 11 hours a day, report to their terminals at the beginning and at the end of their workday, wear uniforms, drive vehicles with the FedEx logos painted on the vehicles in ‘FedEx white,’ and work in assigned service areas. *Id.* at 985-87.

<sup>41</sup> See Harris & Krueger, *supra* note 3, at 9-10 (discussing in some detail how gig economy workers are similar to and different from both employees and independent contractors); Sherk, *supra* note 1, at 6-7 (discussing elements of both employee and independent contractor status for many gig economy workers, using rideshare drivers as an example).

<sup>42</sup> See Harris & Krueger, *supra* note 3, at 8 tbl.1 (providing a summary of how

common law “control test” — the degree of control that a putative employer has over an individual worker — is a key feature.<sup>43</sup> Other relevant factors include whether the work performed by the worker is an integral part of the putative employer’s business, the worker’s entrepreneurial opportunity, the worker’s capital investment, the degree of special skill needed to perform the job, and the permanency of the relationship between the individual worker and the putative employer.<sup>44</sup>

Gig economy relationships, being hybrids, do not fit well into either classification.<sup>45</sup> Take the example of rideshare drivers. On the one hand, they resemble independent contractors in that they have complete control over when to work, whether to work at all, how many (or how few) hours they work, and where they work. They are also free to have other jobs and work relationships, including driving for a competing platform.<sup>46</sup> In fact, a recent study shows that a

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employee/independent contractor status is determined under a few major federal laws).

<sup>43</sup> See *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1113, 1148 (N.D. Cal. 2015) (stating the “principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result”); *McGillis*, 210 So. 3d at 223-25 (primarily considering Uber’s “extent of control” over the plaintiff former Uber driver to determine whether he was an “employee” under common law); *ROGERS*, *supra* note 10, at 2-4 (discussing the control test that “governs most federal employment statutes” and its difficulty of application); *Sherk*, *supra* note 1, at 6 (“Congress has not passed a bright-line test differentiating independent contractor status from employee status. Instead, different federal statutes use variants of the common law test. The common law test centers on the degree of control an employer has over an agent.”).

<sup>44</sup> See *Means & Seiner*, *supra* note 1, at 1526; *Harris & Krueger*, *supra* note 3, at 8 tbl.1; *Sherk*, *supra* note 1, at 6; see also *Saleem v. Corp. Transp. Grp.*, 854 F.3d 131, 140-48 (2d Cir. 2017) (concluding that plaintiff drivers were independent contractors for purposes of the FLSA under an analysis that considered the nature of their affiliation with the platform, entrepreneurial opportunities, investment and return, and schedule flexibility).

<sup>45</sup> But see Benjamin Sachs, *Do We Need An “Independent Worker” Category?*, ONLABOR (Dec. 8, 2015), <https://onlabor.org/do-we-need-an-independent-worker-category> (arguing that rideshare drivers do fit within the legal classification of employees).

<sup>46</sup> See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (“Lyft drivers can work as little or as much as they want, and can schedule their driving around their other activities. A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little income.”); *McGillis*, 210 So. 3d at 225-26 (“Drivers supply their own vehicles . . . and control whether, when, where, with whom, and how to accept and perform trip requests. Drivers are permitted to work at their own discretion, and Uber provides no direct supervision. Further, Uber does not prohibit drivers from working for its direct competitors.”); *Harris & Krueger*, *supra* note 3, at 9-10 (describing the gig economy

significant minority of gig economy workers, 14%, work on more than one market platform.<sup>47</sup> Having this type of personal control over one's work arrangement is inconsistent with being an employee, as a Florida appellate court recently noted in finding that an Uber driver was not an employee of the Uber platform/intermediary, but an independent contractor:

[A]s a matter of common sense, it is hard to imagine many employers who would grant this level of autonomy to employees permitting work whenever the employee has a whim to work, demanding no particular work be done at all even if customers will go unserved . . . and permitting work for direct competitors.<sup>48</sup>

On the other hand, rideshare drivers are like employees in that the platform/intermediary does exert control over some important aspects of their work. Uber or Lyft, not the drivers, set the fares that are charged to customers.<sup>49</sup> Further, the drivers must comply with myriad rules set by Lyft or Uber regarding insurance, safety, and service,<sup>50</sup> and they are subject to expulsion from the platform if their customer ratings, a system maintained by the platform, fall below a certain level.<sup>51</sup>

Other aspects of typical work arrangements in the gig economy likewise point in different directions and do not provide clarity. For

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worker's control in that she: "provides personal services only when she chooses to do so"; "chooses when and whether to work at all"; shares in a "relationship [that] can be fleeting, occasional, or constant" at her sole discretion; and "may offer her services through multiple intermediaries, or combine working with intermediaries and employment with a traditional employer").

<sup>47</sup> DIANA FARRELL & FIONA GREIG, JPMORGAN CHASE & CO. INST., PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 23 (2016), <http://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf>.

<sup>48</sup> *McGillis*, 210 So. 3d at 226.

<sup>49</sup> *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1113, 1142 (N.D. Cal. 2015) ("Uber sets the fares it charges riders unilaterally.").

<sup>50</sup> *See, e.g., id.* at 1136, 1142 ("Uber exercises substantial control over the qualification and selection of its drivers. . . . [A]spirng drivers must first complete Uber's application process, including a background check, city knowledge exam, vehicle inspection, and personal interview."); *Cotter*, 60 F. Supp. 3d at 1078-79 (summarizing Lyft's "suggestions" to drivers "not to do a number of things — not to talk on the phone with a passenger present, not to pick up non-Lyft passengers, not to have anyone else in the car, not to request tips, not to smoke or to allow the car to smell like smoke, and not to ask for a passenger's contact information").

<sup>51</sup> *O'Connor*, 82 F. Supp. 3d at 1143; *Cotter*, 60 F. Supp. 3d at 1079.

example, the workers’ relationship with a platform/intermediary is typically not as dependent or permanent as that seen in traditional employment relationships, which cuts in favor of finding independent contractor status.<sup>52</sup> However, the work performed by gig economy workers is usually integral to the platform/intermediary’s business — Lyft and Uber, for example, would not exist without their drivers — which supports a finding of an employee relationship.<sup>53</sup> And gig economy workers generally have minimal entrepreneurial opportunities: the only real path toward additional “profits” is for the individual to work longer hours, which is not the hallmark of an independent contractor. It is therefore unsurprising that a district court judge, in a high-profile case involving Lyft, said that having to determine whether rideshare drivers are employees or independent contractors is like being “handed a square peg and asked to choose between two round holes.”<sup>54</sup>

As discussed earlier, the innovative business model of Uber, Lyft, and other sharing economy platforms has offered not only substantial consumer gains, but also opportunities for additional income and greater flexibility for workers. But the disadvantage is that workers in these relationships receive none of the usual benefits to which employees are entitled, have little individual leverage, and “are at risk of being excluded from [the] social compact” between employers and employees.<sup>55</sup> The challenge is to find an appropriate solution that

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<sup>52</sup> See Harris & Krueger, *supra* note 3, at 8 (finding gig economy workers’ relationships with online platforms “are not so dependent, deep, extensive, or long lasting that we should ask these intermediaries to assume responsibility” for their economic security as if they were employees). For example, a 2015 analysis of the labor market for drivers on the Uber platform showed that 31% of Uber drivers surveyed held other full-time jobs and only moonlighted for Uber; furthermore, 30% had other part-time jobs. Hall & Krueger, *supra* note 2, at 10. Additionally, 32% of the drivers indicated that they were in transition between jobs, and were driving only “to earn money while looking for a steady, full-time job.” *Id.* at 12.

<sup>53</sup> See Cotter, 60 F. Supp. 3d at 1069. However, as a matter of common sense, this should probably not be a relevant factor in determining work status for sharing economy markets, which are multisided markets. In multisided markets, a platform’s role is to intermediate transactions between users on both sides of the platform. Therefore, the service providers or vendors, by definition, are integral to the platform’s business. Uber would not exist without drivers, but neither would eBay or Etsy exist without vendors. Yet, it would be strange indeed to find that sellers on eBay or Etsy are employees of their respective platforms. In sum, where the business is a multisided platform that exists to facilitate transactions between both sides, the fact that the service providers are integral to the platform’s business should have no bearing on the issue of whether they are independent contractors or employees of the platform.

<sup>54</sup> *Id.* at 1081.

<sup>55</sup> Harris & Krueger, *supra* note 3, at 6; see Warner, *supra* note 16 (noting that

would allow workers to obtain an appropriate share of the surplus generated by the efficiencies of the model without upending the model itself.

II. THE CASE FOR EXPANDING THE ANTITRUST LABOR EXEMPTION TO INSULATE COLLECTIVE ACTION BY GIG ECONOMY WORKERS

The basic point of collective action by employees is to enable them to aggregate their minimal individual bargaining power, so as to remedy the imbalance of power that exists between them and their employers in typical employment relationships.<sup>56</sup> This, in turn, would allow employees to negotiate more effectively with employers for higher wages and better terms of employment. From a policy perspective, permitting collective action by gig economy workers in dealing with the platform/intermediary is similarly justified, since the relationship between an individual worker and a platform/intermediary is probably as unequal as that found in a typical employment situation. For example, an individual worker realistically has little leverage in contracting with Uber or TaskRabbit. The NLRA, however, explicitly excludes independent contractors from its coverage.<sup>57</sup> Likewise, the antitrust labor exemption, which shields legitimate labor activities from the application of the antitrust laws, has been held inapplicable to independent contractors.<sup>58</sup>

The different treatment of independent contractors is probably rooted in the fact that, by definition, they have more autonomy and are generally less dependent on any single “employer” for their livelihood. Hence, there is less justification for providing them the various protections afforded employees, or for requiring a putative employer to assume responsibility for all aspects of their economic security.<sup>59</sup> Cases that have excluded independent contractors from the

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even the gig economy workers who are doing very well “exist on a high wire, with no safety net beneath them”).

<sup>56</sup> See National Labor Relations Act, 29 U.S.C. § 151 (2018) (“The inequality of bargaining power between employees . . . and employers . . . substantially burdens . . . commerce . . . by depressing wage rates and the purchasing power of wage earners . . .”).

<sup>57</sup> *Id.* § 152(3) (2018).

<sup>58</sup> See discussion *infra* Section II.A.

<sup>59</sup> See Harris & Krueger, *supra* note 3, at 7 (describing the employer-employee social compact as one where “employees agree to be economically dependent on their employers by relinquishing control over many aspects of their work lives . . . and, in return, employers must provide workers with a degree of economic security”). The logical corollary is that independent contractors, who unlike employees do not surrender control and are not economically dependent on a single “employer,” do not



scope of the antitrust labor exemption, moreover, have tended to stress that the contractors in question were independent business people.<sup>60</sup> Seen in this light, declining to extend the antitrust labor exemption to immunize collective action by independent contractors is perhaps understandable. Arguably, it would be comparable to condoning a cartel of competing (albeit small) suppliers, which is antithetical to the fundamental principles of antitrust law. But if the characteristics associated with independent contractors, especially in the early cases, are *not* typically reflected in modern gig economy work situations, then the different antitrust treatment of collective action by gig economy workers based on their non-employee status may not be warranted. And, a reasonable case can be made, conceptually, for broadening the exemption to encompass collective bargaining by gig economy workers, subject to the same limiting principles that currently apply to the exemption.<sup>61</sup>

A. *Background of the Antitrust Labor Exemption and the Exclusion of Independent Contractors in Its Application*

The Sherman Act (“the Act”), the principal federal antitrust law enacted in 1890, essentially protects the competitive marketplace by prohibiting unreasonable restraints of trade or commerce and the exercise of market power by a monopolist.<sup>62</sup> Congress passed it in

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have similar entitlements.

<sup>60</sup> See, e.g., *L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94, 96, 103 (1962) (finding that grease peddlers were “independent entrepreneurs” who shared “no job or wage competition or economic interrelationship” with the other members of the appellant union); *United States v. Women’s Sportswear Mfg. Ass’n*, 336 U.S. 460, 463-64 (1949) (holding that the stitching contractors were entrepreneurs, not laborers); *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 144-45 (1942) (emphasizing that the fishermen represented by the union were independent fishermen, not employees of the processor-buyers, and that they “carr[ied] on their business as independent entrepreneurs, uncontrolled by [the processor buyers]”); *Hawaiian Tuna Packers v. Int’l Longshoremen’s & Warehousemen’s Union*, 72 F. Supp. 562 (D. Haw. 1947) (finding that fishermen were independent businessmen who together decided to fix the prices of fish); see also *Am. Med. Ass’n v. United States*, 317 U.S. 519, 532-36 (1943) (rejecting assertions that the antitrust labor exemption applies to concerted efforts by independent physicians and their professional associations to boycott Group Health to force it to cease operation).

<sup>61</sup> For example, collusion between workers and the platform designed to foreclose competition from a competing platform or a potential new entrant would not be exempt. The exemption would only apply if the workers acted in their own economic self-interests, and did not “combine with non-labor” groups. See *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

<sup>62</sup> 15 U.S.C. § 1 (2018) (declaring illegal “[e]very contract, combination . . . or

response to concerns about trusts, monopolies, and concentrations of economic power. While it is uncertain whether the Act was initially intended to be wielded against workers organizing for better wages and work conditions,<sup>63</sup> collective action by workers seeking higher pay theoretically does fall within its scope as a restraint on competition in the labor market, and thus could be condemned.

Whatever the initial legislative intent, the Sherman Act in its earlier years was in fact used aggressively against labor unions, with courts finding that union-organized strikes constituted restraints of trade in violation of the Act.<sup>64</sup> Disapproving of this unexpected turn of events, Congress in 1914 enacted section 6 of the Clayton Act, which specifically exempted concerted labor activities from the antitrust laws.<sup>65</sup> The section begins with a strong pronouncement that “[t]he labor of a human being is not a commodity or article of commerce,” and declares that the Sherman Act should not be interpreted to forbid the organization and legitimate operation of labor unions.<sup>66</sup> Another section, enacted as section 20 of the Clayton Act, complements section 6 by prohibiting the issuance of judicial injunctions against certain

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conspiracy, in restraint of trade or commerce among the several States”); *id.* § 2 (2018) (declaring it unlawful to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States”).

<sup>63</sup> See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 990 (2016) (arguing that the Sherman Act “was not originally intended to apply to worker collective action”). However, legislative history of the Sherman Act shows that Congress had specifically considered the inclusion of an exemption for labor in the legislation, but the Act that was ultimately passed did not include such an exemption. See Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 16-19 (1983) (discussing the Congressional debate on the issue). This suggests, at the very least, that there was no consensus on the issue. See *id.*

<sup>64</sup> See, e.g., *Loewe v. Lawlor*, 208 U.S. 274 (1908) (finding that union-organized boycott violated the Sherman Act); *United States v. Workingmen’s Amalgamated Council*, 54 F. 994, 999 (E.D. La. 1893) (finding that “the combination [of union workers] to secure or compel the employment of none but union men” was a restraint of commerce in violation of the Sherman Act); see also HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836–1937*, at 229 (1991) (indicating that twelve of the first thirteen antitrust violations found by American courts after passage of the Sherman Act were challenges against labor strikes).

<sup>65</sup> 15 U.S.C. § 17 (2018).

<sup>66</sup> *Id.* (“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organization 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.”).

labor activities.<sup>67</sup> Courts, however, construed these exemption provisions narrowly<sup>68</sup> until Congress passed the Norris-LaGuardia Act in 1932. A labor provision that does not mention antitrust, Norris-LaGuardia deprived federal courts of jurisdiction to issue injunctions in labor disputes,<sup>69</sup> enumerated the acts that cannot be enjoined,<sup>70</sup> and set forth conditions that would be considered “to involve or to grow out of a labor dispute.”<sup>71</sup> After its enactment, the Norris-LaGuardia Act had the effect of bolstering the 1914 antitrust labor exemption and, at the same time, shaping its interpretation.<sup>72</sup>

Concerted action by independent contractors was excluded from the exemption’s application<sup>73</sup> in two relatively early Supreme Court cases:

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<sup>67</sup> 29 U.S.C. § 52 (2018) (prohibiting courts from granting injunctions in cases “involving, or growing out of, a dispute concerning terms or conditions of employment” and specifying certain types of conduct for which injunctions cannot be issued).

<sup>68</sup> See, e.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n*, 274 U.S. 37 (1927) (holding that union workers engaging in boycotts were not protected under the exemption); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925) (holding that the exemption did not cover a strike prompted by the employer’s setting up a nonunion facility); *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921) (holding that the activity protected under the exemption did not cover picketing).

<sup>69</sup> 29 U.S.C. § 101 (2018).

<sup>70</sup> *Id.* § 104 (2018).

<sup>71</sup> *Id.* § 113(a)-(c) (2018). And, three years later, Congress passed the Wagner Act, also known as the National Labor Relations Act, which clearly expresses a national policy favoring union organization and collective bargaining by establishing a comprehensive regime for the protection of employees’ right to unionize and to engage in collective bargaining through recognized unions under the oversight of the National Labor Relations Board. See *id.* §§ 151-169 (2018).

<sup>72</sup> See Paul, *supra* note 63, at 1021 n.202 (explaining that the Norris La Guardia Act “partially revived” and then “came to define the ethos of the labor exemption”).

<sup>73</sup> In addition to the exclusion of independent contractors, the statutory labor exemption has other limitations. For example, it applies only if a labor union acts “in its self-interest,” and does not “combine with non-labor” groups. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). However, the Court has held that if “job or wage competition or some other economic inter-relationship affecting legitimate union interests [exists] between the union members and the independent contractors,” then the independent contractors could be considered a “labor group” and may organize with the employees in a union under the labor exemption. See *Am. Fed’n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968); see also *Milk Wagon Drivers’ Union, Local No. 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 98-100 (1940) (ruling that union-organized picketing by independent contractor milk vendors involved a “labor dispute” exempt from the antitrust law because the independent contractors were in wage or job competition with employee milk wagon drivers represented by the union).

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*Columbia River Packers Ass'n v. Hinton* (“*Hinton*”)<sup>74</sup> and *Los Angeles Meat & Provision Drivers Union, Local 626 v. United States* (“*L.A. Meat*”).<sup>75</sup> At its heart, each case involved independent business people operating small competing businesses who joined unions and, through the unions, coordinated the prices or other terms at which they would sell their product/service to commercial buyers.<sup>76</sup> In *Hinton*, the Court stressed that the fishermen represented by the union were independent fishermen, not employees of the processor-buyers, and that they “carr[ie]d on their business as independent entrepreneurs, uncontrolled by [the processor buyers].”<sup>77</sup> To the Court, the case was no more than “a dispute among businessmen over the terms of a contract for the sale of fish,”<sup>78</sup> and the antitrust labor exemption “was not intended to have application to disputes over the sale of commodities.”<sup>79</sup>

*L.A. Meat* similarly involved “independent entrepreneurs”<sup>80</sup> who were “sellers of commodities.”<sup>81</sup> The defendants — middlemen who bought restaurant grease and resold it to processors — had joined a union and, through the union, fixed both the purchase price they paid for the restaurant grease and their resale price of the grease to the processors.<sup>82</sup> They further enforced their terms with the processors by threatening boycotts if the processors did business with non-union middlemen.<sup>83</sup> The Supreme Court affirmed the district court’s holding that the antitrust labor exemption did not apply to insulate the middlemen’s “illegal restraint of trade” from the reach of the antitrust law.<sup>84</sup> Other earlier cases similarly stressed that those engaged in collective action were independent business entrepreneurs who were essentially colluding to restrain competition.<sup>85</sup>

The employee-independent contractor dichotomy that continues to be seen in antitrust cases in the modern era typically involves

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<sup>74</sup> *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942).

<sup>75</sup> *L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962).

<sup>76</sup> See *L.A. Meat*, 371 U.S. at 95-97; *Hinton*, 315 U.S. at 144-45.

<sup>77</sup> *Hinton*, 315 U.S. at 144-45.

<sup>78</sup> *Id.* at 145.

<sup>79</sup> *Id.*

<sup>80</sup> *L.A. Meat*, 371 U.S. at 96.

<sup>81</sup> *Id.* at 102.

<sup>82</sup> *Id.* at 96-97.

<sup>83</sup> *Id.* at 97.

<sup>84</sup> *Id.* at 99-102.

<sup>85</sup> See cases cited *supra* note 60.

professionals. In a case that most resembles a regular labor strike, *FTC v. Superior Court Trial Lawyers’ Ass’n*,<sup>86</sup> the Supreme Court found that a collective refusal to accept court-appointed cases — organized by an organization of independent criminal defense attorneys and aimed at forcing the District of Columbia government to raise their compensation rates — constituted horizontal price fixing, a per se violation of the antitrust law.<sup>87</sup> Though the opinion made no mention of the exemption and its applicability or inapplicability, the “strike” would clearly have been exempt from the antitrust law had it involved collective action by a union of attorney-employees (not independent lawyers), and it is extremely doubtful that the Federal Trade Commission (“FTC”) would have brought the case in the first place.

The dichotomy is also evident in the many legal challenges brought by federal antitrust enforcers against independent physicians or other healthcare professionals who had organized and engaged in collective bargaining with health plans.<sup>88</sup> The premise of these cases was that the

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<sup>86</sup> 493 U.S. 411 (1990).

<sup>87</sup> *Id.* at 418, 434-46.

<sup>88</sup> See, e.g., *United States v. Fed’n of Physicians & Dentists, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,868 (D. Del. Nov. 5, 2002), <https://www.justice.gov/atr/case-document/final-judgment-83> (involving competing physicians and orthopedic surgeons engaging in unlawful collective bargaining with health care insurers); *United States v. Fed’n of Certified Surgeons & Specialists, Inc.*, 64 Fed. Reg. 5831 (Dep’t of Justice Feb. 5, 1999) (consent decree), <https://www.justice.gov/atr/case/us-v-federation-certified-surgeons-and-specialists-inc-and-pershing-yoakley-associates-pc> (involving Federation of Certified Surgeons and Specialists, Inc.’s agreement to restrain price competition); *Colegio de Optometras, F.T.C.* File No. 051 0044 (Sept. 11, 2007) (Decision & Order), <http://www.ftc.gov/os/caselist/0510044/070730decision.pdf> (involving price fixing and concerted refusal to deal with vision plans by independent optometrists); *Advocate Health Partners, F.T.C.* File No. 031 0021 (Dec. 29, 2006) (Decision & Order), <https://www.ftc.gov/enforcement/cases-proceedings/031-0021/advocate-health-partners-et-al-matter> (involving independent physicians and physician groups in metro Chicago engaging in collective bargaining and refusing to deal individually with health plans); *North Lake Tahoe Med. Grp., Inc.*, 64 Fed. Reg. 14730 (F.T.C. Mar. 26, 1999) (proposed consent agreement) (involving collective negotiation with health plan by a group of independent physicians in Lake Tahoe, California, for higher reimbursement rates); *Physicians Grp., Inc.*, 120 F.T.C. 567 (1995) (consent order) (involving a group of independent physicians in Danville, Virginia, who collectively agreed to boycott third-party payers who did not agree to their reimbursement rates, and succeeded in blocking the entry of a new health plan in their area); *Mich. State Med. Soc’y*, 101 F.T.C. 191 (1983) (challenging, in an early case, the medical organization’s forming a “negotiating committee” that orchestrated boycotts of a health plan to secure the physicians’ preferred reimbursement policies). For a listing of more enforcement actions blocking collective action by groups of independent physicians seeking higher fees, see Robert Pitofsky, Chairman, Fed. Trade Comm’n, Concerning H.R. 1304: The “Quality Health-Care Coalition Act of 1999,” Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, United States House of Representatives 3 (June 22,

antitrust labor exemption is inapplicable to combinations of non-employee physicians, who are considered independent business people.<sup>89</sup> Therefore, the collective pressure the independent physicians exerted on health plans for higher fees and other favorable terms was within the reach of the antitrust law.<sup>90</sup> These cases, which ended in consent decrees prohibiting the professionals' collective price-fixing, boycotts, and related restraints of trade,<sup>91</sup> made clear the federal government's position that the antitrust labor exemption may not and should not be applied to independent contractors, or at least not to independent healthcare professionals.<sup>92</sup>

This position is also apparent in the FTC's firm opposition to proposed antitrust exemption legislation that, if passed, would have specifically allowed independent physicians or other independent health care professionals to engage in collective bargaining with health plans.<sup>93</sup> Testifying before Congress, former FTC Chair Robert Pitofsky warned of the potential serious adverse impact on healthcare costs and access<sup>94</sup> if independent physicians or specialists in an area were "to band together and insist that they be paid an additional 10 or 20%."<sup>95</sup>

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1999), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-quality-health-care-coalition-act/healthcaretestimony.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-quality-health-care-coalition-act/healthcaretestimony.pdf) [hereinafter FTC Statement Before House Judiciary Committee]. For a discussion of the efforts of independent physicians to unionize and engage in collective bargaining with health maintenance organizations and managed care organizations in response to the ascendancy of managed care, see William S. Brewbaker III, *Physician Unions and the Future of Competition in the Health Care Sector*, 33 UC DAVIS L. REV. 545, 547-50 (2000).

<sup>89</sup> FTC Statement Before House Judiciary Committee, *supra* note 88, at 4 ("[P]hysicians who are employees (for example, of hospitals) are already covered by the labor exemption under current law. The labor exemption, however, is limited to the employer-employee context, and it does not protect combinations of independent business people.").

<sup>90</sup> *See id.*

<sup>91</sup> *See cases cited supra* note 88.

<sup>92</sup> It should be noted that, relying on the state action doctrine, Texas has enacted state legislation authorizing the state Attorney General to grant independent physicians the right to enter into collective bargaining with health care plans if certain requirements are met. *See Kennedy, supra* note 36, at 158-59 (discussing the limited Texas antitrust exemption statute). However, unlike the NLRA, the Texas statute does not compel any health plan to negotiate with any group of independent physicians formed for that purpose. *Id.*

<sup>93</sup> *See* FTC Statement Before House Judiciary Committee, *supra* note 88, at 1. The bill passed the House but failed to emerge from the Senate.

<sup>94</sup> *Id.* at 5-7 (drawing from past experience in cases involving independent physicians' collective bargaining on fees and other terms to explain that permitting collective bargaining by independent physicians would cause serious harm to consumers, raise costs, and reduce access to care).

<sup>95</sup> *Id.* at 2.

In light of *Hinton* and its progeny, and the consistent position of the federal antitrust agencies on the issue, it might seem initially that an expansion of the antitrust labor exemption to cover gig economy workers would be difficult to rationalize. However, the issues that seemed to trouble the Court the most in *Hinton* and the earlier cases — and the antitrust agencies in the independent physician cases — are not compelling factors in the gig economy context, as will be discussed in the following section. Lyft and Uber drivers, for example, do not fit the independent entrepreneur image that the Court had of independent contractors in *Hinton*. Nor is it likely that their collective bargaining with Uber/Lyft would cause the immense consumer harm predicted, and in some cases documented, for collective action by independent physicians.

*B. Extension of Antitrust Labor Exemption to Cover Gig Economy Workers Is Consistent with the Fundamental Philosophy Underlying the Exemption*

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.”<sup>96</sup> 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.<sup>97</sup>

However, society obviously has other values, in addition to marketplace competition, that are worthy of protection — such as the fair treatment of workers.<sup>98</sup> Congress gave expression to this competing value in enacting the labor exemption to the antitrust laws in 1914. Starting with a forceful declaration that human labor is not “a commodity or article of commerce,” section 6 of the Clayton Act continues to state that antitrust laws are not to be construed to

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<sup>96</sup> Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978).

<sup>97</sup> See, e.g., FTC v. Super. Ct. Trial Lawyers Ass’n, 493 U.S. 411 (1990) (finding that independent attorneys boycotting together to force the D.C. government to raise compensation rates constituted a per se violation of antitrust law).

<sup>98</sup> See Hoffmann, *supra* note 63, at 1-4 (discussing the different philosophies of the antitrust and labor laws).

prohibit labor organizations and the legitimate operations of the organizations and their members.<sup>99</sup>

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. Thus, while the antitrust law typically values robust competition and forbids price fixing in regular markets, an exception is made for workers who may act collectively to obtain higher pay and other favorable terms, even if that concerted action does “fix prices” and limit competition among workers. This exemption from the antitrust law, then, is a value choice that Congress has made for the protection of workers.

The main antitrust labor exemption provision, section 6 of the Clayton Act, does not explicitly exclude independent contractors from its coverage. However, judicial interpretation of the exemption has generally been tied to the 1935 Norris-LaGuardia Act, a piece of labor legislation that prohibits the issuance of injunctions in cases involving a “labor dispute” and defines labor disputes in terms of controversies “concerning terms and conditions of employment.”<sup>100</sup> Furthermore, case law on the application of the exemption has interpreted the provisions to exclude collective action by independent contractors.<sup>101</sup>

It should be noted, however, that the exclusion had emerged in an era that did not contemplate the fluid work relationships that are now ascendant and that typify the gig economy. In the past, an individual was typically either an employee working in a traditional employment arrangement in which a single employer controlled all aspects of the work relationship, or an independent business person who competed against other small suppliers in the market for the opportunity to supply goods or services (or a combination of both) to a buyer or customer for a profit. In that context, limiting the antitrust labor exemption to employees was perhaps understandable.

If an individual business person were truly autonomous, free to work with multiple customers or clients, not dependent on a single “employer” for her livelihood, and able to “profit” from her business based on her own actions and decisions, then justifications for the

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<sup>99</sup> 15 U.S.C. § 17 (2018).

<sup>100</sup> 29 U.S.C. § 113 (a)-(c) (2018); *accord* United States v. Hutcheson, 312 U.S. 219, 233-34 (1941); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 504 n.24 (1940) (noting that the Norris-LaGuardia Act is predicated on the policy that laborers must have full freedom to negotiate the terms and conditions of their employment).

<sup>101</sup> *See supra* notes 73–85 and accompanying text.



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protection of the labor laws or the antitrust labor exemption might be less compelling. Likewise, if independent contractors were indeed individual businesses in competition with each other to supply goods to a buyer, as in *Hinton*, extending the labor exemption to them would effectively authorize a classic competitor agreement not to compete. Gig economy workers, however, do not occupy this space for two reasons. First, they lack the kind of autonomy that courts, as in *Hinton*, tend to associate with independent contractors. Second, they are generally not competing suppliers who, but for their collective action, would be competing against each other for business by offering better terms to potential buyers.

Today, the line between employees and independent contractors is often blurred. It is true that workers have substantial flexibility and control in a triangular relationship where online platforms, aided by technology, efficiently link workers to customers and facilitate their transactions with each other.<sup>102</sup> They alone will decide whether, when, and how much they wish to work with the platform; and they are free to have multiple work relationships, including with competing platforms, if they so choose. Nevertheless, these workers are subject to the platforms' control over certain important aspects of their work, including being indirectly supervised through customer ratings and being subject to the threat of expulsion for unacceptable ratings. In the case of the rideshares, the platforms/intermediaries even determine the prices (fares) that drivers may charge for each ride. In short, gig economy workers are exposed to vulnerabilities in their relationship with the platforms/intermediaries that are similar to those of employees in an employment context. Like employees, they also lack individual leverage in negotiating with a platform/intermediary on the terms of their relationship, such as the revenue split.

Extension of the antitrust labor exemption to cover collective action by these workers, therefore, would be consistent with the philosophy underlying the exemption. It would allow gig economy workers to aggregate their bargaining power and collectively bargain with the platform/intermediary for appropriate benefits and compensation, perhaps in the form of a more favorable revenue split that would take into account the various economic benefits that are unavailable to them as non-employees, such as employers' payroll tax contribution for Social Security and Medicare, and reimbursement of job-related expenses such as gas and car maintenance for rideshare drivers.

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<sup>102</sup> See TELLES, *supra* note 3, at 11-13.

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With respect to concerns that allowing collective action by independent contractors would effectively condone classic horizontal collusion and eliminate competition among competing suppliers, these are non-factors in most gig economy markets. Workers providing service on a platform are generally not independent businesses in competition with each other, like the independent fishermen in *Hinton* or the grease middlemen in *L.A. Meat*.<sup>103</sup> Uber drivers, for instance, do not compete with each other for more rider “matches” from Uber by individually offering the platform a better revenue split than other Uber drivers. Nor do they compete against each other for more riders by individually offering potential riders lower fares. A Lyft or Uber driver is essentially an individual with a car who seeks to earn some income, at times of her choosing, by driving passengers linked to her by the rideshare platform based on fares determined by the platform. Extending the antitrust labor exemption to allow their collective bargaining with the platforms should not raise the same type or degree of competitive concerns as would eliminating competition among genuine competing suppliers.

C. *Distinguishing Independent Physicians’ Organizations and Collective Bargaining with Health Plans*

As mentioned earlier, federal antitrust agencies have brought many enforcement actions against independent physicians and other healthcare professionals for engaging in collective bargaining with health plans.<sup>104</sup> In light of that, a reasonable question is whether an extension of the antitrust exemption to gig economy workers proposed in this Article is intended to apply to collective bargaining by independent physicians as well. It is not so intended because the circumstances of gig economy workers and the potential market effects of their collective bargaining are very different from those involving independent physicians.

In his Congressional testimony opposing an antitrust exemption for independent physicians, former FTC Chair Pitofsky noted that “specialists already compensated at \$150,000 to \$200,000 a year [in 1999 dollars] . . . band[ing] together and insist[ing] that they be paid an additional 10 or 20%” present circumstances “very different from the context in which the labor exemption was originally adopted by Congress.”<sup>105</sup> Independent physicians themselves seem aware of the

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<sup>103</sup> See *supra* notes 74–84 and accompanying text.

<sup>104</sup> See *supra* notes 88–92 and accompanying text.

<sup>105</sup> FTC Statement Before House Judiciary Committee, *supra* note 88, at 2.

differences in their circumstances and rarely, if ever, seek to rationalize their engagement in collective bargaining on the need to act collectively to counter low wages or poor working conditions — arguments that are traditionally asserted for union activity. Moreover, while independent physicians often complain of having to comply with bureaucratic rules set by health plans for fee reimbursements, few would suggest that they lack real autonomy over their individual medical practices. A health plan’s “control” over independent physicians in matters relating to fee disbursement and related issues seems very different in nature from an employer’s more pervasive control over employees in typical employment relationships.

In contrast, while gig economy workers do have almost complete freedom over when and how often to work, if at all,<sup>106</sup> once they accept a specific job or assignment, they cede much of their autonomy and control to the platform. For Uber or Lyft drivers, for example, the platform sets the amount that they may charge a rider. Drivers must also follow platform-established “suggestions” relating to quality of service: they are admonished to maintain car cleanliness, to dress professionally, to play soft jazz or NPR on the radio, and to not talk on the phone, smoke, or have companions in the car, among other things.<sup>107</sup> They are also monitored through consumer ratings and can be expelled from the platform if their ratings fall below certain levels.<sup>108</sup> The circumstances of these workers, despite the much valued flexibility they enjoy, are in reality more similar to that of typical low-wage employees than of independent physicians. They also bear much less resemblance (than independent physicians do) to the type of

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<sup>106</sup> See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (“Lyft drivers can work as little or as much as they want, and can schedule their driving around their other activities. A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little extra income.”); *McGillis v. Dep’t of Econ. Opportunity*, 210 So. 3d 220, 225-26 (Fla. Dist. Ct. App. 2017) (“Drivers supply their own vehicles . . . and control whether, when, where, with whom, and how to accept and perform trip requests. Drivers are permitted to work at their own discretion, and Uber provides no direct supervision. Further, Uber does not prohibit drivers from working for its direct competitors.”); see also *Harris & Krueger*, *supra* note 3, at 9-10 (describing the gig economy worker’s control in that she: “provides personal services only when she chooses to do so”; “chooses when and whether to work at all”; shares in a “relationship [that] can be fleeting, occasional, or constant” at her sole discretion; and “may offer her services through multiple intermediaries, or combine working with intermediaries and employment with a traditional employer”).

<sup>107</sup> *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1149-50 (N.D. Cal. 2015); *Cotter*, 60 F. Supp. 3d at 1078-79.

<sup>108</sup> E.g., *O’Connor*, 82 F. Supp. 3d at 1150-51; *Cotter*, 60 F. Supp. 3d at 1079.

independent business people or entrepreneurs that courts seemed to have had in mind when they ruled that the labor exemption did not apply to collective action by independent contractors.

Another area of substantial difference lies in the potential market effects of collective bargaining by independent physicians versus that of gig economy workers.<sup>109</sup> Where independent physicians are involved, the market and consumer welfare effects are significant and, in some cases, well-documented.<sup>110</sup> In his Congressional testimony earlier mentioned, Pitofsky drew on the FTC's antitrust enforcement action records to support the assertion that permitting collective bargaining by independent physicians (or other healthcare professionals) with health plans would substantially raise the cost of healthcare and reduce access.<sup>111</sup> In one case cited, for example, the collective fee demands by independent pharmacists in New York were shown to have cost the state an estimated \$7 million in additional expenditures for state employees' health benefits.<sup>112</sup> Further, a study conducted in 1999 and commissioned by the Health Insurance Association of America estimated that health care expenditures would increase in the range of \$34.5 billion and \$80 billion annually if collective bargaining by independent physicians were allowed.<sup>113</sup>

Logically, higher input costs for a producer will raise consumer prices for the final product or service, assuming that the producer's higher costs are passed on to consumers. Permitting independent physicians to engage in collective bargaining with health plans would almost certainly result in health plans paying higher fees to the

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<sup>109</sup> See Brewbaker, *supra* note 88, at 549-50 (“[W]idespread collective bargaining would bring competition among physicians, especially price competition, to an abrupt halt, resulting in dramatic increases in health care costs. Legalized collective bargaining would permit physician unions to function as doctors’ cartels, raising physician fees and organizing professional boycotts of MCOs . . . in the name of consumer interests.”).

<sup>110</sup> See *id.* at 555-61, 565-66 (discussing the market effects of any legislation that would exempt from the antitrust law collective bargaining by independent physicians with health plans); FTC Statement Before House Judiciary Committee, *supra* note 88, at 5-7.

<sup>111</sup> FTC Statement Before House Judiciary Committee, *supra* note 88, at 5-7.

<sup>112</sup> See *id.* at 6 (citing Peterson Drug Co. of N. Chili, N.Y., Inc., 115 F.T.C. 492, 540 (1992)); *accord* Pharm. Soc’y of the State of N.Y., Inc., 113 F.T.C. 661 (1990) (consent order) (also stating that collective fee demands by independent pharmacists have ultimately caused the state of New York to pay an additional \$7 million in employee health benefits programs).

<sup>113</sup> See Brewbaker, *supra* note 88, at 558 (citing CHARLES RIVER ASSOCS., INC., ANTITRUST WAIVERS FOR PHYSICIANS: COSTS AND CONSEQUENCES, SUMMARY OF RESEARCH FINDINGS (1999)).

physicians — that is, after all, the purpose of collective bargaining. Physician fees constitute about one-half of all payments for health services and supplies made by private insurance.<sup>114</sup> As Pitofsky suggested in his testimony, when the cost of an input (physician services) constitutes a large percentage of the total cost of the product, a substantial increase in the cost of that input would normally raise the cost of the final product (healthcare or health insurance) to consumers.<sup>115</sup>

It is theoretically possible that higher physician fees might not be passed on to consumers or their employers in the form of higher insurance premiums and higher co-pays, but would simply be absorbed by the health plan itself. There is, however, little basis for that assumption in the context of healthcare. Independent physicians would presumably engage in collective bargaining with, not just one, but most or *all* health plans if an exemption removes the antitrust constraint. And, “[e]conomic theory predicts that a significant industry-wide increase in input costs will ordinarily raise the price of the final product.”<sup>116</sup> Moreover, the fact that no good substitutes exist for physician services for serious illnesses further increases the likelihood that physicians would succeed in having their collective fee demands met, and that health plans would pass on the increased costs to consumers.<sup>117</sup> The collective power of physicians is also enhanced by licensure laws and other barriers to entry.<sup>118</sup> All of these factors suggest that an antitrust exemption allowing independent physicians to engage in collective bargaining with health plans would be a poor policy choice because of the predicted serious harm to consumers and employers.

In contrast, the potential market impact of gig economy workers engaging in collective bargaining with platforms is likely to be less significant. Gig economy workers would, in all likelihood, seek a higher revenue split to compensate for the lack of many benefits usually afforded employees, which would indeed translate to higher production costs for the platform/intermediary. The platform/

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<sup>114</sup> See FTC Statement Before House Judiciary Committee, *supra* note 88, at 6.

<sup>115</sup> See *id.*, stating that it is unlikely that physician fee increases would not result in higher costs for insurance when “[f]ees . . . account for almost one-half of private insurance payments for health services and supplies. If these costs increase significantly, the most logical assumption is that costs to consumers would go up substantially.”

<sup>116</sup> *Id.*

<sup>117</sup> See Brewbaker, *supra* note 88, at 565.

<sup>118</sup> See *id.*

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intermediary, however, may face some limits in its ability to pass on those higher costs fully to consumers by raising prices. Using again the rideshare business sector as an example, unlike the case with physician services, there are more good substitutes for rideshare services. Uber and Lyft have to be mindful that riders might revert to taking taxis, public transit, driving their personal cars, or turning to other reasonable alternatives, in response to a significant increase in rideshare fares.

And even if Lyft or Uber succeeds in completely passing on the higher costs to riders in the form of higher fares, the market impact should be much slighter than the impact of collective bargaining by independent physicians, which was predicted to increase healthcare expenditures by \$34.5 billion to \$80 billion annually.<sup>119</sup> Given the relative inelasticity of demand for physician services and the substantial costs of those services to begin with, the potential market effect of higher physician fees is likely to be orders of magnitude larger than the effect of higher compensation rates for Uber drivers, even if those higher costs are all passed on to riders.

Of course, drivers might also seek terms that would provide them with longer-term economic security but which could stifle innovation, such as limiting the introduction of new technologies including driverless cars. Such terms, if adopted, could have a more substantial adverse impact on consumer welfare. With a nascent, fast-moving, gig economy sector, it is difficult to know what disruptive innovations or technologies might be around the corner that could benefit consumers and the economy. Terms that could impede the development and introduction of innovations and technologies would be problematic. However, shielding workers' concert of action from the antitrust law simply allows them to engage in collective negotiation without exposure to antitrust liability. All issues are still subject to bargaining between the workers and the platforms, and one would assume that a platform would reject any proposed term that could hinder its ability to innovate or be nimble, or interfere with its strategic goals for growth.

An antitrust exemption immunizing collective action by gig economy workers, in all likelihood, would have some upward impact on price or reduction in output, but that impact should be no greater than that resulting from collective bargaining by employees, which is permissible under current law. Congress saw fit, over a century ago, to make the tradeoff between marketplace competition and the welfare of

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<sup>119</sup> See *id.* at 558.

labor when it passed the exemption. The argument I make here is simply that the circumstances of gig economy workers, unlike that of independent physicians, are quite similar to that of ordinary labor for whom the exemption was intended to benefit. Moreover, any likely anticompetitive effects should be much less severe than that flowing from collective bargaining by independent physicians.

### III. DRAWBACKS OF ALTERNATIVE PROPOSALS

Instead of simply seeking to extend the antitrust labor exemption to immunize collective action by gig economy workers as proposed in this Article, others concerned about the workers’ precarious circumstances have suggested different approaches. One involves enacting legislation to redefine “employment” very broadly under wage/hour, discrimination, and labor laws so that it would easily encompass gig economy and other similar work relationships.<sup>120</sup> Another proposal, made by Seth Harris and Alan Krueger, former Deputy Labor Secretary and former Chair of the President’s Council of Economic Advisers in the Obama administration, respectively, suggests passing legislation to create a new, intermediate, legal classification for “independent workers” that would offer certain specified employee rights, but not those rights the application of which could undermine the platform model.<sup>121</sup>

The greatest potential problem with the first suggestion is that shoehorning gig economy workers into the employee classification could jeopardize the very business model that has given rise to online-intermediated work, and the benefits associated with it.<sup>122</sup> Instead of achieving the hoped-for result of dividing the surplus more equitably between workers and the platform, it might reduce or wipe out the surplus, adversely affecting all concerned.<sup>123</sup> Another potential unintended consequence of this approach is that it could reduce competition among platforms, as workers (being employees) may be unable to work with two or more competing platforms (*i.e.*, “multihome”) — an undesirable effect from a competition-policy perspective.

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<sup>120</sup> See, *e.g.*, ROGERS, *supra* note 10, at 2 (proposing that “Congress expand the test for employment status under wage/hour, discrimination, and collective bargaining laws”).

<sup>121</sup> See Harris & Krueger, *supra* note 3, at 2, 34.

<sup>122</sup> See discussion *infra* Section III.A.1.

<sup>123</sup> See Epstein, *supra* note 12 (asserting that “they will kill the goose that lays the golden egg if they impose by law an employee status on the [rideshare] driver”).

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With respect to Harris and Krueger's proposal, the political feasibility of enacting a law that would fundamentally restructure the worker classification system and require across-the-board revisions of existing practices in multiple areas is an open question. Additionally, as some critics have pointed out, it could have certain unintended consequences, such as providing a loophole for companies outside the gig economy to push certain previously classified employees into the new classification. In light of the uncertainties, particularly the real risk that the first proposal could end up dismantling the model that has made possible online platform-intermediated work, simply extending the antitrust exemption to permit gig economy workers to engage in collective bargaining with the online platforms/intermediaries, as proposed in this Article, may be the better approach.

A. *Broadly Redefining Employment Under Core Labor and Employment Statutes*

If Congress passes legislation redefining employment expansively to encompass gig economy work relationships,<sup>124</sup> as proponents of the first approach advocate, it would naturally trigger the entire panoply of employee benefits and protections, along with the related regulations, under the Fair Labor Standards Act ("FLSA"), the NLRA, and other relevant laws. Very broadly, it would mandate the online platforms' compliance with the overtime-pay and other wage/hour requirements of the FLSA for workers on their platform networks, bring gig economy workers under the NLRA/NLRB regime which would govern their rights to formally organize and engage in collective bargaining, and cause the antitrust labor exemption to automatically apply to those union activities taking them outside the reach of the antitrust law.<sup>125</sup> While this might seem ideal to ensure a safety net for gig economy workers similar to that enjoyed by employees, the section below considers the potential unintended drawbacks of this solution.

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<sup>124</sup> The suggestion primarily involves "[r]edefin[ing] employment per the 'suffer or permit' test and specify[ing] that the 'suffer or permit' test defines employment very broadly" and "[d]efin[ing] workers in certain highly fissured industries as the legal employees of firms who contract with them individually for labor." See ROGERS, *supra* note 10, at 6-7.

<sup>125</sup> See *supra* notes 27-37 and accompanying text.



1. Forcing Gig Economy Workers into “Employee” Classification May Threaten a Platform’s Business Model

Sharing economy businesses generally rely on new business models that thrive on fluid part-time work relationships, rather than traditional employment with employer-controlled work schedules and hours.<sup>126</sup> Based on available data and anecdotal evidence, it is evident that a large majority of gig economy workers particularly value the flexibility and control afforded them under this model and cite that as their major motivation for participating in the gig economy.<sup>127</sup> Thus, to the extent that forcing gig economy workers into the “employee” classification is incompatible with a sharing economy model and would require fundamental structural changes, it could harm not only consumers but also those workers for whom this model offers flexibility and additional work opportunities not previously available.<sup>128</sup>

The new technologies harnessed by online platforms allow for the creation of scalable networks efficiently linking sellers/service-providers and potential customers,<sup>129</sup> but this model would probably be unworkable if the employment work relationship is mandated. To use the rideshare business as an example, Uber and Lyft’s technology permits an efficient real-time linking of those requesting rides and the closest available drivers. Riders’ requests, sent through their smartphone “apps,” automatically communicate relevant information including their locations to the platform’s system, and the platform is able to link each ride request in real-time to the closest available driver, who can accept or decline the request. Drivers indicate their availability simply by turning on their apps, through which relevant

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<sup>126</sup> See, e.g., Medici, *supra* note 2 (describing Senator Mark Warner’s perspective on companies like Uber, Lyft, and Instacart as representing “a fundamental shift in the very nature of employment”); *Workers on Tap*, *supra* note 2 (describing on-demand companies as “middle-men” that do not hire traditional employees with guaranteed pay and benefits).

<sup>127</sup> See, e.g., Hall & Krueger, *supra* note 2, at 1-3, 11 (describing results of a study of Uber driver-partners).

<sup>128</sup> See, e.g., Taylor Soper, *Uber and Lyft Drivers Protest Union Ordinance in Seattle, Say Law Would Threaten Our Livelihood*, GEEKWIRE (Jan. 17, 2017, 3:01 PM), <http://www.geekwire.com/2017/uber-lyft-drivers-protest-union-ordinance-seattle-say-law-threaten-livelihood> (discussing ride-share drivers’ resistance to a collective bargaining law for fear that it would restrict their flexibility and freedom).

<sup>129</sup> FTC STAFF REPORT, *supra* note 1, at 20 (stating that “sharing economy platforms generally enable access by modern digital communications technology, running mobile apps to connect buyers and sellers to platforms where they can find matches effectively and cheaply”).

information pertaining to them, including their locations, is communicated to the platform.<sup>130</sup>

It is the flexibility of this model that holds tremendous appeal to a large percentage of drivers.<sup>131</sup> Relying on a survey of Uber drivers in twenty market areas, comprising 85% of all Uber drivers in the United States in 2014, Alan Krueger and Jonathan Hall reported the reasons given for driving Uber: to earn additional income (91%), “to be [their] own boss and set [their] own schedule” (87%), and “to have more flexibility in [their] schedule and balance [their] work with [their] life and family” (85%).<sup>132</sup> In the same analysis, Hall and Krueger used anonymized, aggregated administrative data obtained from Uber to show the existence of a wide range of work patterns on the part of the drivers, which tended to confirm the drivers’ stated preference in the survey for flexibility and control.<sup>133</sup> Many Uber drivers, for example, drove varied hours from day-to-day or from week-to-week,<sup>134</sup> and 51% worked between only one and fifteen hours a week.<sup>135</sup> A significant majority had other jobs, either traditional full-time or part-time, and drove Uber only on the side to supplement their incomes (61%).<sup>136</sup> For some, Uber served as a bridge while they were in transition.<sup>137</sup> Others were stay-at-home parents or had other personal reasons for requiring flexible schedules.<sup>138</sup> In addition, a significant minority “multihomed” — that is, drove with more than one rideshare platform.<sup>139</sup> Whatever the reason, this and other studies tend to confirm many anecdotal accounts that a large percentage of rideshare drivers do not fit the traditional employment mold.

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<sup>130</sup> See Harris & Krueger, *supra* note 3, at 9 (exemplifying how the rideshare business operates).

<sup>131</sup> Hall & Krueger, *supra* note 2, at 11.

<sup>132</sup> *Id.* at 7, 11.

<sup>133</sup> See *id.* at 13-20.

<sup>134</sup> *Id.* at 2, 20.

<sup>135</sup> *Id.* at 20 tbl.4.

<sup>136</sup> See *id.* at 10 (showing through survey that 38% of the Uber drivers had no other jobs, 31% had a full-time job elsewhere, and 30% had a part-time job in addition to working for Uber).

<sup>137</sup> *Id.* at 12 (indicating that 32% of respondents drove on the platform “to earn money while looking for a steady, full-time job”).

<sup>138</sup> See *id.* at 10-11. 7% of drivers in the survey were students, 3% were retired, and 2% were stay-at-home parents. *Id.* at 10. In addition, 42% of the women drivers and 29% of the men in the survey responded that they drove Uber primarily because of a “family, education, or health reason” that required flexible schedules. *Id.* at 11.

<sup>139</sup> See FARRELL & GREIG, *supra* note 47, at 23 (reporting that 14% of labor platform workers use more than one platform).

If rideshare drivers were classified as employees, platforms would likely have to fundamentally alter their business model. Drivers are currently completely free to choose how many hours they work, and when and where they work, depending on their own desires and particular circumstances, and perhaps on market conditions. A driver may, for example, choose to work over forty hours one week and only a few hours (or none at all) the following week, or to have their apps open during the slowest periods, such as in the middle of the night, if that somehow suits their strategy, lifestyle, or other purposes. Furthermore, drivers may have more than one rideshare app turned on simultaneously. For various reasons, this flexible model would probably be unsustainable under an employment scheme.

Under the FLSA, employers must pay employees at least the minimum hourly wage and time-and-a-half for work in excess of forty hours per week.<sup>140</sup> If drivers were deemed employees, Uber or Lyft would rationally wish to limit their drivers to no more than forty hours of work in any given week, so as to avoid paying overtime pay. From the perspective of the drivers, this restriction would deprive them of the flexibility that they currently have and highly value<sup>141</sup> — to choose “overtime” work one week in order to not work another week or for any other reason. In terms of platform economics and consumer welfare, adopting this limitation would almost certainly increase the platform companies’ administrative burdens and costs, which could raise customer prices. Moreover, application of the overtime pay rule seems inappropriate where the worker is genuinely free to decide the number of hours she wishes to work in any given week.

It is also uncertain, in the first place, how work hours are to be measured for purposes of compliance with the FLSA’s wage and hour guarantees. Does the entire period during which a driver’s app is open constitute compensable work hours? Under FLSA rules, an employee’s waiting time is considered compensable work hours if she is deemed to be “engaged to wait” rather than “wait[ing] to be engaged,” with the determination turning on whether the employee is free to use the waiting time as she pleases.<sup>142</sup> If she is, she is deemed to be “wait[ing] to be engaged,” and the waiting time is not compensable work time;

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<sup>140</sup> 29 U.S.C. § 206(a)(1)(C) (2018) (establishing minimum pay); *id.* § 207(a)(1) (2018) (setting forth overtime pay).

<sup>141</sup> See Hall & Krueger, *supra* note 2, at 2-3, 24 (showing through survey data and anonymized, aggregated, administrative data that Uber drivers highly value and desire flexibility).

<sup>142</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-38 (1944); see also *Armour & Co. v. Wantock*, 323 U.S. 126, 133-34 (1944).

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otherwise, she is “engaged to wait,” and the wait time would be compensable.<sup>143</sup> Since rideshare drivers are free to pursue any activity they wish while their apps are on, it would seem that they are merely “waiting to be engaged” until they accept a ride request.

But to the extent there is uncertainty on this issue, platforms may find it necessary to take steps to protect against undesirable strategic behavior. This includes the possibility that drivers will purposefully turn on their apps (and leave them on) during slow periods, or that they will deliberately wait for ride requests in low-demand areas during certain hours (while spending their supposed waiting time on other personal activity). To guard against this risk, the platforms would likely have to assume the scheduling of driver work-hours, controlling and streamlining the hours they work, and perhaps even deciding where to deploy them and when. Platforms would also likely put an end to multihoming, to avoid the administrative difficulty of allocating waiting times between apps that are open simultaneously.<sup>144</sup> The drastic changes that would have to be implemented to accommodate the hour/wage mandate of the FLSA are essentially incompatible with the current rideshare business model.

Even assuming that it is possible to force all gig economy work relationships into the employment classification without completely upending the model, those workers who work irregular or relatively few hours would likely see diminishing work opportunities. To manage the type of controlled business that would be required under an employment model, the platforms would undoubtedly have to incur much higher administrative costs and face increased logistical problems. Under such circumstances, it would be economically rational for platforms to terminate relationships with those workers whose work hours are too low, too inconsistent, or too sporadic to justify their inclusion in the network. It is probably for all these reasons that Harris and Krueger have warned that defining gig economy workers as employees “could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy.”<sup>145</sup>

These are probably also the reasons for some Uber and Lyft drivers’ protests against Seattle’s recent efforts to implement a novel ordinance that would generally mimic the NLRA in adopting unionization and formal collective bargaining rules for rideshare businesses operating in

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<sup>143</sup> See *Skidmore*, 323 U.S. at 136-38.

<sup>144</sup> See Harris & Krueger, *supra* note 3, at 9 box 1.

<sup>145</sup> See *id.* at 8.

the city.<sup>146</sup> The drivers’ objections included concerns that the law would “threaten [their] livelihood,” cause them to “los[e] a lot of [their] freedoms,” destroy their flexibility, and lead to both Lyft and Uber leaving Seattle.<sup>147</sup> In issuing a preliminary injunction temporarily blocking the first step in the enforcement of the Seattle ordinance, a federal district court specifically mentioned the likelihood that implementation “threatens the business model on which [the rideshare businesses] depend, and that “an innovative model [] is likely to be disrupted in fundamental and irreparable ways” if an injunction were denied.<sup>148</sup> These concerns should likewise give us pause.

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<sup>146</sup> Legal challenges to the Seattle ordinance have been filed by Uber, the Chamber of Commerce, and a group of platform drivers. See Complaint for Injunctive Relief, Declaratory Judgment, & Damages at 1-6, *Clark v. City of Seattle*, No. 2:17-cv-00382-RSL, 2017 WL 3641908 (W.D. Wash. Aug. 24, 2017); Complaint at 1-5, *Chamber of Commerce v. City of Seattle*, No. 2:17-cv-00370-RSL, 2017 WL 1073503 (W.D. Wash. Apr. 4, 2017); Petition for Constitutional Writ of Certiorari Under Article 4, Section 6 of the Washington State Constitution at 1-4, *Rasier, LLC v. City of Seattle*, No. 17-2-00964-4 SEA (Wash. Jan. 17, 2017). A particularly controversial aspect of the city ordinance concerns the eligibility requirements for voting on the question of whether or not to unionize. See Nat Levy, *Uber Sues City of Seattle to Block Landmark Driver Union Ordinance*, GEEKWIRE (Jan. 17, 2017, 10:50 AM), <https://www.geekwire.com/2017/uber-sues-city-seattle-block-new-rules-landmark-unionization-ordinance>. To be eligible, drivers must have driven with the platform at least ninety days prior to the effective date of the ordinance and must have made at least fifty-two trips starting or ending in Seattle during any three-month period in the preceding year. *Id.* This eligibility restriction effectively excludes the newer or more sporadic drivers from having any say on the issue of whether they wanted union representation. See *id.*

<sup>147</sup> Soper, *supra* note 128. A group of Uber and Lyft drivers in Seattle have filed a lawsuit challenging the ordinance on First Amendment and other grounds. See *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908, at \*1-2 (W.D. Wash. Aug. 24, 2017); see also Jessica Lee, *Some Seattle Lyft, Uber Drivers Sue over City’s Unionization Law*, SEATTLE TIMES (Apr. 17, 2017, 11:37 AM), <http://www.seattletimes.com/seattle-news/transportation/some-seattle-lyft-uber-drivers-sue-over-citys-unionization-law>.

<sup>148</sup> See *Chamber of Commerce v. City of Seattle*, No. C17-0370RSL, 2017 WL 1233181, at \*9 (W.D. Wash. Apr. 4, 2017). The order also referenced the drivers’ legal case and their request for a preliminary injunction as well. See *id.* at \*1 (“[T]he Court has also considered the request for preliminary injunctive relief filed by individual for-hire drivers in *Clark v. City of Seattle*, C17-0382RSL.”). The district court subsequently granted the City of Seattle’s motion to dismiss. See *Chamber of Commerce v. City of Seattle*, No. C17-0370RSL, 2017 WL 3267730, at \*14 (W.D. Wash. Aug. 1, 2017). Afterwards, the district court denied plaintiffs’ motion for injunction pending appeal. See *Chamber of Commerce v. City of Seattle*, No. C17-0370RSL, 2017 WL 3641901, at \*2 (W.D. Wash. Aug. 24, 2017). The Ninth Circuit quickly dismissed the appeal. See *Chamber of Commerce v. City of Seattle*, No. 17-35371, 2017 WL 5197158, at \*1 (9th Cir. Sept. 6, 2017). However, the FTC and the DOJ have filed a joint amicus brief in support of the Chamber of Commerce in favor of reversal. Brief for the United States & the FTC as Amici Curiae in Support of

## 2. Defining Workers on Platforms as “Employees” Could Decrease Platform Competition

From a competition policy standpoint, another drawback of treating gig economy workers as employees is that it could have the unintended effect of reducing competition among platforms, as workers would no longer be able to multihome. And, worker multihoming is important for competition to exist among platforms.<sup>149</sup> There are currently no exclusivity conditions in most contracts between workers and their platforms/intermediaries; drivers can and do drive on both the Uber and Lyft networks.<sup>150</sup> However, should the platforms be deemed employers subject to the various wage/hour, labor, and employment laws, they would have the right and probably the incentive to exert the type of control over their workers that employers typically have over their employees, including the right to their undivided loyalty in not working for a competitor. This would effectively end multihoming on the part of gig economy workers, and multihoming may be critical to maintaining or encouraging competition among platforms in a relevant market sector.

Multihoming is critical because platforms, which are multisided markets, must have a critical mass of participants and be competitive on both sides of the market to succeed.<sup>151</sup> For rideshare companies, that means Uber and Lyft (and any other rideshare platform) must compete against each other, not only by offering better pricing and service to attract riders, but also by offering attractive terms to drivers to attract participants on the production side of the platform. If restrictions on multihoming are implemented, existing and new drivers would be forced to choose a single platform for affiliation. In

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Appellant & in Favor of Reversal, *Chamber of Commerce v. City of Seattle*, No. 2:17-cv-00370, 2017 WL 5197158 (9th Cir. Nov. 3, 2017) (No. 17-35640).

<sup>149</sup> See David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, in 1 *THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS* 363, 374-75 (Roger D. Blair & D. Daniel Sokol eds., 2015) (discussing the importance of multihoming for multisided platform competition).

<sup>150</sup> See *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 222-23, 226 (Fla. Dist. Ct. App. 2017) (noting Uber does not prohibit its drivers from working for its direct competitors); see also FARRELL & GREIG, *supra* note 47, at 23 (reporting that 14% of labor platform workers as of September 2015 used more than one platform); Harris & Krueger, *supra* note 3, at 10 (noting that “[t]he independent worker may offer her services through multiple intermediaries”).

<sup>151</sup> See EVANS & SCHMALENSEE, *supra* note 20, at 9, 36, 70-73; see also Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1677-78 (2013) (discussing generally the interdependence of the different sides of multisided platforms).

that context, one platform — probably the one that is more dominant or has had a head start — could gain a substantial competitive advantage over its competitors. Because the availability of a critical mass of drivers is crucial to attracting passengers (and vice-versa),<sup>152</sup> one platform’s significant advantage in the number of drivers participating on its platform could be self-reinforcing, eventually relegating the non-dominant platform(s) to the fringes and producing an undesirable market effect.<sup>153</sup>

### B. A New “Independent Worker” Category

Recognizing that fitting gig economy work relationships into the employment classification could be an “existential threat” to online-intermediated work,<sup>154</sup> but also understanding the unfairness of excluding these workers from the entire “social compact” between employees and employers,<sup>155</sup> Harris and Krueger set forth an alternative proposal. They have suggested that Congress enact legislation to create a new legal classification called “independent workers,” to cover those who “operate in a triangular relationship” in which they “provide services to customers identified with the help of intermediaries.”<sup>156</sup> The new law would provide independent workers with certain specific rights and protections afforded employees, including civil rights protections, tax withholding, employer contributions for payroll taxes, the right to engage in collective bargaining outside the NLRA/NLRB regime, and exemption from the antitrust laws for such collective bargaining.<sup>157</sup> But it would not extend other protections, such as the minimum wage and overtime pay mandate, and unemployment benefits, because of the difficulty of

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<sup>152</sup> See David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms* 7 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 753, 2016), [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2468&context=law\\_and\\_economics](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2468&context=law_and_economics) (discussing the economics of multisided platforms, including the fact that participants on one side of a platform “value a platform if it has more [participants on the other side] and vice versa”).

<sup>153</sup> See *id.* at 5-8 (discussing this phenomenon through the economic terminology of indirect network effects and feedback loops).

<sup>154</sup> Harris & Krueger, *supra* note 3, at 8.

<sup>155</sup> *Id.* at 8-9.

<sup>156</sup> *Id.* at 9.

<sup>157</sup> See *id.* at 2, 15-20.

administering those rules under the typical gig economy platform model.<sup>158</sup>

This proposal is conceptually appealing in that it would extend to gig economy workers some of the “important components of the social compact” between employees and employers<sup>159</sup> without undermining the efficiencies of the online platform business model and the flexibility it affords workers. A major problem with it, however, is its political feasibility. As Harris and Krueger themselves acknowledged, it is extremely difficult to pass an omnibus bill that would completely reform the existing worker classification system and require a wholesale revision of practices in multiple areas.<sup>160</sup> Legislators would likely be hesitant to act upon such a major undertaking — which former Director of the National Economic Council Gene Sperling has described as a “once-in-a-generation endeavor”<sup>161</sup> — without a comprehensive examination of all related issues and their potential implications. Even Virginia Senator Mark Warner, a former tech entrepreneur with particular interest in finding ways “to support innovation and new technologies while making sure [gig economy] workers are not left out in the cold,”<sup>162</sup> has warned against legislating too quickly.<sup>163</sup>

One particular concern that skeptics of the Harris and Krueger proposal have raised is that the creation of this intermediate classification might lead firms to try to downgrade employees to this independent worker category.<sup>164</sup> Former Labor Secretary in the Obama

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<sup>158</sup> *Id.* at 2.

<sup>159</sup> *Id.* at 26.

<sup>160</sup> *See id.* at 15 (“We acknowledge that proposed legislation addressing multiple subjects often faces the difficult challenge of working its way through multiple committees with different jurisdictions in each house of Congress.”).

<sup>161</sup> Gillian B. White, *When Will Labor Laws Catch Up with the Gig Economy?*, ATLANTIC (Dec. 9, 2015), <https://www.theatlantic.com/business/archive/2015/12/new-laws-for-the-gig-economy/419745>.

<sup>162</sup> Medici, *supra* note 2.

<sup>163</sup> White, *supra* note 161 (quoting Virginia Senator Mark Warner’s warning that “[if] we legislate too quickly we’re going to screw it up”).

<sup>164</sup> *See* DE STEFANO, *supra* note 16, at 19-20 (asserting that the creation of an intermediate category in Italy and the United Kingdom had led to some strategic reclassification of employees into the new classification with fewer benefits); Benjamin Sachs, *Thinking About a Third Category of Work in the Trump Years*, ONLABOR (Jan. 2, 2017), <https://onlabor.wordpress.com/2017/01/02/the-right-and-wrong-strategy-for-gig-work-in-the-trump-years> (highlighting the concern that the creation of a middle work classification would result in “leveling down,” such that “workers previously classified as employees would be shifted down into the new category and thus offered fewer protections relative to what they enjoyed as employees,” and also contending



administration, Thomas Perez, alluded to this risk when he cautioned against acting too hastily, lest we “end[] up doing more harm than good.”<sup>165</sup> While the risk can be minimized by taking care to more precisely define the parameters of the new independent worker classification, comprehensive reforms do tend to have unintended consequences that should be anticipated and examined.

Given these concerns, until the possible implications of adding a third classification are thoroughly explored and understood, a simple extension of the antitrust labor exemption to allow gig economy workers to engage in collective bargaining, as proposed in this Article, seems to be the better path. It would allow gig economy workers to pool their bargaining power and collectively negotiate with platforms — free of the constraints of the antitrust law — to obtain a fairer share of the joint surplus, without dissipating the surplus by destroying the model.

#### IV. EXEMPTION FROM ANTITRUST LAW ALONE, THOUGH AN IMPERFECT SOLUTION, CAN HELP GIG ECONOMY WORKERS

One could reasonably ask whether having the benefit of the antitrust labor exemption alone would ensure more equitable treatment of workers whose labor contributes substantially to a platform’s success. An exemption simply allows workers to act in concert to pursue higher compensation and better contract terms without exposure to antitrust liability. It does not affirmatively provide a social safety net similar to that afforded employees.<sup>166</sup> Moreover, to the extent that any collective negotiation would occur outside the NLRA/NLRB system, the NLRB’s processes, including its enforcement mechanisms and the NLRA’s remedies, would be unavailable to the workers.<sup>167</sup> Thus, the

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that the legal definition of employee actually already covers gig economy workers).

<sup>165</sup> Noam Scheiber, *A Middle Ground Between Contract Worker and Employee*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/11/business/a-middle-ground-between-contract-worker-and-employee.html>.

<sup>166</sup> Some have raised the idea of “portable benefits” — linking social benefits to the individual rather than to one’s employment — to address the shift in the nature of work and to ensure that workers have access to an affordable safety net while also embracing new business models, innovation, and new forms of work. See Adi Kamdar, *Portable Benefits and the Gig Economy: A Backgrounder*, ONLABOR (Apr. 8, 2016), <https://onlabor.org/portable-benefits-and-the-gig-economy-a-backgrounder> (discussing a proposal for portable benefits set forth by tech gurus, union leaders and startup CEOs); Medici, *supra* note 2 (discussing Senator Mark Warner’s benefit portability suggestion).

<sup>167</sup> See 29 U.S.C. § 157 (2018) (defining an employee’s right to engage in collective bargaining); *id.* § 158 (2018) (describing unfair labor practices); *What We Do*, *supra* note 34 (describing the scope and function of the NLRB, which includes the

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platforms would be under no legal obligation to negotiate with the workers acting collectively, let alone negotiate in good faith. Nor would they be bound by the NLRA's prohibitions against unfair labor practices as defined by the Act, such as reprisals for workers who engage in strikes.

Despite these limitations, I am optimistic that having the benefit of the exemption would facilitate gig economy workers' efforts to secure more benefits and protections from their respective platforms/intermediaries because there are incentives for platforms to negotiate in good faith. First, a collective work strike is a potent tool for workers, and an antitrust exemption would permit them to engage in such strikes without violating the antitrust law. Uber drivers, for instance, could agree to turn off their apps on certain busy days, timed to create the most inconvenience to consumers and thereby increase public awareness and support. Second, a platform's own self-interest in boosting morale and productivity should motivate it to meet, or compromise on, those workers' demands that do not jeopardize critical sources of the platform's competitive advantages. Third, the popularity of social media may give additional leverage to workers in that they can more easily organize protests, galvanize support, and otherwise influence public opinion as to relative equities of the circumstances in ways that were less feasible before. That, in turn, could put pressure on platforms to negotiate in good faith and reach some reasonable agreement with workers even without the threat of NLRB sanctions.

A well-publicized verbal altercation between an Uber driver and the founder and former CEO of Uber, Travis Kalanick, provides an excellent illustration of the impact of social media. The exchange caught on video showed Kalanick, who happened to be a passenger in the car, berating the Uber driver for complaining to him about his earnings. After the video was made public, backlash from social media was swift, and Kalanick was forced to apologize for his behavior and to reach out to the driver to make amends.<sup>168</sup>

Moreover, social media, such as Twitter and Facebook, could prove to be a helpful tool for worker organization if the cumbersome rules of the NLRA do not apply.<sup>169</sup> Indeed, as Harris, Krueger, and others have

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prosecution of unfair labor practices).

<sup>168</sup> See Mike Isaac, *Travis Kalanick, Uber Chief, Apologizes After Fight with Driver*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/technology/uber-chief-apologizes-after-video-shows-him-arguing-with-driver.html>.

<sup>169</sup> See Harris & Krueger, *supra* note 3, at 16 (suggesting that opportunities may exist for "[m]ass organizing on Twitter, Facebook, Snapchat, and other social media

suggested, there may be advantages to collective bargaining outside the NLRA/NLRB regime, which has been much criticized as “ossified”<sup>170</sup> and not adaptable to modern work situations.<sup>171</sup> It has been said, for example, that some of the rigid work rules and seniority protections that unions have achieved through collective bargaining over the years do not make sense in today’s organization of work and could make their companies less competitive, less nimble, and less able to adjust quickly to market changes.<sup>172</sup>

There is some evidence that collective action by workers outside of the NLRA/NLRB umbrella can occur and can achieve meaningful results. Uber drivers in New York City are currently represented by an Uber-recognized quasi-union, the Independent Drivers Guild (“the Guild”), which is an affiliate of the International Association of Machinists and Aerospace Workers union.<sup>173</sup> The Guild recently reached an agreement with Uber resolving disputes over Uber’s internal appeal processes for driver deactivations — the removal of a driver’s access to the Uber platform, usually over poor customer ratings — and secured a role for itself in representing deactivated drivers on such appeals.<sup>174</sup>

Obviously, because the antitrust labor exemption does not now extend to independent contractors, and rideshare drivers are currently

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platforms . . . if they are not subject to the detailed and burdensome requirements of a private sector labor law designed for different kinds of work relationships and workplaces”).

<sup>170</sup> See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 14 (1990); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530-32 (2002) (arguing that the inefficacy of American labor law and the shrinking scope of collective bargaining is traceable in part to the law’s “ossification”); Harris & Krueger, *supra* note 3, at 15-16 (arguing that it “may be beneficial for independent workers’ organizing prospects” to not be covered by the NLRA and NLRB, as the “NLRA has been long derided as ossified, ineffective, and lacking in effective remedies”).

<sup>171</sup> See generally KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) (noting that the traditional practices of American labor unions are “at odds with the boundaryless workplace”).

<sup>172</sup> See *id.* at 203-05 (criticizing strict rules specifying which workers must perform which jobs and how the jobs were to be performed, and rigid seniority rights in the event of layoffs, and various other typical clauses in collective bargaining agreements as unsuitable in modern day work).

<sup>173</sup> Noam Scheiber & Mike Isaac, *Uber Recognizes New York Drivers’ Group, Short of a Union*, N.Y. TIMES (May 10, 2016), <https://www.nytimes.com/2016/05/11/technology/uber-agrees-to-union-deal-in-new-york.html>.

<sup>174</sup> Josh Eidelson, *Uber Found an Unlikely Friend in Organized Labor*, BLOOMBERG (Oct. 27, 2016, 3:00 AM), <https://www.bloomberg.com/news/articles/2016-10-27/uber-found-an-unlikely-friend-in-organized-labor>; see Scheiber & Isaac, *supra* note 173.

treated as independent contractors, the Guild is not free to engage in negotiations with Uber relating to price or output, such as revenue allocation between the platform and drivers. Nor can it organize a strike, as doing so would very likely constitute a group boycott or horizontal price-fixing, a per se violation of section 1 of the Sherman Act.<sup>175</sup> An extension of the antitrust labor exemption to immunize the collective action of gig economy workers would free labor organizations, such as the Guild, from these antitrust constraints and make them more effective instruments in helping gig economy workers gain a voice and secure additional benefits and security. In addition to compensation, as platform markets continue to grow and evolve, the ability to act collectively may facilitate negotiation on myriad important issues as they arise. Workers, for example, might seek to negotiate over ownership of virtual information relating to them, such as customer rating data and the right to port that information to other platforms.

#### CONCLUSION

As innovative companies take advantage of technological advances to create online platform models that efficiently link workers to consumers in different market sectors, consumers are the clear winners, as are the technology companies that conceived and developed the models and that serve as the intermediaries. Though workers have also benefited, particularly those who value flexibility, there is a sense that they are not receiving an appropriate share of the joint surplus that their “partnership” with the platforms produces. For those troubled by this disparity, the challenge is to find a solution that would allow the benefits to be distributed more equitably, but would not upend the innovative business model and thereby lose the associated efficiencies and other benefits.

In this Article, I have argued for the extension of the antitrust labor exemption, by legislation or possibly through interpretation, to gig economy workers to allow them to engage in collective negotiation with the platform/intermediary over compensation and benefits issues without violating the antitrust law. I have argued that it would be consistent with the philosophies underlying the antitrust law and the exemption itself to do so, since gig economy workers are hardly the

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<sup>175</sup> See, e.g., *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (holding that a group boycott organized by an association of independent attorneys, who refused to accept court appointed criminal cases at the existing rates in order to force the D.C. government to raise those rates, constituted a per se violation of antitrust law).

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independent business people that courts and enforcement agencies seem to have had in mind when they excluded independent contractors from the scope of the exemption. Instead, the vulnerabilities in the gig economy workers' relationship with the platform/intermediary are quite similar to those of employees in an employment relationship. Insulating their collective bargaining with the platform/intermediary from the antitrust law would permit workers to aggregate their bargaining power to negotiate for perhaps a higher revenue split that would effectively compensate for the benefits that they, as non-employees, do not receive.

Others concerned about the precarious circumstances of gig economy workers have suggested different solutions. One involves legislatively redefining “employment” broadly to cover gig economy workers. My unease with this proposal is that it risks jeopardizing the very business model that has facilitated online intermediated work and produced the efficiencies that have greatly benefited consumers. Instead of dividing the pie more equitably, the solution could end up reducing the size of the pie. The other proposal, by Harris and Krueger, suggests passing legislation to create a new classification for gig economy workers that would offer them certain rights and protections afforded employees, but not those rights whose application would force platforms to substantially change their business models. The issue with this proposal, though attractive at its core, is its political feasibility and the potential for unintended consequences. At least until the possible implications of this third-classification proposal are thoroughly examined and understood, the simpler approach of extending the antitrust labor exemption to permit collective bargaining by gig economy workers with platforms/intermediaries, proposed in this Article, seems to be the better path.

The exemption is not a perfect solution. But it is a means to advance the workers' interests in securing an appropriate share of the surplus that has been jointly created by the platform and the workers, without much risk of dismantling the business model in the process. The model, despite some flaws, has not only benefited consumers, but also offered more options and flexibility to workers as well.