

January 2019

Don't Burn the Looms—Regulation of Uber and Other Gig Labor Markets

Henry H. Perritt Jr.
Chicago-Kent College of Law

Recommended Citation

Henry H. Perritt, *Don't Burn the Looms—Regulation of Uber and Other Gig Labor Markets*, 22 SMU SCI. & TECH. L. REV. 51 (2019)

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Science and Technology Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Don't Burn the Looms—Regulation of Uber and Other Gig Labor Markets

*Henry H. Perritt, Jr.**

TABLE OF CONTENTS

I.	INTRODUCTION	53
II.	GIG MARKETS	58
	A. How Uber Works	59
	B. Signing Up to Drive for Uber.....	61
	C. Other Gig Labor Markets.....	63
	1. Owner-Operator Truckers.....	63
	2. Other Examples.....	67
	D. Market Structure	69
	1. Transaction Costs	71
	2. Contracts of Adhesion.....	72
	3. Switching Costs.....	73
	4. Barriers to Entry	74
	5. Price Inelasticity	76
III.	JUSTIFYING REGULATION	77
	A. Risk-Based Regulation	78
	B. Market Failure and Opportunities for Exploitation: Allocative Efficiency and Distributive Justice.....	78
	C. Politics of Regulation	80
	D. Sources of Worker Dissatisfaction.....	81
	1. What the Drivers Say	82
	a. The Message Forums.....	83
	i. Love-Hate	83
	ii. Compensation.....	84
	iii. Uber pool	88
	iv. Surge.....	90
	v. Long distance pickups.....	91

* Professor of Law, former Dean at the Chicago-Kent College of Law, the law school of Illinois Institute of Technology. Author of more than twenty books and 100 law review and magazine articles on employment law, law and technology, nation building, and entertainment law. S.B., Aeronautics and Astronautics, 1966, MIT; S.M., Management, MIT Sloan School of Management, 1970; J.D., Georgetown University Law Center, 1975; member of the bar, Virginia (inactive), Pennsylvania (inactive), District of Columbia, Maryland, Illinois, Supreme Court of the United States; nominee of the Democratic Party for the United States Congress from the 10th District of Illinois, 2002; Uber and Lyft driver; commercial helicopter, private instrument airplane, and remote vehicle pilot; extra class radio amateur (K9KDF).

The author dedicates this article to Chad G. Kunsman, his late research assistant, who authored much of the material on Uber driver complaints, co-chaired the Uber and Lyft driver focus group, and whose untimely death at the age of thirty deprived the bar of a dedicated patriot and rigorous analyst of the law's engagement with society. The author appreciates contributions by his student Vito Cali to the material on municipal regulation.

	vi. Passenger Issues	92
	b. AmazonFlex	95
	c. YouTube Posts.....	96
	d. Henry Campbell's <i>The Rideshare Guide</i>	97
	e. Driver Interviews	98
	f. Author Experience Driving for Uber and Lyft ..	99
	2. Conflicts Between Workers and Customers	101
	3. Psychology of Feeling Mistreated	103
IV.	REGULATORY ALTERNATIVES	104
	A. Supply and Demand.....	104
	B. State and Municipal Responses	105
	1. New York	106
	2. Colorado	107
	3. Massachusetts.....	107
	4. Georgia.....	107
	5. Pennsylvania.....	108
	6. San Francisco.....	109
	7. Los Angeles	112
	8. Phoenix	114
	9. Dallas/Fort Worth	115
	10. Seattle.....	117
	C. Enforceability	121
	D. Types of Worker Protection	123
	1. Adequate Compensation	124
	a. Minimum Wage and Overtime Premiums.....	127
	b. Wage Payment Statutes.....	129
	c. Employee Retirement Income Security Act of 1974	130
	d. Disclosure of the Terms of Work	131
	2. Occupational Safety and Health.....	132
	a. Safety Rules	132
	b. Worker's Compensation	133
	3. Discrimination	134
	4. Unemployment Compensation	135
	5. Tax Withholding	136
	6. Collective Action	136
	E. Third-Party Protection: Vicarious Liability	138
	F. Customer Disputes and Video Cameras.....	138
	G. Legal Regimes	140
	1. Governmental Level of Regulation	140
	2. Class Actions	142
	3. Extending the Labor Exemption from the Antitrust Laws	142
	4. Common Law	145
	H. Cameras in the Car.....	145
V.	NEW CATEGORY OF "DEPENDENT CONTRACTOR" OR REINTERPRETATION OF "EMPLOYEE"?	146

I. INTRODUCTION

Controversies over Uber and Lyft, as the title of this article suggests, recall a similar dispute two centuries ago during the early stages of the Industrial Revolution. English inventors developed mechanized spinning and weaving in the last half of the 18th century.¹ The result was an enormous increase in the production of cotton cloth, lowering the cost of clothing for all ranks of society.² The new technologies, however, threatened the structure of work for hand spinners and weavers who were now so inefficient, by comparison, that their enterprises were not viable.³ They reacted with a frenzy of sabotage.⁴ They burned thousands of power looms,⁵ and engaged in other direct actions, seeking to limit the spread of the innovations.⁶ Today, taxicab drivers and taxicab medallion holders stand in the shoes of the hand weavers and hand spinners. They are filing lawsuits⁷ and introducing ordinances⁸ to make Uber and Lyft go away. Though arson is not yet a popular weapon in their arsenal, the taxicab passion is not much less than the textile passion of

1. See RICHARD MARSDEN, *COTTON SPINNING: ITS DEVELOPMENT, PRINCIPLES, AND PRACTICE* 4 (George Bell & Sons ed., 1903).
2. See C. Knick Harley, *Cotton Textile Prices and the Industrial Revolution*, 51 *ECON. HIST. REV.* 49, 58–59 (1998).
3. See Katrina Navickas, *The Search for “General Ludd”: the Mythology of Luddism*, 30 *SOC. HIST.* 281, 281 (2005) (assessing reality and perception of Luddist movement; noting its violence).
4. See *id.*
5. *Who Were the Luddites?*, LIBCOM.ORG (Oct. 13, 2016), <https://libcom.org/history/who-were-luddites>.
6. Navickas, *supra* note 3.
7. See *Greenwich Taxi, Inc., v. Uber Techs., Inc.*, 123 F. Supp. 3d 327 (D. Conn. 2015) (dismissing claims); *L.A. Taxi Coop., Inc. v. Uber Techs., Inc.*, 114 F. Supp. 3d 852 (N.D. Cal. 2015) (dismissing most claims); *Yellow Group LLC v. Uber Techs. Inc.*, No. 12 C 7967, 2014 WL 3396055 (N.D. Ill. July 10, 2014) (dismissing most claims; allowing some claims to stand for some plaintiffs); *Boston Cab Dispatch, Inc. v. Uber Techs.*, Civil Action No. 13–10769–NMG, 2014 WL 1338148 (D. Mass. Mar. 27, 2014) (dismissing Lanham Act and state misrepresentation claims; denying motion to dismiss unfair competition claims).
8. See Brendan Bakala, *The End of Uber in Chicago? Ordinance Would Require Fingerprinting of Rideshare Drivers and Limit Surge Pricing*, ILL. POL’Y (Sept. 2, 2017), <https://www.illinoispolicy.org/the-end-of-uber-in-chicago-ordinance-would-require-fingerprinting-of-rideshare-drivers-and-limit-surge-pricing/> (reporting on proposed ordinance introduced by alderman allied with taxi industry); Harriet Taylor, *Uber and Lyft are Getting Pushback from Municipalities All Over the US*, CNBC (Sept. 2, 2016), <https://www.cnn.com/2016/09/02/uber-and-lyft-are-getting-pushback-from-municipalities-all-over-the-us.html> (reporting on municipal regulations resulting in part from pressure from taxi companies).

the 1780s. Despite threats to the traditional taxicab industry, most observers expect the gig⁹ phenomenon—exemplified by Uber—to spread,¹⁰ so getting the focus of the argument right is important. Much energy is being expended in arguing about whether ride-hailing¹¹ drivers are employees or independent contractors.¹² That’s the wrong argument. Stakeholders and reformers should be focusing on whether Uber drivers need additional legal protection or whether they have freely embraced a new kind of market and can look after themselves.

The thesis of this article is that protecting gig workers as employees under traditional labor and employment law¹³ is a bad idea.¹⁴ It is an intellec-

9. The word “gig” first came into the popular English lexicon in the 1930s to refer to one-off performance engagements by musicians. *See Gig*, 1 RANDOM HOUSE DICTIONARY OF HISTORICAL AMERICAN SLANG (J.E. Lighter ed., 1994).
10. ANDREW MCAFEE & ERIK BRYNJOLFSSON, MACHINE PLATFORM CROWD 186–92 (2017) (predicting spread of consumer-oriented platforms such as Uber, Lyft, Airbnb, Grubhub, and Caviar to business-to-business contexts such as trucking, warehouse rental, booking venues for business conferences); MATTHEW TAYLOR ET AL., GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES 28 (July 2017), <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices> (predicting substantial expansion, including into retail sector). *See infra* Section II.C (reviewing other gig markets).
11. Uber and Lyft are the largest ride-hailing services, as *infra* section II.A explains. Many commentators refer to them as “ride-sharing” services, but this is a mischaracterization; most Uber and Lyft rides are not shared.
12. *See, e.g.,* Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape The Sharing Economy*, FORBES (Nov. 15, 2017), <https://www.forbes.com/sites/omribensshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy>.
13. The criteria for distinguishing traditional employees from independent contractors are reasonably well established. *See Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1318–19 (11th Cir. 2015) (applying Florida law, which uses ten non-exclusive factors expressed in RESTATEMENT (SECOND) OF AGENCY § 220(2): “[1] the extent of control which, by the parties’ agreement, the employer exercises over the details of the work; [2] whether or not the one employed is engaged in a distinct occupation or business; [3] the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; [(4)] the skills required in the particular occupation; [(5)] whether the employer or the workman supplies the instrumentalities, tools, and the place of work; [(6)] the length of time for which the person is employed; [(7)] the method of payment, whether by the time or by the job; [(8)] whether or not the work is part of the regular business of the employer; [(9)] whether or not the parties believe that they are creating the relation of master and servant; and [(10)] whether the principal is or is not a business.”). The criteria for distinguishing employees from independent contractors under minimum wage law is slightly different,

tually lazy way of adapting law to new technologies. Two elements support this position. First, the nature of the legal relationships between buyers and sellers of work services in the gig economy is quite different from the structure of the relationship in a factory environment. This factory environment is what gave rise to current elements of labor and employment law.¹⁵ Second, shoehorning gig work into the employment compartment is likely to produce inefficient outcomes and undermine efficient and equitable distribution of resources. It will frustrate the expectations and aspirations of workers it intends to “protect.”¹⁶ Classifying ride-hailing drivers as employees would subject them to all of the traditional types of labor and employment protection,¹⁷ forcing a considerable modification of existing practices, yet such traditional categories of protection do not match what the drivers themselves say they

emphasizing an economic realities test of economic dependence. *See* *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311–12 (11th Cir. 2013) (listing criteria).

14. The author is not the only one to recognize this. *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker,”* THE HAMILTON PROJECT 15–21 (Dec. 7, 2015), http://www.hamiltonproject.org/papers/modernizing_labor_laws_for_twenty_first_century_work_independent_worker (proposing new legal category of “independent worker,” who would be protected by rights to bargain collectively, prohibitions against discrimination, tax withholding and unemployment taxes, and workers compensation, but not minimum wage and overtime rules); Seth D. Harris & Alan B. Krueger, *The Gig Economy: How to Modernize the Rules of Work to Fit the Times*, MILKEN INST. REV. (May 2, 2016), <http://www.milkenreview.org/articles/the-gig-economy> (rejecting “square pegs into round holes” result of traditional choice between employee and independent contractor; proposing new labor law regime for gig workers, paralleling those for employees and independent contractors; summarizing Hamilton Project paper). *See also* Jane Dokko et al., *Workers and the Online Gig Economy*, THE HAMILTON PROJECT (Dec. 9, 2015), http://www.hamiltonproject.org/papers/workers_and_the_online_gig_economy (framing context of gig economy and identifying regulatory and measurement gaps). The Hamilton Project is an initiative of the Brookings Institution aimed at proposing new economic policies into the national economic debate. *About THP*, THE HAMILTON PROJECT, <http://www.hamiltonproject.org/about/> (last visited Aug. 22, 2019). The project’s website offers several dozen papers, most of them reflecting a left-of-center view on labor markets and policy. *See Papers*, THE HAMILTON PROJECT, <http://www.hamiltonproject.org/papers/> (last visited Aug. 22, 2019). *See* discussion *Infra* Section V.
15. *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Guilded Age*, 1985 WIS. L. REV. 767, 769–70 (1985).
16. *See* Ruth Collier et al., *Labor Platforms and Gig Work: The Failure to Regulate* 4 (Inst. For Res. on Labor and Emp., Working Paper No. 106-17, 2017), <http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf>.
17. *See id.* at 3.

are concerned about: levels of compensation¹⁸ and adjustment of disputes with passengers¹⁹

Things were different 125 years ago. As factory production spread in the American industrial revolution,²⁰ a political consensus grew that workers needed protection from concentrated capital.²¹ In the 1920 Ford plant, the tools of workers were large and capital-intensive; the workers had to be brought to the tools, instead of the tools being dispersed among the workers.²² The same thing was true in the steel and automobile industries, in the spinning and weaving industry,²³ and in most other fabrication industries, regardless of the materials used. The National Labor Relations Act (NLRA)²⁴ and the Railway Labor Act²⁵ sought to equalize disparate bargaining power that favored employers. The Fair Labor Standards Act²⁶ prescribed a floor for wages and working conditions for workers thought to be at a disadvantage and unable to procure adequate conditions on their own.²⁷ Under those statutes, status as an “employee” was important because only employees were

18. See Leslie Hook, *Uber: The Uncomfortable View from the Driving Seat*, FIN. TIMES (Oct. 4, 2017), <https://www.ft.com/content/c9a8b592-a81d-11e7-ab55-27219df83c97>.
19. See Carla Green & Sam Levin, *Homeless, Assaulted, Broke: Drivers Left Behind as Uber Promises Change at the Top*, THE GUARDIAN (June 17, 2017), <https://www.theguardian.com/us-news/2017/jun/17/uber-drivers-homeless-assault-travis-kalanick>.
20. See Henry H. Perritt, Jr., *Stitching Up Labor Markets* (forthcoming).
21. A subordinate conclusion was that the mechanisms of labor law could not work effectively if industrial homework in “sweatshops” was allowed to flourish. See *infra* Section III.B.
22. See Kat Eschner, *One Hundred and Three Years Ago Today, Henry Ford Introduced the Assembly Line*, SMITHSONIAN.COM (Dec. 1, 2016), <https://www.smithsonianmag.com/smart-news/one-hundred-and-three-years-ago-today-henry-ford-introduced-assembly-line-his-workers-hated-it-180961267/>.
23. See Perritt, *supra* note 20.
24. 29 U.S.C. §§ 141–188 (Westlaw through Pub. L. No. 115-442 (excluding Pub. L. No. 115-334)).
25. 45 U.S.C. §§ 151–165 (Westlaw through Pub. L. No. 115-442 (excluding Pub. L. No. 115-334)).
26. 29 U.S.C. §§ 201–209 (Westlaw through Pub. L. No. 115-442 (excluding Pub. L. No. 115-334)).
27. These were not only efforts to repair instances of market failure; they were instances in which the market worked too well to satisfy social distributional goals. In a purely competitive labor market, unemployed workers could bid down wage levels employers had to pay a race to the bottom.

thought to need the protection from their employers; independent contractors could take care of themselves.²⁸

Now the relevant inquiry is not whether gig workers should be classified as employees or independent contractors; the relevant inquiry is whether they, like the factory workers of the 1930s, need the government's help to strike a better deal with those that hire them. Collective bargaining agreements covering a large factory where employees work for their entire productive lives is no longer the model of work arrangements in today's labor markets,²⁹ which are influenced by evolving global capital and product markets.³⁰ Relatively short-term worker attachment to employers, and many more second and supplementary jobs represent an entirely different arrangement of labor markets.³¹ The potential for market failure and abuse differs according to the structure of these markets.³² Determining what kind of legal intervention might be appropriate for gig labor markets requires a sophisticated inquiry into the structure of the new industries. Even if workers need similar protection in gig labor markets as their factory forerunners, the answer may be different.

This article begins by considering the nature of gig labor markets, pointing out that they are not new; they antedate the Internet by a couple of hundred years. It assesses their market structure and identifies instances of market failure and other sources of transaction costs that may place workers at a disadvantage. Then, it considers justifications for new regulation of these markets, both the economic ones and the political ones, synthesizing from empirical data on worker complaints about the gig economy. Next, it develops a taxonomy of regulatory protections and considers which of these might be well suited for the actual conditions of gig work. It concludes with a comprehensive proposal for regulation that mostly can be implemented by the courts, without legislation.

-
28. Among tests for determining if a worker is an employee or contractor, a large factor is "economic dependence," essentially the extent to which a worker can take care of themselves. *See, e.g., Parrish v. Premier Directional Drilling, L.P.*, 17-51089, 2019 WL 973091, at *5 (5th Cir. Feb. 28, 2019).
 29. *See* SOC'Y FOR HUMAN RES. MGMT., BUSINESS AND HUMAN CAPITAL CHALLENGES TODAY AND IN THE FUTURE 28, 30 (2015), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/15-0502%20Bus_HC_Challenges_Report_FINAL.pdf.
 30. *See* Adrian Moore, *The Changing Workplace and the New Self-Employed Economy*, REASON FOUND. (May 8, 2018), <https://reason.org/policy-study/the-changing-workplace-and-the-new-self-employed-economy/>.
 31. *See id.*
 32. *See generally* John O. Ledyard, *Market Failure*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Palgrave Macmillan ed., 2018) (ebook) (explaining concept of market failure).

II. GIG MARKETS

Gig markets are ones in which workers are also producers and in which workers often work for different entities at the same time, determine their own schedules unilaterally, and independently determine how much to work.³³ The term “gig markets” comes from the world of music, in which performances by independent musicians have these same characteristics.³⁴ Gig platform markets,³⁵ which have been a relatively small part of the western economy, are now expanding rapidly³⁶ through transportation services. These services are organized as Transportation Network Companies (TNCs) and facilitate “prearranged transportation services for compensation using an online-enabled application (app) or platform to connect users with Partners using their personal vehicles.”³⁷ The two most prominent TNCs are Uber and Lyft.³⁸ Curb offers a similar service through taxis but is active in only sixty cities.³⁹ Via is actively recruiting drivers, but it offers a somewhat different service, more like an on-demand bus line, with multiple passengers per

-
33. “Commentators have been quick to point out that many aspects of the gig economy—the flexible schedules, the lack of in-person supervision, the ability to work for many businesses at the same time—defy simple classification.” *Employment Law—National Labor Relations Act—NLRB Classifies Canvassers as Employees, Not Independent Contractors*, 129 HARV. L. REV. 2039, 2042 (2016) (noting that gig workers “get to be their own boss” but often suffer from disparities in power over work).
 34. *Highsteppin’ Productions, LLC v. Porter*, 719 F. Supp. 2d 140, 141–42 (D. Mass. 2010) (using the term “gig” to refer to a musical performance).
 35. See Harris & Krueger, *A Proposal for Modernizing*, *supra* note 14, at 10, fig. 1 (showing growth in various gig occupations, including Uber, Lyft, GrubHub, Mechanical Turk, and TaskRabbit); *id.* at 11, fig. 2 (showing cumulative web searches for different gig platforms in 2015, with Uber dominant, GrubHub next at 18.5 % as many searches as Uber, and Lyft with 12.4 % as many searches as Uber); *id.* app. 28–33 (describing business models of various platforms).
 36. See TAYLOR ET AL., *supra* note 10, at 25, 28 (reporting that 4% of UK employment is in gig economy, but 12% of non-participants say they want to try it; and predicting substantial expansion, including into retail sector).
 37. Chad G. Kunsman, *Ride-Sharing-Company Drivers: Employees or Independent Contractors?*, 26 S. CAL. INTERDISC. L.J. 137, 140 (2016) (citations omitted).
 38. Uber, Lyft, and other TNCs are referred to collectively as “ride-hailing services.”
 39. CURB MOBILITY, <https://gocurb.com> (last visited Aug. 22, 2019).

ride.⁴⁰ Competition for the two dominant players, Uber and Lyft, is greater internationally than in the United States.⁴¹

A. How Uber Works

Uber operates a business model similar, in some ways, to a taxi enterprise. They offer the same services, i.e., transporting passengers from one location to another,⁴² but instead of using the traditional hail-wave or telephone request methods of summoning a passing cab, users (or passengers) open an app⁴³ on their smartphones and upload their location and destination to request a ride (a request).⁴⁴ The app sends the request to the nearest driver (referred to by Uber as a Partner)⁴⁵ and the Uber software alerts the driver that there is a nearby ride request. The driver can either accept or decline the request within ten seconds or the request will time out and be forwarded to the next closest available driver.⁴⁶ A driver does not know the destination of the request until he accepts and picks up the user,⁴⁷ and in some cities, drivers cannot view a rider's rating prior to pick up. If the driver accepts the request, the software gives him turn-by-turn directions to the pickup location and the name of the passenger. When the passenger is aboard, the driver taps an icon on the application to begin the trip and gets turn-by-turn directions to the destination the passenger already entered when making the pickup request. At the destination, the driver taps an icon on the application to end the trip and his earnings are eventually calculated and displayed on the screen.

The agreement between Uber and its drivers provides that Uber will collect fares from passengers and distribute the collected fare to the driver,⁴⁸ less certain service fees payable to Uber. Uber drivers are paid once per

40. See VIA, <https://my.drivewithvia.com/> (last visited Aug. 22, 2019).

41. See Madeleine Johnson, *Who Are Uber's Biggest Competitors?*, NASDAQ (Oct. 17, 2017), <https://www.nasdaq.com/article/who-are-ubers-biggest-competitors-cm860923> (discussing Curb, Didi Chuxing in China, Grab in Southeast Asia, and Ola in Mumbai).

42. Kunsman, *supra* note 37, at 141.

43. An "app" is an application designed to operate on a smart phone, usually limited to a particular vendor of goods or services.

44. Kunsman, *supra* note 37, at 141.

45. Uber calls their Drivers Partners in communications, announcements, and its agreements.

46. Kunsman, *supra* note 37, at 141.

47. The author uses the Uber and Lyft apps.

48. *Technology Services Agreement*, RASIER, LLC, https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf (last updated Dec. 11, 2015).

week⁴⁹ via direct deposit to their bank account and are only paid for the work they perform; and the more requests a driver accepts and completes, the more money the driver earns. The fares are structured as either pickup or on-trip fees. The pickup fees include a: (1) base fare; (2) charge per mile en route to pick up location; (3) variable long pickup fee; and (4) charge per minute en route to pick up location. The on-trip fees include a: (1) booking fee; (2) minimum fare; (3) charge per mile en route to pick up location; and (4) charge per minute en route to pick up location. For example, the estimated fare from Chicago's McCormick Place Conference Center to Chicago Kent College of Law⁵⁰ includes: (1) a \$1.79 base fare; (2) \$.28 charge per minute to pick up; (3) \$.81 charge per mile to pick up; (4) \$1.85 booking fee; (5) \$4.85 minimum fare; (6) \$.28 charge per minute to drop off; and (7) \$.81 charge per mile to drop off. The total fare of such a trip is estimated to be \$15.14,⁵¹ of which the driver should expect to receive approximately \$13.⁵²

Uber offers different types of service, each with its own schedule of rider fees and driver sharing arrangements: Uber Pool, Uber X, Uber XL, Uber Select, and Uber Black. Greenlight hubs are centers where Uber drivers can interact face-to-face with Uber support personnel.⁵³ They exist in places with substantial numbers of drivers; for example, Chicago has four locations.⁵⁴ Uber and Lyft also implement surge pricing where demand by riders exceeds the supply of drivers. Uber software highlights those locations on the driver app indicating higher rates for passengers and higher pay for drivers.

49. *Id.*

50. The actual fare structure and the levels of each element vary from place to place and with market conditions. *See Addendum, RASIER, LLC* (May 22, 2017) (replacing section 4 of Technology Services Agreement), <https://uber-regulatory-documents.s3.amazonaws.com/reddog/country/United%20States/p2p/RASIER%20Financial%20Terms%20Addendum%20May%202022%202017%20-%20v2.pdf> (describing, without quantifying, fare structure and service fees owed by driver to Rasier, agent for Uber).

51. *See Uber Fare Estimator*, UBER, <https://www.uber.com/us/en/price-estimate> (last visited Aug. 22, 2019).

52. *See Technology Services Agreement*, *supra* note 48.

53. *See Alyssa Newcomb, Inside the Place Where Uber Tries to Make Nice With Its Drivers*, NBC NEWS (Apr. 24, 2017), <https://www.nbcnews.com/tech/tech-news/inside-place-where-uber-tries-make-nice-its-drivers-n749031>; *See Alyssa Newcomb, Uber Opens 'Greenlight Hub,' In-Person Support Center for Drivers, in Secaucus*, HUDSON CTY. VIEW (Feb. 21, 2018), https://www.youtube.com/watch?v=Wa75l_oz-Wc.

54. *Find an Uber Greenlight Hub*, UBER, <https://www.uber.com/drive/chicago/contact/> (last visited Aug. 22, 2019).

This strategy is consistent with the literature on how geographic fare differentials influence supply and demand.⁵⁵

B. Signing Up to Drive for Uber

To support the analysis in this article, the author signed up as both an Uber and a Lyft driver. Signing up is quick and painless. The author completed the basic steps in the process, online, in less than half an hour for each service. The author had to provide basic contact information, and upload photographs of his driver's license, insurance certificate, and vehicle registration. He had to provide his Social Security Number and consent to a background check. He also had to schedule a vehicle inspection, which he reserved online for a Sunday afternoon within five hours of beginning the registration process. The early stages of the sign-up process offered the opportunity to obtain a vehicle through Uber or its partners. Both Uber and Lyft advertised third-party vehicle renting and leasing arrangements and made it easy to sign up for them as an integral part of enrolling as a driver.

Appearing at the physical center for registration, training, and vehicle inspection took less than an hour. Uber's "Hub" was better organized than Lyft's but imperfect in its delivery of services. To get his vehicle inspected, the author visited Uber's North Avenue Greenlight Hub in Chicago on March 25, 2018. The Hub occupied a clean and reasonably attractive, though Spartan, floor in a small industrial building. The entrance led to a reception desk where a greeter with a computer terminal found the author's record immediately and told him, with a friendly smile, to sit down for a short wait.⁵⁶ After about twenty minutes, the author's name was called and popped up on a video display directing him to a particular station; about a dozen stations were marked, but only three or four of them were in operation on the Sunday afternoon. The support person at the designated station found his record, verified that the system had his documentation (driver's license, registration, and insurance verification images), and directed him to sit down again in another area. After a short wait, another support person came and asked for the key to the car. Someone else went outside to inspect the car and came back in about five minutes with the form showing that it was approved. The initial online registration had directed the author to bring his bank account information to the Greenlight Hub, but Uber's support personnel said that the author would need to come back after his background check was complete to provide the bank account information. Only at that time would the author receive his decals, what Uber calls "trade dress," for affixing to his vehicle. The whole process took about thirty-five minutes.

55. Ricardo Lagos, *An Alternative Approach to Search Frictions*, 108:5 J. POL. ECON. 865–66 (Oct. 2000) (concluding that fare increases shift search to areas with higher fares and reduce search frictions in those areas).

56. The author was about twenty-five minutes early for his scheduled appointment.

The author still does not have his Uber decals (trade dress) and has been operating on temporary trade dress received by email after making a separate, specific request. After about a week, the author received a message that his background check was complete and that he now could drive. He queried the help function and asked where his vehicle stickers were. He was told that he could be emailed temporary stickers and that the others would arrive in the mail. He started driving with the temporary stickers and had still not received his permanent decals some two weeks later. Nor had he received his chauffeur license from Uber, even though he asked about it through a help function inquiry and was told he would receive it in due course. The author is driving for both Uber and Lyft with the Lyft-provided chauffeur license, which should be sufficient for both services under the Chicago city ordinance. The additional instruction required by the Chicago city ordinance for a chauffeur license was satisfied for both services by presenting the would-be driver with screens of aphorisms about safety including honoring the thirty mph speed limit, not to pick up or drop off passengers in bicycle lanes, and not to drive while impaired by alcohol or drugs or when distracted by cellphones. Uber did offer some day-one tips but nothing on using the app. On the other hand, the Uber video on how to do deliveries was quite good.

The Lyft registration process was somewhat more elaborate and time-consuming than Uber's. The Lyft center had an actual group lesson on how to use the Lyft application and highlights on the Chicago TNP regulations. Driver applicants had to complete a short tutorial and quiz on their smart phones regarding airport regulations. While Uber inspected the author's vehicle with on-site personnel, Lyft required drivers to cross the street to a Midas Muffler facility. This facility was chaotic and took advantage of driver applicants by finding minor exceptions, such as burned out bulbs, to exact additional fees before approving the vehicles.⁵⁷ The Lyft indoctrination of new drivers is superior to that delivered by Uber; for example, Lyft sent an email with links to a video, "Take a Practice Ride," and with tips under "Day 1 Need-to-Knows." However, there were only common-sense textual tips and instructions to use the app to see an actual video. The video did not make it clear whether it was simulating a ride request or presenting an actual request. Declining the simulated request produced a warning, which did not make it clear whether that warning was simulated or real. The tutorial was a bust. Further vignettes of the author's experience are provided in Section III.D.1.f.

57. The author's vehicle had passed an Uber inspection two weeks before the Lyft inspection. It is possible, but unlikely, that a headlight bulb could have burned out in the interim.

C. Other Gig Labor Markets

Uber and Lyft are neither the first, nor the only gig, labor markets in the American economy.⁵⁸ For instance, literature exists on outwork arrangements in the garment industry.⁵⁹ Owner-operator trucking has been a prominent phenomenon in the gig industry since the 1930s.⁶⁰ Now, some 90% of over the road and local cartage freight is hauled by owner-operators as opposed to employees of trucking companies.⁶¹ Another example is Amazon, which entered the gig market for delivery services with AmazonFlex.⁶²

1. Owner-Operator Truckers

The owner-operator labor market attracts relatively little controversy, although it has long represented gig ordering. Owner-operators, as the terminology suggests, own their own truck tractors and arrange, on an ad-hoc ba-

58. Harris & Krueger, *A Proposal for Modernizing*, *supra* note 14, at 28–33 (appendix table briefly describing 26 different gig platforms).
59. Compare Nancy L. Green, *Fashion, Flexible Specialization, and the Sweatshop*, in *SWEATSHOP USA* 43–47 (Daniel E. Bender & Richard A. Greenwald eds., 2003) (describing late 19th and early 20th century putting-out systems), with McAfee & Brynjolfsson, *supra* note 10 (explaining that gig enterprises like Uber have (almost) no assets and depend on a “thin lawyer” of computerized control). See Green, *Fashion*, *supra* note 59 (arguing that outwork systems tend to emerge when the product markets require flexibility: avoidance of fixed costs; avoidance of a fixed labor force; and avoidance of restrictive rules for the labor market); John R. Commons, *The Sweating System in the Clothing Trade*, in *TRADE UNIONISM AND LABOR PROBLEMS* (John R. Commons ed., 1905).
60. Todd Dills, *Breaking Free: Owner-Operator History Upon Overdrive's 50th Anniversary*, *OVERDRIVE* (Sept. 1, 2011), <https://www.overdriveonline.com/breaking-free/>; Shane Hamilton, *Trucking Country: The Road to America's Wal-Mart Economy* (2014) (describing historical struggle by owner operators); Henry H. Perritt, Jr. & James A. Wilkinson, *Economic Pressure and Antitrust*, 23 *AM. U.L. REV.* 521 (1974) (analyzing antitrust liability of owner-operators who organized protests against federal wage and price control program).
61. See *Trucking Industry in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Trucking_industry_in_the_United_States (last visited Aug. 22, 2019); see generally *Owner-Operator and Professional Employee Driver Facts*, OWNER-OPERATORS & IND. DRIVER ASS'N FOUND., <https://www.ooida.com/OOIDA%20Foundation/RecentResearch/OOfacts.asp> (last visited Aug. 22, 2019).
62. On April 9, 2018, at approximately 3:30 p.m., the author received an Amazon delivery. The personnel who delivered the boxes were in an ordinary sedan and were dressed in casual clothes. This suggests that Amazon is entering the gig market for delivery services. See *Make \$18–\$25/hour*, AMAZONFLEX, <https://flex.amazon.com/> (last visited Aug. 22, 2019).

sis, to transport trailers from one point to another. Owner-operators emerged in the industry almost as soon as highways and truck vehicles advanced to the point that highway transportation was attractive to shippers and consignees as an alternative to rail or water transportation. The Teamsters union, however, sought to strangle the owner-operator phenomenon at birth, once the union recognized that, as independent contractors, the owner-operators would be exempt from collective bargaining under the NLRA.⁶³ The union used not only traditional labor organizing pressure but also, joined by the power of regulated truckers, used its standing before the Interstate Commerce Commission (ICC) to condition operating rights on the use of employees as drivers.⁶⁴ Owner-operators were, for a time, relegated to local grocery deliveries and hauling agricultural products until the operators gradually began to fight back.⁶⁵ Particularly significant in creating space for owner-operators was deregulation of the trucking industry in the 1980s during the Carter Administration.⁶⁶ Even before its abolition, the ICC had begun to act to address

63. *See* Local 814, Int'l Broth. of Teamsters, Chauffeurs, Warehousemen v. Nat'l Labor Relations Bd., 546 F.2d 989, 990, 565–66 (D.C. Cir. 1976) (describing Teamsters' efforts to prohibit use of owner-operators in lieu of employees).
64. *Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 303–04 (1953) (summarizing the history of shift to owner-operators—use by operators of “non-owned equipment”—and the ICC's response); *id.* at 306 (noting the “demoralizing effect on industry”); *id.* at 308 (summarizing the ICC rules, including those requiring that some routes be driven by employees of certificated carrier); *id.* at 309 (“All agree that the rules thus abolish trip leasing”).
65. *See* *Wales Transp. Co. v. Interstate Comm. Comm'n*, 728 F.2d 774, 778–79 (5th Cir. 1984) (sustaining the ICC order involving owner operators against traditional trucking line claim that the ICC order was an ultra-vires effort to regulate terms of employment and working conditions).
66. *In re M & M Transp. Co.*, 13 B.R. 861, 863 (S.D.N.Y. 1981) (internal footnotes omitted) (adjudicating dispute over value of operating rights in bankruptcy).

[T]he enactment on July 1, 1980 of the Motor Carrier Act of that year, Pub. L. 96-296, 94 Stat. 793 et seq. . . . achieved a sweeping change in the trucking industry. It reversed nearly half a century of experience under prior legislation, 49 U.S.C. § 1 et seq., by effectuating its policy of deregulation, a policy designed to lessen the national government's economic regulation of this industry.

The regulatory structure under prior law had the effect of severely limiting entry into the trucking industry, for it stringently limited the opportunity of a motor carrier to obtain operating rights from the ICC. An inevitable corollary of these restrictions was the benefit to those who were successful in procuring ICC-granted operating rights of limited competition, for if no other rights were conferred, the successful carrier had a virtual monopoly. The value of such exclusivity was plain. Indeed, in recognition of the intrinsic value of these federally given operating rights, motor carriers carried them on their books as valuable assets. Apart from the benefit derived

some of the problems faced by owner-operators, such as a lack of resources to sue carriers for breach of contract.⁶⁷

Today, everyone accepts that owner-operators are independent contractors and that their compensation and working conditions are outside the reach of labor laws. The owner-operator labor market is bound by an infrastructure that is not nearly as formal or rigorous as the Uber dispatch system, but their qualifications and hours of work are closely regulated by the Department of Transportation.⁶⁸ The barriers to entry are somewhat greater for owner-operators than they are for Uber drivers. Owner-operators must obtain a motor carrier certificate from the United States Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA),⁶⁹ and they must obtain commercial driver's licenses (CDLs) from state motor vehicle authori-

from a continued operation in a virtually competition free area, holders of these rights were also able to profit from the restrictive nature of the regulations governing the marketplace when the time came to sell their rights. Substantial profit could be had from a sale as it was easier for carriers to gain entry into a marketplace by the purchase of existing rights. While the ICC had to approve the sale, at least the routes, designated points and type of haulage had already undergone administrative scrutiny.

The deregulation flowing from the 1980 statute has changed the face of all this. The new statutory and regulatory structure contemplates virtually unlimited entry and provides for a simple and expeditious grant of operating rights upon payment of a minimal fee. An existing operating right, previously valued at cost and subject to amortization, now must be written off as an extraordinary loss. It is thus plain that the value of previously granted rights to operate on the nation's highways has been permanently impaired by the elimination of monopolistic benefits which, of course, impacted adversely on a profitable operation.

67. See Interstate Comm. Comm'n, Lease and Interchange of Vehicles (Rules Modifications), 132 M.C.C. 916, 918 (1982) (declaring intention to take agency action for abusive contractual practices).
68. See *What is Operating Authority (MC number) and Who Needs It?*, U.S. DEP'T TRANSP. FED. MOTOR CARRIER SAFETY ADMIN. (Nov. 21, 2017), https://ask.fmcsa.dot.gov/app/answers/detail/a_id/245.
69. See 49 U.S.C. § 13902 (Westlaw through Pub. L. No. 114-94); 49 C.F.R. parts 365, 368 (2018); 49 C.F.R. § 392.9a (2018); see *How Do I Get Operating Authority (MC Number)?*, U.S. DEP'T TRANSP. FED. MOTOR CARRIER SAFETY ADMIN. (Sept. 18, 2017), https://ask.fmcsa.dot.gov/app/answers/detail/a_id/194 (explaining that an MC number is required for vehicles weighing more than 10,000 pounds or those that transport hazardous materials, but not for private carriers, transporting their own cargo, carriers of exempt commodities, and carriers that operate within federally designated "commercial zones," such as those involving multi-state metropolitan areas).

ties. Getting operating authority takes about a month, costs \$300, and involves making an online application and providing proof of insurance.⁷⁰

Owner-operators of the 21st century use one or more of a dozen or so established load boards to arrange for trailers to transport.⁷¹ The load boards, unlike the Uber and Lyft networks, do not actually match driver and shipper, but rather, they provide drivers and shippers with lists of potential counterparts.⁷² The load boards do some screening based on selection criteria entered by the searching entity and may provide information about shipper financial responsibility, promptness in paying accounts payable, and creditworthiness.⁷³ Some boards also provide information on rates agreed to with other owner-operators, traffic congestion, and other factors influencing the selection of routes (lines).⁷⁴ The Owner-Operators and Independent Driver Association (OOIDA) makes available a special arrangement with the largest of these load boards, Dial-A-Truck (DAT) at \$35 per month for basic services.⁷⁵ The owner-operator message boards are full of advice and anecdotes about how operators can negotiate effectively with brokers they perceive as ready and eager to accept their services.⁷⁶

Conflicts sometimes exist among owner-operators, brokers, and the shippers, however. A 1984 challenge to ICC owner-operator regulations⁷⁷ illustrates other owner operator grievances including: (1) failure to make prompt payment to operators⁷⁸; (2) imposing unusual types or amounts of

70. See U.S. DEP'T TRANSP. FED. MOTOR CARRIER SAFETY ADMIN., *Unified Registration System*, <https://portal.fmcsa.dot.gov/UrsRegistrationWizard/> (last visited Aug. 22, 2019).

71. See *The Five Best Load Boards Every Trucker Should Know*, RTS FINANCIAL (July 25, 2017), <http://www.rtsfinancial.com/articles/top-five-load-boards-every-trucker-should-know> (identifying DAT Solutions, Truckstop.com, 123 Loadboard, OOIDA's DAT Members Edge, and Direct Freight).

72. See *Load Board Features*, DAT MEMBERS EDGE, <http://www.mymembersedge.com/products/features> (last visited Aug. 22, 2019).

73. *Id.*

74. *Id.*

75. *Load Board Packages*, DAT MEMBERS EDGE, <http://www.mymembersedge.com/products> (last visited Aug. 22, 2019).

76. See *My First Week as an Owner Operator . . . Ouch!*, TRUCKERS REPORT (Feb. 15, 2011), <https://www.thetruckersreport.com/truckingindustryforum/threads/my-first-week-as-an-owner-operator-ouch.133412/page-3>; *Is Being an Owner-Operator Worth It?*, TRUCKER TERRITORY, <https://truckerterritory.progressivecommercial.com/toolbox/owner-operator-worth/> (last visited Feb. 26, 2019) (summarizing considerations).

77. See *Wales Transp. Co. v. ICC*, 728 F.2d 774, 778–79 (5th Cir. 1984).

78. *Id.* at 781.

paperwork for payment⁷⁹; and (3) shifting to operators the liability for fines arising from overweight and oversize trailers.⁸⁰ In the 2010 case of *Owner-Operator Independent Drivers Association, Inc. v. Landstar System, Inc.*,⁸¹ the plaintiffs claimed that:

Landstar violated 49 C.F.R. § 376.12(d) and (h), provisions of the Truth-in-Leasing regulations, 49 C.F.R. § 376.1 *et seq.*, by failing to disclose in their lease agreements that banking fee charges would be deducted from compensation paid to the truck owners and drivers, and by failing to provide documentation regarding the computation of charge-back items including pricing information submitted by Qualcomm Incorporated (Qualcomm). The Owner-Operators also [sought] restitution or disgorgement.⁸²

The court of appeals found that the original lease did not comply with the federal regulation on disclosure of banking fee deductions⁸³ but rejected the plaintiffs' claims on charge-backs.⁸⁴ It held that restitution and disgorgement were not available under the Motor Carrier Act,⁸⁵ and that the plaintiffs had not yet proved actual damages and remanded for trial of that question.⁸⁶ The court further stated that, “[b]ecause the Owner-Operators failed to establish that actual damages can be easily calculated for all class members, the District Court did not abuse its discretion in decertifying the class for actual damages.”⁸⁷

2. Other Examples

AmazonFlex is a specialized version of Uber Delivery which allows gig workers to schedule blocks of time on particular days during which they deliver packages to Amazon customers, replacing UPS, USPS, and FedEx delivery.⁸⁸ Domino's Pizza hires gig workers as drivers, and, like AmazonFlex, requires them to work pre-designated blocks of time. Platforms similar to Uber and Lyft include those such as Craigslist and eBay. Craigslist provides a global reach for what are basically newspaper want ads by porting

79. *Id.*

80. *Id.*

81. 622 F.3d 1307 (11th Cir. 2010).

82. *Id.* at 1310 (describing claims).

83. *Id.* at 1318.

84. *Id.* at 1322–23.

85. *Id.* at 1324.

86. *Id.* at 1326.

87. *Landstar Sys.*, 622 F.3d at 1327.

88. AMAZON FLEX, <https://flex.amazon.com/about> (2018) (video overview of Amazon Flex).

them onto the Internet.⁸⁹ eBay is comparable to an upscale virtual flea market.⁹⁰ These platforms perform searching and matching functions, relying on buyers and sellers to engage in ad hoc negotiation about their terms. eBay assures performance by escrowing payments and also provides a dispute resolution mechanism.⁹¹ Other examples of gig markets exist, but their characteristics distinguish them from Uber and Lyft.

Gig markets fairly similar to Uber and Lyft include Mechanical Turk, Airbnb, and the plan reportedly being tested by General Motors to allow car owners to rent their personal automobiles to others on a short-term basis. Mechanical Turk is similar in that it facilitates workers' going to customers to perform services while using their own capital equipment.⁹² It differs significantly in that the nature of the service is not narrowly defined, making it more difficult for efficient matching to occur because of ambiguities in what customers want and what workers offer.⁹³ Airbnb differs from Uber and Lyft in that the assets offered—residential housing structures—are not mobile.⁹⁴ The customer must go to the worker's premise.⁹⁵ Additionally, the urban transportation service provided by Uber is fungible, while the housing services provided through Airbnb are unique and differentiated.⁹⁶ Lastly, most Airbnb hosts perform only limited services, unlike the driving and route selection performed by Uber and Lyft drivers; they simply make their assets available to customers.⁹⁷ Airbnb does not organize a labor market so much as it organizes a product market.⁹⁸

Platforms fairly similar to Uber and Lyft with greater automation than Craigslist and eBay include TaskRabbit, Moonlighting, and Mega Pros. TaskRabbit⁹⁹ and Moonlighting¹⁰⁰ automate more of the matching process, including, in the case of TaskRabbit, matching bids and requests for compensation. However, whether buyer and seller make a deal and the terms

89. CRAIGSLIST, www.craigslist.com (last visited Aug. 22, 2019).

90. EBAY, www.ebay.com (2019).

91. RESOLUTION CENTER, <https://resolutioncenter.ebay.com/> (2019).

92. See Harris & Krueger, *A Proposal for Modernizing*, *supra* note 14, at 19.

93. See *id.* at 31.

94. See *id.* at 10.

95. MCAFEE & BRYNJOLFSSON, *supra* note 10, at 222–23.

96. *Id.* at 222 (noting that urban transportation is undifferentiated but that short-term housing is highly differentiated). *Id.* at 201 (describing Uber's early growth at the expense of monopolistic taxicab enterprises).

97. See *id.* at 222.

98. See *id.* at 222–23.

99. TASKRABBIT, www.taskrabbit.com (last visited Aug. 22, 2019).

100. MOONLIGHTING, www.moonlighting.com (2018).

of their deal are negotiated conventionally online.¹⁰¹ A platform in Chicago, called Mega Pros, is a network that ties together home craftsman, including appliance servicing, gutter and siding work, painting contractors, and home improvement contractors.¹⁰² Mega Pros is a brand and advertises extensively on radio. A potential customer makes contact by telephone, or Internet message, and the enterprise arranges for someone with appropriate skills to do the work.¹⁰³ However, the details of the actual gig are worked out between service personnel and the customer.¹⁰⁴ Mega Pros is not involved in the invoicing and payment process.¹⁰⁵ Uber and Lyft lie beyond these platforms in their functionality. They not only match buyers and sellers of services; they also automate payment based on a compensation formula that the platform determines.¹⁰⁶ While riders and drivers can elect among several options, they may not negotiate their own compensation arrangements; indeed, the contract terms of service prohibit them from doing so.¹⁰⁷

D. Market Structure

The gig networks and platforms of the 21st century are simply markets. They perform the same functions as farmers' markets, stock and futures exchanges, and, more recently, online markets such as eBay and Amazon. With respect to ride-hailing drivers, the market structure is usually analyzed as a labor market, although it is often difficult to disentangle labor markets and product markets altogether because supply and demand in product markets influences supply and demand in the associated labor market. Considering the intermediaries as well as the drivers and riders, analysis of market structure is more complex. Uber drivers are simultaneously buyers and sellers in

101. The author tested TaskRabbit and Moonlighting by seeking someone to "edit a 50-page manuscript for a law review article, checking citations for conformance with 'Blue Book,'" TaskRabbit matched the task with several dozen candidates who held themselves out as editors. They had widely varying experience. One said he could do a good job editing because he had "written several papers in college." Another presented himself as an editor who values brevity, but his reviews said things like "took down my old TVōunt, and mounted new one," and "install[ed] a ceiling fan that proved tricky due to a gas pipe." Others advertised experience in editing published books and articles. Prices also varied widely, ranging from \$50 per hour at the low end to \$100 per hour at the upper end. Moonlighting reported only fifteen matches, with generally lower prices.

102. MEGA PROS, <https://megapros.com/> (last visited Aug. 22, 2019).

103. *Id.*

104. See THE MEGA PROS DIFFERENCE, <https://megapros.com/why-mega-pros/> (last visited Aug. 22, 2019).

105. See *id.*

106. See Harris & Krueger, *A Proposal for Modernize*, *supra* note 14, at 31–33.

107. See *id.*

two different markets. They sell their labor and their vehicle services in one market, where the riders are the consumers and the drivers are the suppliers. They buy¹⁰⁸ network services from Uber in the other market. In this market, Uber is the supplier and the drivers are the consumers. A third market does not involve the drivers: the market in which Uber sells its network to the riders. The first market exemplifies almost pure competition. There are many drivers; their services are fungible, and they provide them to thousands of riders, who are largely indifferent to their sources of supply. It is the second market where barriers to competition exist.

Labor markets that are purely competitive do not need regulation because participants are capable of taking care of themselves, but analysis of the market's structure is necessary to determine competitiveness.¹⁰⁹ The consumer side of the Uber and Lyft markets is quite competitive because thousands of buyers (riders) are willing to pay hundreds, or thousands, of sellers (drivers) to pick them up and take them where they want to go. Someone wanting a ride across town or to the airport has a half-dozen or more choices. In most cities, she can choose between Uber and Lyft, take any one of several competing taxis, take the bus or rapid transit, drive a personal automobile, or rent a car. Choice among these alternatives is driven by a combination of cost and convenience. The problem is that riders and sellers confront huge transaction costs in finding each other at the right time and place. As in any perfectly competitive market, individual buyers and sellers lack the capacity to influence prices and other terms on which deals can be made in the marketplace; a buyer or seller seeking terms better than the equilibrium determined by supply and demand simply won't find deals. Ride hailing intermediaries, primarily Uber and Lyft, have risen to reduce these transaction costs. Although differing levels of automation among the platforms may restrict the choices of suppliers, or customers, by matching instead of showing all available products or services, this technology reduces the transaction costs of shopping, depending on the platform's design.

The driver side of the market is less competitive. The Taylor Review explains that the key factor in making gig labor markets unfair is the "imbalance of power," which may arise from a dominant local employer or a dominant employer for a particular skill.¹¹⁰ Uber and Lyft dominate the market in the form of an oligopoly on the product side, a market in which few sellers and many buyers compete, and an oligopsony on the labor side, a market in

108. The drivers "buy" the service in the sense that they share the total revenue paid by the rider.

109. See Barbara Ann White, *Countervailing Power—Different Rules for Different Conduct and Context in Antitrust Law and Economics*, 41 DUKE L.J. 1045, 1055–59 (1992) (comparing role of market structure as determinant of competitiveness under different schools of thought).

110. TAYLOR ET AL., *supra* note 10, at 26.

which few buyers and many sellers compete.¹¹¹ As in all oligopolies and oligopsonies, the side of the market with only a few participants has disparate access to information and disparate bargaining power, compared to the side of the market with many players.¹¹² Most U.S. markets for driving services are duopolies, with Via and Curb also present in a few markets. Curb is not, however, purely competitive with either Uber or Lyft because one must be qualified as a taxi driver to drive for Curb.¹¹³ Although they have some degree of control over the prices they pay, they face more competitive markets on the product side and so have less control over pricing to consumers.

These power imbalances disproportionately affect workers with low skills or who are immobile.¹¹⁴ In other words, the imbalance of power arises from limited alternatives.¹¹⁵ Oligopolies and oligopsonies exemplify a number of types of market failure: transaction costs, contracts of adhesion, switching costs, barriers to entry, and price inelasticity. Contracts of adhesion matter, because they preclude bargaining between buyer and seller, an assumption that underlies the model of perfect competition. Switching costs matter because they impede the driver switching between competing ride-hailing services, which they would otherwise be able to do fluidly as one or the other improves the terms it offers. Barriers to entry matter because, if they are low, a driver dissatisfied with the limited number of providers simply can start his own ride hailing service. Price inelasticity matters, because it retards driver willingness to look for a better deal.

1. Transaction Costs

Frictionless markets, like those hypothesized in basic economics courses, do not exist.¹¹⁶ Participants in all real markets encounter transaction costs. Uber and Lyft enormously reduce the transaction costs associated with

111. See James Murphy Dowd, *Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets*, 76 BOSTON UNIV. L. REV. 1075, 1084–85 (1996) (“Oligopsony is essentially the demand-side manifestation of oligopoly”).

112. See White, *supra* note 109, at 1079–80.

113. See Harris & Krueger, *A Proposal for Modernizine*, *supra* note 14, at 29.

114. TAYLOR ET AL., *supra* note 10, at 26.

115. Imbalances of power arise from limited competitive alternatives to one side of the transaction, which can arise from switching costs or barriers to entry. Opportunities for exploitation in all markets depends upon the availability of alternatives: competition between markets. This in turn depends upon barriers to entry, including natural-monopoly tendencies and on switching costs. See TAYLOR ET AL., *supra* note 10.

116. See Ning Wang, *Transaction Costs and the Structure of the Market: A Case Study*, 58 AMER. J. ECON. & SOC. 783, 784 (1999) (failing to consider transaction costs removes understanding of markets from reality; analyzing specific transaction costs in markets; using Chinese fish markets as case study).

drivers and riders finding each other.¹¹⁷ These result from information asymmetries as between individual drivers and the Uber or Lyft platform. In theory, an individual could also set out on his own to find riders by cruising the streets with some kind of advertisement on the vehicle, but the efficiency of finding riders in that way is extremely low. The platform knows who wants a ride at any instant in time and makes it seamless for the driver to match himself with one of those riders. Without a relationship with the platform, the driver is clueless as to potential riders. These platforms also reduce what would be very large transaction costs of riders performing background investigations on potential drivers. Potential riders likely would be deterred by the absence of any assurance that such an unknown and un-vouched-for driver is safe. They similarly reduce the symmetrical transaction costs of negotiating and making payment for services rendered between riders and drivers.

However, institutions developed to reduce transaction costs and make markets more efficient introduce new transaction costs of their own because drivers are dependent on their platforms and lack the power to negotiate their own terms. Uber sets the terms of the deal; drivers can take it or leave it. Switching costs, however, are quite low; an Uber driver owns his own car and retains his privilege to work with Lyft, taxicab companies, or delivery services like Domino's Pizza or AmazonFlex. Because the work rules are embedded in the software, instead of being implemented by a hierarchy of supervisors, payroll clerks, and human resource professionals, the rigidities associated with traditional organizational structures do not exist. If the platform enterprise decides to change the way a rider's payment is shared with drivers, it can do so simply by changing a few lines of computer code. Tens of thousands of drivers experience the change simultaneously on their smart phones. Similarly, if the platform decides to change the way it notifies drivers about ride opportunities based on calculations of supply and demand, it already has the data to make appropriate changes. Of course, careful management of software updates is necessary to prevent collapse of the system, but the process of change is still much easier than having to republish employee policy manuals all over the country and retrain multiple levels of supervisors. Transaction costs may simply make markets less efficient, or they may create imbalances of power.

2. Contracts of Adhesion

The platform itself has disproportionate power. In the case of Uber and Lyft, no real negotiation occurs between the participants in the platform, on either the buyer or the seller side. The platform writes the terms of participation, and buyers and sellers either must accept them or not, in a take-it-or-leave-it manner. In other words, Uber and Lyft and similar platforms operate

117. See Lagos, *An Alternative Approach to Search Frictions*, *supra* note 55 (applying "matching function approach" to enable consideration of search frictions in taxicab markets, the Lagos study predicts that technology that reduces search frictions such as Uber's and Lyft's will improve social welfare).

through contracts of adhesion. The law-and-economics movement defends contracts of adhesion as efficient and urges courts to enforce them.¹¹⁸ However, others perceive them as negating the essential characteristics of private contracting in markets: bargained for exchange. Appeals to “freedom of contract” to privilege such contracts are illusory and it is appropriate for the law to intervene to protect the weaker parties in this exchange. That perception underlies much consumer-protection regulation and much labor and employment regulation, although the early labor reformers did not use the same terminology. Despite the contracts of adhesion used by each ride-hailing service, drivers are not without choice. They can leave one and go to another or drive for multiple services, as the spirit moves them.

3. Switching Costs

Switching costs matter because low switching costs mitigate the disparity of power resulting from contracts of adhesion. If many different buyers offer their own contracts of adhesion, sellers can maintain choice if they can easily switch from one buyer to another. Switching costs are low for drivers with both Uber and Lyft, who permit their drivers to drive for the other enterprise and for other enterprises. No fee is required to sign up for either, and the only investment is a few minutes to sign up.¹¹⁹ The capital a driver uses is his own automobile, which can be used in either service. Even assuming that the only relevant skill set is driving a vehicle, individuals possessing that skill can become a driver for Uber, Lyft, or services like GrubHub, Domino's Pizza,¹²⁰ or, in increasing numbers of markets, Amazon.¹²¹ Barriers to entry exist in other similar occupations, but they are modest. Driving a taxi depends upon obtaining the chauffeur license and finding a medallion holder willing to enter into a contract.¹²² Driving for FedEx or UPS requires a com-

118. See Richard A. Posner & Lucian Arye Bebchuk, *One-Side Contracts in Competitive Consumer Markets*, COASE-SANDOR WORKING PAPERS SERIES IN L. & ECON. (2006), https://chicagounbound.uchicago.edu/law_and_economics/347/.

119. See UBER: DRIVE WITH UBER, https://www.uber.com/a/us/?var=org2&exp=70622_t2 (last visited Aug. 22, 2019).

120. See QUICK TIPS. GREAT HOURS. AND YOU'RE ALWAYS IN CHARGE OF THE RADIO, <https://static1.squarespace.com/static/5627ccd4e4b030f0c573a8f7/56357bf2e4b07d5e1832b38a/56357cb0e4b0767213f56831/1513190480296/Dominos-recruitment-email-III.png?format=500w> (last visited Aug. 22, 2019).

121. See AMAZON FLEX, <https://flex.amazon.com/> (last visited Aug. 22, 2019) (“Make \$18–\$25/hour. Be your own boss, set your own schedule, and have more time to pursue your goals and dreams. Join us and put the power of Amazon behind you.”); see BECOME AN INDEPENDENT AMAZON FLEX DELIVERY DRIVER, <https://amazonflexbusiness.com/flex-cities> (last visited Mar. 6, 2019) (reporting presence in fifty cities).

122. See *Basic Requirements to Drive a Taxi*, DIV. MOTOR VEHICLES, <https://www.dmv.org/special-licenses/driving-a-taxi-cab.php#Basic-Requirements-to-Drive-a-Taxi> (last visited Aug. 22, 2019).

mercial driver's license and various collectively bargained hiring rules in the case of UPS.¹²³

An important type of switching costs is the capital embedded in the enterprise a market participant is leaving. For example, if a worker for a talent agency has invested \$1,000 in software that is only capable of performing useful functions at the particular agency for whom the worker works, and other agencies use different software, which also requires worker investment, switching costs include the cost of the software at the new agency. Even though economists say that sunk costs should be disregarded in making rational economic decisions, sunk costs frequently have payoffs over time because they represent investment assets that have continuing utility. If one pays cash for an automobile, for example, the cost of the car is sunk, but the owner can expect five or more years of transportation function from the car. If he scraps it, he is giving up functionality.

The availability of other work and the cost of switching influences bargaining power, as explained by the well-known principle of negotiation theory: Best Alternative to Negotiated Agreement (BATNA).¹²⁴ The BATNA principle says that one's position—what one is willing to accept—in any negotiation is rationally determined by the best alternative to a negotiated agreement.¹²⁵ If a worker believes he can get a job with another enterprise at \$15 per hour, he rationally should not accept employment with his existing enterprise at \$12 an hour. He will insist that his current enterprise pay him at least \$15 an hour or he will switch jobs. His enterprise's willingness to pay him \$15 depends on how it assesses its alternatives. If it thinks it can hire somebody else for \$13, it will refuse to pay the first worker more than that. Switching costs matters, because if the wage differential is the assumed three dollars per hour, but it cost the worker \$1,000 to switch, he faces a loss until he can earn the thousand dollars back with the new enterprise.

4. Barriers to Entry

Barriers to entry in the labor market matter. The issue is whether suppliers of labor are relatively independent of platform providers because they can “do-it-yourself”—perform the same functions independent of the platform.¹²⁶

123. See *Qualifications/Specifications*, FEDEx, <https://customcritical.fedex.com/us/owneroperator/quals/default.shtml> (last visited Aug. 22, 2019); see also Kathryn Walsh, *How to Become a UPS Driver*, CAREER TRENDS, <https://careertrend.com/how-2189918-become-ups-driver.html> (last visited Aug. 22, 2019).

124. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1991).

125. *Id.*

126. When a driver undertakes his own matching activity, he is engaging in a form of vertical integration; the driver is now not only performing the driving function and supplying the vehicle, but also performing the marketing, sales, and dispatch functions.

Whether they can do it themselves depends on the barriers to entry. Barriers to entry matter, not only in the sense that other drivers may offer their services, increasing competition to incumbent drivers and diluting their bargaining power, but also in the sense that barriers to entry in the platform market reduce the bargaining power of drivers and force them to accept whatever the platform offers without any real negotiation. Economies of scale and scope, including substantial network effects, limit new entry into the TNP market. That is why it is an oligopoly.¹²⁷

Most gig arrangements involve “two-sided” or “multi-sided” platforms.¹²⁸ Gig intermediaries like Uber are sometimes referred to as “two-sided platforms,” and the term “matchmaker” evokes appreciation of their multisided nature as well. In that respect, they’re like most markets, in that they facilitate transactions between sellers and buyers. Delivery services like AmazonFlex, Domino’s Pizza, and Uber Delivery are multisided platforms. While original Uber and Lyft matched two actors in the market—drivers and riders—delivery services have at least a third side: the supplier of the product. This can be a product from Amazon or a pizza from Domino’s or any other item that needs to be delivered. The customer not only wants the product; she also wants it at a particular location, so transportation services are bundled with the tangible product. AmazonFlex and the other multisided platforms organize a gig submarket for the transportation service and bundle it together with the customer and the supplier. The more sides to a platform, the greater the barriers to entry, because now the driver not only must find customers, he also must construct a network of suppliers.

Barriers to entry in the market for platform services depends in part on the tendency toward natural monopoly. The tendency toward natural monopoly depends upon the presence of network effects and on economies of scale. An enterprise providing a service with substantial network effects is likely to experience a natural monopoly phenomenon, as is one that enjoys substantial economies of scale. A particular enterprise may become the natural monopolist, or it may get squeezed out of the market by another that becomes the natural monopolist. Gig networks exhibit large network effects.¹²⁹ They are like telephone companies, in that suppliers and customers want to subscribe to the network with the greatest number of contacts. Ride-hailing customers want the network with the largest number of drivers. Ride-hailing drivers

127. An oligopoly is a market in which only a limited number of producers can stay in business. *Oligopoly*, MIRIAM-WEBSTER, <https://miriam-webster.com/dictionary/oligopoly> (last visited Aug. 22, 2019).

128. See MCAFEE & BRYNJOLFSSON, *supra* note 10, at 214 (explaining power of two-sided networks); DAVID S. EVANS & RICHARD SCHMALENSEE, *MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS* 14–19 (2016) (explaining power of multi-sided matchmakers).

129. See EVANS & SCHMALENSEE, *supra* note 128, at 25–30 (explaining network effects); MCAFEE & BRYNJOLFSSON, *supra* note 10, at 140–42 (discussing network effects).

want the network with the largest number of customers. Network effects, however, are bound by the geographic character of the market. Someone who wants a ride in Chicago doesn't care how many drivers are in the Uber network in Boston.¹³⁰ Otherwise, economies of scale are likely to be modest.

For instance, any reasonably skilled computer programmer can develop an application in any one of dozens of programming languages that matches persons offering a service with those who want to consume it. Development and debugging of such an application need not cost more than a few thousand dollars, depending on how much the entrepreneur is capable of doing himself. Making it available on a website or through a smartphone app is trivial, both in effort and cost.

The requirements of the application include:

- A highly reliable backend database, capable of tracking the location and state of riders and drivers online at the time.
- Separate apps for riders and drivers that have the following capabilities:
 - Display user's position on a map, updated continuously;
 - Display position of drivers and riders to each other;
 - Compute efficient routes from one place to another and display it on the screen, backed up by voice synthesizer turn-by-turn commands;
 - Perform trip accounting calculations and interface with riders' credit card accounts and drivers' bank accounts.

Of course, merely developing the software is not enough to launch a successful entry. Substantial advertising expenditures and a persuasive message are necessary to break into the markets, both for drivers and riders.

5. Price Inelasticity

Price elasticity matters because sensitivity to price differences and changes shape the propensity to seek substitutes for both drivers and riders. A number of econometric studies have been done over the last twenty years about urban on-demand transportation including taxicabs, limousines, and ride-hailing services.¹³¹ The studies focused on supply of services, mainly

130. One cares about how many residential properties are offered on the service like AirBnB only in those areas to which one intends to travel.

131. See Hai Yang et al., *A Multiperiod Dynamic Model of Taxi Services with Endogenous Service Intensity*, 53 OPS. RES. 501 (2005) (building on early models by allowing taxi drivers to choose certain numbers of hours per day to drive and describing vacant and occupied taxi movements, including search behavior by drivers, in terms of demand elasticity, and congestion effects; considering interaction among profits, intensity of taxi supply, waiting times, fares, and demand through mathematical models; emphasis is relationship between types of regulation and social welfare); Ricardo Lagos, *An Analysis of the Market for Taxicab Rides in New York City*, 44 INT'L ECON. REV. 423 (2003) (examining effects of search and meeting frictions on supply and demand of cabs, in light

involving taxi drivers, showing that while drivers are more willing to work when compensation is higher, they work only until they have reached a certain number of hours or a certain level of earnings, and then they clock off.¹³² No studies have been conducted on the cross elasticities of supply—the factors that determine whether a driver works for a taxicab company, the limo company, or a particular ride hailing service; that is probably because Uber and Lyft only recently became a visible part of the on-demand transportation system. Demand-side studies reinforce the intuition that passengers are relatively insensitive to price, but more sensitive to waiting times and trip times. A typical passenger who orders a cab does not care much how much it costs, but he cares how long he will have to wait for the cab to arrive, and how long the trip will take once he is in the cab. However, studies of cross elasticity of demand are not available either. But despite the price inelasticity of demand for taxicab services, it is plausible to conclude that passengers will move to substitutes when the relative price changes, even a little.

These studies of driver and passenger behavior have only indirect implications for how the labor market for drivers should be regulated. They suggest that regulation changing fares and driver compensation may have relatively little effect, except to increase the returns to the entrepreneurs organizing the services. On the other hand, increasing the price of Uber and Lyft, relative to taxis, is likely to diminish the demand for Uber and Lyft. They also suggest that increasing driver compensation may not pull forth much additional work from drivers, because drivers are more interested in how long they work and how much they make than in maximizing earnings, and increased compensation rates mean they can meet earnings targets with less time.

III. JUSTIFYING REGULATION

The law intervenes and regulates an industry either when economic analysis suggests that the market, operating alone, will not allocate resources efficiently or will not distribute them equitably, or when political forces determine to advantage one interest group over another.

of regulatory changes). Bus, rapid transit, and rental cars are close substitutes but are not exactly on-demand. As close substitutes, they factor into the assessment of demand for the on-demand services.

132. See Henry S. Farber, *The Labor Supply of New York City Cabdrivers*, 113 J. POL. ECON. 46 (2005) (concluding that decision by cab driver to stop work is primarily related to cumulative hours works up to that point; noting other students that suggest strongly negative wage elasticity—drivers stop work as soon as they have earned a target income).

A. Risk-Based Regulation

The second Coase Theorem postulates that regulation is not necessary to assure allocative efficiency in frictionless markets.¹³³ As long as property rights exist and contracts are enforceable, actors in the market will calculate their own preference functions and bargain accordingly to exchange property rights. The Theorem, however, does not say that distributional fairness will be assured.¹³⁴ If the value placed on a good by the two parties overlaps, then a surplus exists and it must be divided. Whoever starts out owning the property will appropriate all of the surplus. Most economists accept the validity of the Coase Theorem. They disagree vigorously, however, on what transaction costs exist and where and what kind of regulatory intervention is appropriate to reduce or eliminate them. They generally also agree that while perfect markets are desirable, no such markets exist. Accordingly, lawyers and lawmakers who are literate in economics understand that regulatory regimes should be designed to focus on reducing or eliminating transaction costs. Such an exercise must begin by identifying specific transaction costs and understanding how alternative regulatory measures will reduce them. Designing regulatory regimes around transaction costs in particular markets can be thought of as a kind of risk-based regulation, where the risks are not those to health and safety, but instead those of allocational inefficiency or distributive unfairness because of transaction costs.¹³⁵

B. Market Failure and Opportunities for Exploitation: Allocative Efficiency and Distributive Justice

Economic analysis of law—popularly known as “law-and-economics”—addresses *allocative efficiency* and *distributive justice*.¹³⁶ Allocative efficiency is concerned with market failure that jeopardizes the optimal allocation of resources.¹³⁷ Distributive justice involves something else: an al-

133. See George J. Stigler, *Two Notes on the Coase Theorem*, 99 YALE L.J. 631 (1989) (summarizing theorem and its implications).

134. See *id.*

135. In the health and safety context, externalities are threats to health and safety; in the economic rhetoric context the externalities are sources of friction for market transactions.

136. RICHARD H. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014) (providing overview of law-and-economics concerns); see also Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, John M. Olin L. & Econ. Working Paper No. 53, https://www.law.uchicago.edu/files/files/53.Posner.Values_0.pdf (examples of economic analysis of law).

137. See Richard S. Markovits, *Legal Analysis and Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811, 814–27 (1980) (describing and critiquing of Posner’s allocative efficiency approach).

location of resources that is “fair” or “equitable” in some moral sense.¹³⁸ Allocative efficiency and distributive justice goals usually conflict.¹³⁹ One can improve the fairness of the distribution of resources, but only by making their allocation less efficient. Single-minded pursuit of allocative efficiency often results in an inequitable distribution of resources—a race to the bottom. For ease of discussion, this article refers to shortcomings in distributive justice as “opportunities for exploitation.”

Microeconomics and markets limit the degree to which any regulatory regime can pursue equitable distribution. Law can boost compensation for any factor of production, including labor, only so far, so that regulation that obligates an enterprise to pay out more of its revenue to workers and less to its sources of capital will find it increasingly difficult to attract capital for operations and expansion because it pays a subpar rate of return. An enterprise may seek to avoid this result by raising prices, but new entrants in the market charging lower prices will gain market share at the enterprise’s expense and eventually put it out of business. The regulators can seek to shore up the compensation norm by limiting market entry and thus allowing higher prices for the entire industry, but then, unless the price elasticity of demand is zero or negative—unlikely for most industries—the result of the higher prices will lower demand. Depending on the exact level of elasticity and pricing, the total revenue may drop, thus producing a smaller pool for worker compensation. Ultimately, the compensation-boosting regulation pushes the workers out of the market (if not the labor market for that particular industry, then the broader markets for goods and services generally).

Even imperfect markets impose ultimate limits on how much regulation can accomplish. Supply and demand continue to operate at some level of efficiency, meaning that increasing the cost of labor reduces the demand for their services. Rational lawmaking scrutinizes specific instances of market failure that jeopardize efficient allocation and equitable distribution. The unwillingness to look beyond the traditional distinction between independent contractor and employee in deciding how to regulate gig markets is myopic. It largely ignores an appropriate inquiry into instances of market failure and opportunities for exploitation. What matters is not how the law could pro-

138. See Lee Anne Fennell & Richard H. McAdams, *Fairness in Law and Economics: Introduction*, Case-Sandor Working Paper Series in L. & Econ. 1 (2014), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2381&context=law_and_economics (arguing that law and economics must confront questions of distributive fairness as well as allocative efficiency).

139. See Lewis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principles, Preferences, and Distributive Justice*, NBER Working Paper 9622, at 3–6 (2003) (acknowledging conflict between allocative efficiency and distributive justice). *But see* Martha T. McCluskey et al., *Law and Economics: Contemporary Approaches*, 35 *YALE L. & POL’Y REV.* 297, 301 (2016) (criticizing teaching materials on law and economics because they overstate the tension between efficiency and equity).

mote allocative efficiency and reduce opportunities for exploitation in a Ford Motor factory of 1924 or a sewing sweatshop in New York in 1890; what matters is whether and how to regulate the gig labor markets of the 21st century. Yet it was the model of 1924 factory and the 1890 sweatshop on which New Deal labor law was erected, concerning only “employees” and leaving “independent contractors” largely out in the cold. A rational regulatory regime for gig markets begins by identifying specific instances of market failure and opportunities for exploitation. The market structure analysis of part II.D of this article suggests that regulatory intervention may be justified by the dependence of gig workers on platforms when the market for the platforms is not competitive because of barriers to entry by new platform providers, including gig workers themselves.

C. Politics of Regulation

Regulatory design reflects more than the rationality of an economist looking at allocative efficiency and distributive justice. It also reflects the politics of the disappointed.¹⁴⁰ No market is perfect, and almost any reasonably articulate critic can mobilize credible claims of market failure. Reasonably sympathetic victims can organize a movement to address credible claims of exploitation. Business interests that are doing well in unregulated markets naturally advocate the superiority of markets over regulation. Laissez-faire policy leaves them free to make their own decisions without regulators looking over their shoulder contemporaneously or afterwards. Economic success reinforces the preference of the successful in unregulated markets, but tides turn and sometimes free-will decisions produce failure instead of success. When that happens, the decision-maker is likely to seek someone else to blame. In regulated markets, that might be the government, while in less regulated ones, it’s more likely to be another entrepreneur or capitalist. That blame game is likely to spawn proposals for regulatory initiatives to curtail the power of those the market has made successful.

That phenomenon, at least superficially, explains the Populism of the turn of the 20th century, when local merchants began to lose market share to larger enterprises at the regional or national level. It illustrates the antagonism of textile workers, steelworkers, and autoworkers to foreign imports. Similarly, it goes a long way toward explaining hostility by taxicab drivers and medallion holders against Uber and Lyft.¹⁴¹ As a result, proposed regulatory regimes for gig enterprises usually reflect not only instances of exploitation or market failure, but also the desire of incumbents, like taxicab monopolies, to thwart competition from gig entities like Uber. Their natural

140. See DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 116–18 (1991) (arguing that public law results from a combination of economics, politics, and ideology).

141. See MCAFEE & BRYNJOLFSSON, *supra* note 10, at 202 (explaining that incumbents seek to block new entrants by appealing to regulation).

desire to defend their monopolies is reinforced by poorly informed beliefs that the popularity of Uber and Lyft are increasing traffic¹⁴² and threatening mass public transportation.¹⁴³ On the other hand, it is hard to make a case for additional regulation of labor markets, unless the participants in the labor market are dissatisfied with the status quo.

D. Sources of Worker Dissatisfaction

The politics of regulatory intervention substantially depend on the cries of citizens who claim to be victims of an entity they wish to regulate. According to the proverb “the squeaky wheel gets the grease,” some gig workers claim they are victimized, and such sentiment, along with the preference of the taxi industry for the status quo, gives life to proposals for regulation of the gig economy.

Any inventory of worker grievances in gig markets should begin with the grievances that have provoked litigation. A class action lawsuit by Uber drivers is pending in the U.S. District Court for the Northern District of California,¹⁴⁴ and the law firm representing the class is soliciting participation.¹⁴⁵ Counsel describes the lawsuit as follows:

Uber drivers have filed a class action lawsuit claiming they have been misclassified as independent contractors and are entitled to be reimbursed for their expenses that Uber should have to pay, like for gas and vehicle maintenance. The lawsuit also challenges Uber’s practice of telling passengers that the gratuity is included and not to tip the drivers, even though (until 2017) you were not getting a tip!!¹⁴⁶

142. See Steve LeBlanc, *Studies are Increasingly Clear: Uber and Lyft Congest Cities*, CHI. TRIB. (Feb. 25, 2018), <http://www.chicagotribune.com/bluesky/technology/ct-uber-lyft-congestion-20180225-story.html>; Sean Wolfe, *Uber and Lyft are Creating More Traffic Congestion Instead of Reducing It, According to a New Report*, BUS. INSIDER (July 27, 2018), <https://www.businessinsider.com/uber-lyft-creating-traffic-cities-bruce-schaller-2018-7>.

143. See Steven Hill, *Ridesharing Versus Public Transit: How Uber and Lyft Tend to Widen Disparities of Race and Class in Urban Transportation Systems*, AM. PROSPECT (Mar. 27, 2018), <http://prospect.org/article/ridesharing-versus-public-transit>; Greg Lindsay, *What if Uber Kills Off Public Transport Rather Than Cars?*, GUARDIAN (Jan. 13, 2017), <https://www.theguardian.com/sustainable-business/2017/jan/13/uber-lyft-cars-public-transport-cities-commuting>.

144. O’Connor v. Uber Techs., Inc., No. CV 13-3826-EMC (N.D. Cal. Nov. 17, 2014).

145. See *Uber Drivers*, LICHTEN & LISS-RIORDAN, P.C., <http://www.uberlawsuit.com/> (last visited Aug. 22, 2019).

146. *Id.*

The inquiry into driver dissatisfaction then should extend into the gripes expressed on driver message boards and blogs. These include claims by drivers (1) for minimum-wage and premium pay for overtime; (2) that they are entitled to organize for purposes of collective-bargaining; (3) that they have been deprived of promised benefits or subject to wrongful deductions from pay in violation of consumer protection or fair business practices regulation; and (4) that the platform provider unfairly sides with a customer against the driver.¹⁴⁷

1. What the Drivers Say

After nearly a decade of debate on the unevenly regulated business practices of Uber through multiple unsettled class action suits¹⁴⁸ and academic scholarship, a void still exists in the literature related to the issues as perceived by Uber Partners. The author set out to discover whether Partners identified issues within the industry creating employment related concerns. Specifically, the investigators were interested, *inter alia*, in Uber Partners': (1) perception of the hiring and task assignment processes; (2) grievance resolution procedures; (3) mistreatment and exploitation by the company; (4) economic disadvantages; and (5) interpersonal relationships with the company and passengers. The ultimate research goal was to determine whether issues exist in the business model warranting state regulation. Finally, the author sought to determine *how* Uber Partners' concerns should be addressed, namely via state regulation.

The author sought this information in two forms. First, the author reviewed posts by users on Internet message forums to collect data by observing group dynamics without interaction or contact with the group members. Co-author Kunsman created user accounts on each website, read and analyzed posted messages by other users, and explored users' complaints about

147. On the Uber Drivers Forum in UberPeople.net, the following categories had approximately the number of postings and comments indicated:

- (1) Pay: 5,000 posts, 70,900 comments
- (2) Technology: 3,400 posts, 30,000 comments
- (3) Ratings: 2,100 posts, 33,800 comments
- (4) Vehicles: 1,900 posts, 28,000 comments
- (5) Tips: 1,200 posts, 19,000 comments
- (6) Taxes: 1,100 posts, 12,700 comments
- (7) Insurance: 857 posts, 13,400 comments
- (8) Licensed: 236 posts, 2,700 comments
- (9) Surge: 752 posts, 8,900 comments

Uber Drivers Forum, UBERPEOPLE.NET, <https://uberpeople.net> (last visited Aug. 22, 2019); see also TAYLOR ET AL., *supra* note 10, at 26 (identifying unauthorized deductions from wages (26%), unfair dismissal (19%), and terms & conditions of employment—especially classification as independent contractors (13%) as the top three grievances).

148. See generally Deborah F. Buckman, *Liability and Regulation of Ride-Sharing Services Using Social Media*, 6 A.L.R.7TH ART. 1 (2015).

Uber practices.¹⁴⁹ Research indicates that online forums are used by a vastly diverse group for information support and exchange,¹⁵⁰ so a diverse pool of forum members was observed. The author analyzed and selected forum posts to illustrate the purpose of this article. Next, the author interviewed active and inactive Uber Partners regarding their experiences and impressions of the Uber business model.

a. The Message Forums

Message boards and blogs are open to everyone who wants to post a comment but are skewed toward negative comments, because those having something bad to say are more willing to go to the trouble of posting something than someone who is satisfied. This bias is not a problem for present purposes because the purpose of reviewing the posts is to determine the subjects about which drivers are unhappy.

i. Love-Hate

The following is quoted from uberpeople.net; it typifies driver postings:

Uber and I are having a lovers quarrel.

Uber I love you but you have gone to far and need to be set strait. This is a two way relationship and you have been asking for way too much and giving very little in return. It was not like this at first but now you clearly only think about yourself what happened to the Uber I use to know.

Lately all you send me is 11 minute pickups to grocery stores that I never take or cancel on you send me pax's that want me to pick them up in bus zones or busy streets with no parking or pax in sight. Cancel. You want me to go on a long distance trip with massive traffic on the way home or force me to work in the city.

If I call customer service I get nowhere every time.

You send me badges but steel my tips and when someone accuses me of something you do not tell me who or why so I can not defend myself.

Clearly this is a one sided relationship so I'll just use you like you use me.¹⁵¹

149. The author did not use a text mining or other automated data collection method.

150. Eun-OK Im & Wonshik Chee, *Practical Guidelines for Qualitative Research Using Online Forums*, 30 *COMPUTERS, INFORMATICS, NURSING* 604, 605 (2012).

151. @Mole, *Uber and I are Having a Lovers Quarrel*, UBERPEOPLE.NET (July 28, 2018, 2:55 PM), <https://uberpeople.net/threads/uber-and-i-are-having-a-lovers-quarrel.274577/>.

“sounds like you [are] the b\$тч in the relationship”¹⁵²

“Sounds like it’s time to get a new GF . . . 8>”¹⁵³

“Time apart makes the heart grow fonder. Go a month without driving and when you return your love will be even stronger than before”¹⁵⁴

“Lol I do this quite often.”¹⁵⁵

ii. *Compensation*

Significant numbers of gripes relate to driver compensation. The following exchanges are edited and excerpted from uberpeople.net.

Why is everyone complaining? I am considering driving for Uber/Lyft on weekends to make some extra cash. My goal is to make \$100–\$200 a week for a couple of days of driving (anywhere from 6–8 hours per day). I have a Toyota Prius at my disposal for the endeavor.

Every single [Uber] driver I have met in person (about 8–10 people by now) says this is very doable. But I see a lot of people here constantly complaining about how they’re losing money or getting ripped off on fares and/tolls by [Uber], etc. . . . Are these experiences unique or more isolated concerns than what is the norm for most?

I am located in the Dallas market and live north of town near Denton. What say you? Is this feasible? If so or if not, why?

ps - please don’t let this turn into a uber @@@@ session. Constructive comments are appreciated. Thank you.¹⁵⁶

152. @Eugene73, Comment to *Uber and I are Having a Lovers Quarrel*, UBERPEOPLE.NET (July 28, 2018, 3:29 PM), <https://uberpeople.net/threads/uber-and-i-are-having-a-lovers-quarrel.274577/>.

153. @Rakos, Comment to *Uber and I are Having a Lovers Quarrel*, UBERPEOPLE.NET (July 28, 2018, 3:53 PM), <https://uberpeople.net/threads/uber-and-i-are-having-a-lovers-quarrel.274577/>.

154. @Grahamcracker, Comment to *Uber and I are Having a Lovers Quarrel*, UBERPEOPLE.NET (July 28, 2018, 4:10 PM), <https://uberpeople.net/threads/uber-and-i-are-having-a-lovers-quarrel.274577/>.

155. @Mole, Comment to *Uber and I are Having a Lovers Quarrel*, UBERPEOPLE.NET (July 28, 2018, 4:17 PM), <https://uberpeople.net/threads/uber-and-i-are-having-a-lovers-quarrel.274577/>.

156. @MaxReaver, *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 6, 2018, 10:18 AM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

“Sure it’s feasible if you don’t care how many hours it takes you to do it. Your rate in Dallas is .68 per mile plus .075 per minute. If you wait in a drive thru line for 30 minutes you’re earning \$4.50 per hour before car expenses. The X rate is a joke and not worth your time. You can deduct \$.54 per mile before you show any taxable income and that includes your unpaid miles between rides. At base rate you will show zero taxable income because you don’t have any to tax. Drive only surge, boost or XL, or just stay home.”¹⁵⁷

“[E]xperience uber after your honey moon period. at first you will get great trips, Uber then filters rides to keep people at a certain hourly rate.”¹⁵⁸

“You stated that you want to ‘make’ a couple hundred bux a week. What is your definition of making money? Is it only what you take home? Or, is it what you take home after expenses? If you don’t mind spending \$300 to ‘make’ \$200 then yer good. If that idea poses a problem for you, maybe you can see why the drivers complain.”¹⁵⁹

“\$100.00/day for UberEats is what I shoot for but usually get tired by \$75 and that is not all day. If \$100.00/week is all you want then it is definitely doable. But some people want to do this to pay the rent.”¹⁶⁰

“If you want to make \$200/wk expect to put about 15-20 hours into it. That’s earnings before expenses, gas, taxes, etc. At least you have a good car to keep the mileage cost down. XL gets paid double but the Prius can’t do XL so it’s irrelevant, and it’s not worth getting an XL-qualified vehicle because X to XL ratio will be about 7 to 1, unless you do only XL, which just means you’ll be spending a lot of time reading books in parking lots and making less per hour. You would be better off doing 4 hours of driving during prime time 4 days a week, rather than 2 days at 8 hours.

157. @Doughie, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 6, 2018, 12:30 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

158. @fusionuber, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 6, 2018, 12:52 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

159. @Gov Moonbeam, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 6, 2018, 1:42 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

160. @columbuscatlady, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 6, 2018, 1:53 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

There are long stretches in the day where demand is very low. Just from my personal experience.”¹⁶¹

“Dallas is far from the bottom paying market. There are places around the US with 25% lower per mile per minute rates and . . . higher expenses (gas being more expensive). So \$200 a week turns into \$140 for the same number of hours driven, and the same mileage. Then you have places that aren’t as busy as a top 10 city in the country in terms of population, they will get less fares per hour. So that \$140 turns into \$80, for the same number of hours. Then you have places that are more spread out than Dallas. That \$80 turns into \$75 because of higher number of empty miles. So . . . \$200 for the number of hours you work, might be closer to \$75 in podunk Tampa Florida for the same number of hours driven. These two places do not offer the same opportunities driving for uber.”¹⁶²

“In my market it’s so slow you REALLY have to hustle to make ‘decent’ money. I only need to make a few hundred \$ profit a week so it’s not too tough, but for the guys that need to pay the rent, buy groceries or pay the Uber-Rental, I can see how they would struggle. Although instead of complaining I wish they would look for a ‘real’ job instead.”¹⁶³

“Why is everyone complaining? Because they have been doing it, and know what’s really going on. Independent studies have confirmed that drivers are in the bottom 10% of earners, nationwide. The companies LIE to our faces. The companies DO NOT have our backs. I could go on and on, but that should be enuf right there to scare you off. I’m sure you don’t believe me (or the rest of the people trying to warn you), so go ahead and get signed up. And when you start to post some crap about Uber taking 40% of the fare, remember this conversation. Good luck!”¹⁶⁴

161. @henrygates, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 6:09 AM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

162. @Stevie The Magic Unicorn, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 7:02 AM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

163. @IERide, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 7:05 AM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

164. @Mista T, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 6:48 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

“I’ll give it to you straight forward. There is lots of ppl who complain for the following reasons: (1) short trips with no tips; (2) getting requests 20 minutes away only for it to turn out to be a dumb ride that pays under \$6 with no tip; (3) rude pax; (4) paying for gas (although you may not worry about it); (5) depreciation and dead miles. The list goes on. You have a great car to do this. It’s only after some mistakes made along the way will you find the best way to do this. Here’s some tips that may help you. (1) don’t accept pings behind you on a highway; (2) try to accept pings of pax 8 minutes away or less; (3) don’t cancel too much; (4) understand that acceptance rate & cancelation rate is reset after one week. In general, ppl complain bc they’re loosing money doing this gig. Trial & error will teach you the best ways for this. You pretty much have to train yourself.”¹⁶⁵

“A New Member: trying to get positive results for earning ‘extra cash’ and ‘Just drive a couple of days.’ LMAO. The truth is driving for Uber pays very little money. The drivers have accepted minimum wage conditions with maximum risk. Assuming you don’t work for Uber, which I’m assuming you do, don’t do it. One bad accident or incident with a passenger could make you regret the whole thing.”¹⁶⁶

“It’s as simple as this: If you want to do this as a part time gig to make some money, and can afford to just stop and go home on a slow night, this is for you. If you go into this out of necessity you will find nothing enjoyable about it. The fares, surges and passenger demand are never constant, thus why many here complain. Lastly, everyone here is your competition. They are fellow drivers looking for the same fares as you. They’re not going to say it’s all perfect because that would encourage you to be out more. By discouraging you saying ‘this sucks,’ your competition now has more fares if you decide to not do this, which = win for them.”¹⁶⁷

“It may seem like a lot of drivers on here complaining. But remember this – Actually only about 10 drivers on UP . . . each with 15 screen names posting to each other. About 1000 posters who

165. @rideshare2870, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 9:04 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

166. @Luber4.9, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 9:13 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

167. @nj2bos, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 10:30 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

don't drive and are just bored with life. 50 'New MEMBERS A WEEK' come in and post one stir the pot post for fun. And a few shills trolls and just for fun moderators who are also school crossing guards."¹⁶⁸

"Firstly, I don't work for uBer for god's sakes. Let me guess, everyone who poses a question gets accused of this at some point lol. I do appreciate the responses from those that have offered their constructive insight. I guess what strikes me as odd is that all the nay-sayers I have seen are online. Of the few uBer drivers I have met in person (DC markets and Dallas markets), their outlook is not so grim."¹⁶⁹

"To be fair, whenever a pax asks me about Uber, I love it. People don't want to hear negativity. I don't really feel like creating negativity. Getting paid peanuts is bad enough. So it's more likely that the drivers you meet are lying for your benefit. Bottom line is that Uber pays drivers way below what the industry used to pay and the keep cutting the pay. Why would anyone be happy with that? Would you be happy with your company if they kept cutting your salary every year?"¹⁷⁰

iii. *Uber Pools*

Most Partners detest Uber Pool rides. One user, @Ribak, accepted a Pool request and discovered rider's destination only at pick up: the airport.¹⁷¹ The Partner asked the rider why he chose Pool for a ride to the airport to which the rider replied it saved him \$6.¹⁷² The Partner traveled twenty-four miles in thirty-one minutes and only earned \$28.79.¹⁷³ Partner @GammaRayBurst believes Pool pays significantly less than Uber X:

Do you guys cringe every single time you pick up somebody on Uber pool yes or no? I always cuss myself out every time I see it

168. @IthurstwhenIP, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 7, 2018, 10:45 PM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

169. @MaxReaver, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 8, 2018, 9:22 AM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

170. @henrygates, Comment to *Why is Everyone Complaining?*, UBERPEOPLE.NET (June 8, 2018, 9:26 AM), <https://uberpeople.net/threads/why-is-everyone-complaining.264790/>.

171. @Ribak, *Pool Request to Airport*, UBERPEOPLE.NET (Dec. 14, 2017, 11:49 AM), <https://uberpeople.net/threads/pool-request-to-airport.225693/>.

172. *Id.*

173. *Id.*

pop up uberpool I get so angry every time . . . they expect me to drive 20 to 25 miles at 5 p.m. in traffic or 3 miles and get paid willy nilly.¹⁷⁴

He now declines pool trips,¹⁷⁵ but @Robert Finnly saw his acceptance rate drop from ninety-six percent to sixty-five percent in two days for declining every pool request in the course of only two days.¹⁷⁶ Partner @The Gift of Fish says “only a fool does Pool.”¹⁷⁷ Others call Pool UberFool.¹⁷⁸ Partners believe they would earn twice as much on Uber X in the same time frame as earned on Pool:

On the Pool trip, the driver would have earned \$9.41 more, or 73% more money than the X trip. But the Pool trip would take him 53 minutes to complete instead of just 18 minutes on the X trip. That’s an additional 35 minutes, or 194% more time. For only 73% more money.¹⁷⁹

Partner @UberBlackNJ wants to know “whatever happened to Uber takes 20%?”¹⁸⁰ After Uber collected the service fee and booking fee for his pool ride, Uber collected 43% of his Pool ride.¹⁸¹ One member, @Yoze, replied, “Uber considers Drivers as slaves”¹⁸²

174. @GammaRayBurst, *I Dispise Uber POOL Let Me Explain*, UBERPEOPLE.NET (Feb. 9, 2018, 7:21 PM), <https://uberpeople.net/threads/i-dispise-uber-pool-let-me-explain.239430/>.

175. @GammaRayBurst, *To Pool or not to Pool*, UBERPEOPLE.NET (Feb. 15, 2018, 10:29 AM), <https://uberpeople.net/threads/to-pool-or-not-to-pool.240682/>.

176. @Robert finnly, *Say No to Uber Pool with Me!*, UBERPEOPLE.NET (Aug. 21, 2017, 11:57 AM), <https://uberpeople.net/threads/say-no-to-uber-pool-with-me.195247/>.

177. @The Gift of Fish, *This is Why You Don't Do Pool (or Line)*, UBERPEOPLE.NET (Feb. 3, 2018, 1:55 AM), <https://uberpeople.net/threads/this-is-why-you-dont-do-pool-or-line.237796/>.

178. @Mr.Belvedere, *Uberfool*, UBERPEOPLE.NET (Sept. 16, 2016, 3:47 AM), <https://uberpeople.net/threads/uberfool.104092/>.

179. @The Gift of Fish, *This is Why You Don't Do Pool (or Line)*, *supra* note 177.

180. @UberBlackNJ, *Uber Takes 43% on Pool Ride Today*, UBERPEOPLE.NET (June 21, 2017 3:28 AM), <https://uberpeople.net/threads/uber-takes-43-on-pool-ride-today.186150/>.

181. *Id.*

182. @Yoze, Comment to *Uber Takes 43% on Pool Ride Today*, UBERPEOPLE.NET (Jun. 21, 2017 12:03 PM), <https://uberpeople.net/threads/uber-takes-43-on-pool-ride-today.186150/>.

iv. Surge

During a surge, a time of day during which a high demand for rides exists, Uber charges riders a surge fee.¹⁸³ Typically, the surge fee is based on the level of demand and, at peak volume, surge fees may exponentially increase the regular fare price.¹⁸⁴ The increased demand could occur during rush hours or events, but often Partners do not know the reason why a surge occurs. For instance, in a Forum Post entitled “Uber’s New Cheat the Driver,”¹⁸⁵ one Partner, @joebo1963, reports the surge fee is not collected and distributed to Partners at the expected rate and expressed his frustration: “I accepted a fare at 1.9 surge, completed the ride but only received 1.1 surge. [Uber kept 90 percent of the surge fee]. I wrote Uber and called them twice, but they called it dynamic pricing.”¹⁸⁶ The adjusted McCormick Fare, including surge fee, would cost \$24–\$29, and a Partner should expect to receive \$19–\$23,¹⁸⁷ but if @joebo1963 performed the McCormick Fare and Uber only paid out 1.1 surge rate the partner would have only received \$14–\$16.

@joebo1963 further reported that Uber cited Partner frustration as a reason for keeping the larger surge fee, to which the Partner replied he “was going to now frustrate some riders and go online [for] some cancels.”¹⁸⁸ A cancellation fee counts as the fare, of which the driver receives 80%.¹⁸⁹ The cancellation amounts to an easy way to collect a quick fare to recoup the amount lost if Uber keeps the surge index. Thus, when a Partner cancels, Uber issues a \$5 standard cancellation fee to the rider, and the Partner makes a quick \$4. Of course, the rider may challenge the fee in their app and Uber

183. See *What is Surge?*, UBER, <https://help.uber.com/partners/article/what-is-surge?nodeId=e9375d5e-917b-4bc5-8142-23b89a440eec> (last visited Aug. 22, 2019) (explaining Surge is sometimes referred to as a multiplier, e.g., 1.9 surge would cost a user 1.9 times the normal rate).

184. See Alison Griswold, *Does Uber’s Surge Pricing Take Unfair Advantage of Drunk People?*, SLATE (Nov. 4, 2014), http://www.slate.com/blogs/moneybox/2014/11/04/uber_price_surging_on_halloween_does_it_take_unfair_advantage_of_drunk_people.html (explaining one twenty-minute ride on Halloween 2014 incurred a 9x surge and totaled \$362.57).

185. @joebo1963, *Uber’s New Cheat the Driver*, UBERPEOPLE.NET (Mar. 25, 2018, 8:59 AM), <https://uberpeople.net/threads/uber’s-new-cheat-the-driver.249588/>.

186. See *id.* (explaining further dynamic pricing is an economic principle wherein business vary the price of goods or services in response to which may increase a company’s sales or profit margin).

187. See *Uber Fare Estimator*, *supra* note 51 (assuming 80%).

188. See @joebo1963, *supra* note 185.

189. See *id.*

often, and without question, immediately credits the user's account \$5.¹⁹⁰ Drivers cannot control whether the app charges a cancellation fee, but if the driver cancels the ride and Uber receives \$5, but pays out \$4 to the driver, plus another \$5 to the rider, the company loses \$4 and the Partner of course gains \$4 in the end.¹⁹¹

Additionally, if Uber does not automatically rebook the trip and the rider is required to create a new ride request in the app, the rate may increase. Of course, riders may choose to either accept the higher fee and request a ride or decline the higher fee and secure an alternate form of transportation. Some riders use multiple ride hailing apps, and if a ride fare increases for one service, the requestor may be inclined to inquire and secure a ride using another ride service, causing Uber to lose much more than \$4. One member, @thegiftoffish, replied to @joebo1963 and suggested retaliation if Uber refuses to distribute the full surge price: "Just introduce dynamic ride length in retaliation. For example, take a pax 1, 2 or 3 miles towards their destination and [cancel the ride]. Just how far they'll go, nobody knows-it's dynamic! If Uber wants to pay Partners for half a trip, give a pax half a trip."¹⁹²

v. Long Distance Pickups

Uber, but not Lyft, implemented long distance pickup fees to cover Partners' costs incurred when driving an exceptional distance to pick up a rider. Partner @Seahawk3 says the fee has helped increase his profit margin.¹⁹³ Partner @excel2345 replied the absence of such fee on Lyft is a deal breaker for him because of his rural area.¹⁹⁴ However, sometimes the Partner barely breaks even.¹⁹⁵ Partner @thegiftoffish believes Uber shorted him nearly \$7 on a long-distance pickup fee:

I still had 13 miles and 24 minutes to go, and for this I should have been paid \$16.80 long distance pickup fee. But Uber only

190. *See generally Trip Issues and Refunds*, UBER, <https://help.uber.com/riders/section/trip-issues-and-refunds?nodeId=595d429d-21e4-4c75-b422-72affa33c5c8> (last visited Aug. 22, 2019).

191. *See generally How are Rider Cancellation Fees Charged*, UBER, <https://help.uber.com/riders/article/how-are-rider-cancellation-fees-charged-?nodeId=eebc0564-5228-4d70-997c-0fe63f0753c2> (last visited Aug. 22, 2019).

192. @TheGiftOfFish, comment to *Uber's New Cheat the Driver*, UBERPEOPLE.NET (Mar. 25, 2018), <https://uberpeople.net/threads/uber's-new-cheat-the-driver.249588/>.

193. @Seahawk3, *Lyft Needs Long Distant [sic] Pick Up Fees*, UBERPEOPLE.NET (Apr. 13, 2018, 5:08 AM), <https://uberpeople.net/threads/lyft-needs-long-distant-pick-up-fees.253987/>.

194. @Excel2345, comment to *Lyft Needs Long Distant [sic] Pick Up Fees*, UBERPEOPLE.NET (Apr. 13, 2018, 5:17 AM), <https://uberpeople.net/threads/lyft-needs-long-distant-pick-up-fees.253987/>.

195. *See id.*

paid me for 8.31 miles and 11.82 minutes; \$10.13 total. They shorted me \$6.57. Their hopelessly inaccurate initial estimate of 22 minutes caused them to overestimate the distance I should, according to them, have [traveled]¹⁹⁶

But @thegiftoffish¹⁹⁷ and @BroOlomide report Uber keeps a large chunk of the pickup costs:

For pickups from 0 Sec to 10 [minutes] - uber keeps 100 % of distance covered plus time taken up to 10 minutes fees collected. From [10 minutes] to arrival-Uber keeps 25% of distance covered from 10.01 plus time (from 10.01 till arrival) fee collected; driver keeps 75%. As usual, Uber's take is rolled into the so called "Service fee."¹⁹⁸

@BroOlomide declines rides if the pickup is slightly over 10 minutes,¹⁹⁹ and @excel2345 finds he barely breaks even.²⁰⁰

vi. Passenger issues

Rivaling compensation as a subject for driver grievances is passenger behavior. Uber Partners in Chicago, and other cities, cannot see a rider rating before accepting the ride request. User @ChicagoBlues states, at one time, Partners could see rider ratings, but this changed in mid-2016.²⁰¹ @ChicagoBlues indicates that he tweeted Uber to ask why he could no longer see rider ratings, calling it a safety issue: "I've had a couple of experiences with bad riders recently. Is there a reason we can't see rider ratings but they can see ours? I'm sure I'm not the first driver to deal with these difficult riders."²⁰² Uber replied that the feature was "removed due to rider discrimination."²⁰³ It is unclear whether Partners were leaving bad ratings for riders

196. @TheGiftOfFish, *Uber not Playing Fair with Long Distance Pickup Fees*, UBERPEOPLE.NET (Feb. 10, 2018 9:51 AM), <https://uberpeople.net/threads/uber-not-playing-fair-with-long-distance-pickup-fees.239534/>.

197. *See id.*

198. @BroOlomide, *Long Distance Fee Rip-off Explained*, UBERPEOPLE.NET (Feb. 2, 2018, 10:01 AM), <https://uberpeople.net/threads/long-distance-fee-rip-off-explained.237602/>.

199. *Id.*

200. *See* @Excel2345, *supra* note 194.

201. @ChicagoBlues, *The Dark Secret of Passenger Ratings*, UBERPEOPLE.NET (Aug. 16, 2016, 11:30 PM), <https://uberpeople.net/threads/the-dark-secret-of-passenger-ratings.97027/>.

202. *See id.*

203. *Id.*

based on protected characteristics such as race²⁰⁴ or if Partners were declining ride requests from low rated riders, but it is presumed the latter because @ChicagoBlues further stated, “[o]f course I discriminate low rated riders . . . shouldn’t we be able to discriminate based on low rider ratings . . . nobody wants a 4 star drunk in their car when the bars close.”²⁰⁵

@ChicagoBlues believes Uber does not “care about the driver safety. Just about the money.”²⁰⁶ @Unleaded cites fears of robbery and carjacking as safety issues.²⁰⁷ One rider offered the Partner \$500 for sex at the end of a ride.²⁰⁸ In May 2017, a rider killed an Uber Partner with a machete.²⁰⁹ Some drivers install dashcams in their vehicles, but the Partner pays for it.²¹⁰ Uber replied to @ChicagoBlues’s tweet by stating that they do an internal audit for low rated riders and remove them when necessary. But is this enough? @ChicagoBlues declares he may begin giving all riders one-star ratings to compel Uber to sufficiently address the issue.²¹¹

Some Uber drivers also install cameras in their cars to protect themselves against bad reviews and false accusations.²¹² Partner @Qbobo received a complaint that he was driving a vehicle other than the one registered in his Partner account.²¹³ Uber immediately deactivated his account and

204. See 42 U.S.C.A. § 2000e-2 (emphasizing how Title VII protects prospective employees from discrimination; the author merely references it for the list of discriminatory features).

205. @ChicagoBlues, *supra* note 201.

206. See *id.*

207. @Unleaded, *Crimes Against Uber Drivers Grim Reality*, UBERPEOPLE.NET (Feb. 26, 2018, 12:31 AM), <https://uberpeople.net/threads/crimes-against-uber-drivers-grim-reality.243074/#post-3660321>.

208. This video was once posted on YouTube but has since been removed. It was found at <https://www.youtube.com/watch?v=1ar3ww7KHbU&app=desktop2>. Unfortunately, the page was not archived in the Wayback Machine.

209. Grace Wong & Brian L. Cox, *Teen Girl Accused of Killing Uber Driver Asked to Provide Phone Password, DNA*, CHI. TRIB. (June 21, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-uber-driver-attacked-with-machete-court-met-20170621-story.html>.

210. See *Can I Use a Video Camera?*, UBER, <https://help.uber.com/partners/article/can-i-use-a-video-camera-?nodeId=efaad152-cbb6-45fe-9d7d-911842d21c8b> (last visited Aug. 22, 2019).

211. @ChicagoBlues, *supra* note 201.

212. Ryan is Driving, *I Drive for Uber – Here Are Some of My Crazy Adventures*, YOUTUBE (Aug. 24, 2016), <https://www.youtube.com/watch?v=pVOJ5ZfzjF8> (showing thirteen minutes of extraordinary dash cam footage in a video which has garnered nearly two million views).

213. @Qbobo, *Passenger False Complaint; Account Deactivation*, UBERPEOPLE.NET (Mar. 28, 2018, 5:59 PM), <https://uberpeople.net/threads/passenger-false-complaint-account-deactivation.250405/>

called the deactivation final.²¹⁴ The Partner attempted to vindicate himself by emailing pictures of the vehicle he drove on the day in question but Uber would not accept his story.²¹⁵ Partner @5231XDMA received a one-star rating from his rider.²¹⁶ The Partner maintains he greeted the rider with a “Hello Sir” and thanked and wished him a great day at the end of the ride, but the rider ignored him and rated him as unprofessional.²¹⁷ A rider accused @Chauffeurberg of driving while intoxicated.²¹⁸ Lyft deactivated @Luigi1892 for receiving too many low ratings, and like @Qbobo, Uber rendered a final decision in this instance.²¹⁹

Another Uber driver complaint is that the destination is not revealed to the Partner receiving the ride request. If a Partner accepts a request for the McCormick Fare, Uber does not reveal the destination until the Partner picks up the rider. @toubersonottouber wants to see the destination and estimated revenue prior to accepting the request.²²⁰

We should have the information Uber has prior to accepting . . . so that we can make a business decision as to whether or not we will accept it . . . I would prefer to take no rides which pay under \$8 as part of my business strategy. I should be able to do this, but Uber hides this information.²²¹

@toubersonottouber and others find this fundamentally unfair because it restricts their ability to control their business and, as a result, their earnings.²²² Moreover, drivers indicate Uber retains a larger percentage of short fares.²²³

214. *See id.*

215. *Id.*

216. @5231XDMA, *It Finally Happened to Me: A 1 Star and Complaint for Professionalism by an Entitled Rich Guy*, UBERPEOPLE.NET (Apr. 11, 2018, 6:22 PM), <https://uberpeople.net/threads/it-finally-happened-to-me-a-1-star-and-complaint-for-professionalism-by-an-entitled-rich-guy.253636/>.

217. *Id.*

218. @Chauffeurberg, *Falsely Reported for Impaired Driving!?*, UBERPEOPLE.NET (Mar. 25, 2018, 12:18 AM), <https://uberpeople.net/threads/falsely-reported-for-impaired-driving.151466/>.

219. *See* @Luigi1892, *Deactivated*, UBERPEOPLE.NET (Dec. 17, 2017, 11:12 AM), <https://uberpeople.net/threads/deactivated.226414/>.

220. @toubersonottouber, *We Should Be Allowed to See the Destination and Estimated Revenue Prior to Accepting the Ping!*, UBERPEOPLE.NET (Mar. 24, 2018, 9:57 AM), <https://uberpeople.net/threads/we-should-be-allowed-to-see-the-destination-and-estimated-revenue-prior-to-accepting-the-ping.249383/>.

221. *Id.*

222. *See id.*

223. *See* @Nuber-le, *We Should Be Allowed to See the Destination and Estimated Revenue Prior to Accepting the Ping!*, UBERPEOPLE.NET (Mar. 24, 2018, 11:02

@Nuber-le transported a passenger five blocks and earned only \$2.17 of a \$6 fare.²²⁴ @Nats121 believes Partners are poorly paid.²²⁵ @dirtylee said Uber and Lyft once shared destinations with Partners.²²⁶

b. AmazonFlex

The indeed.com message board for AmazonFlex²²⁷ showed many complaints highlighting:

- Rude, disrespectful warehouse personnel;
- Insufficient time to deliver all the packages;
- Often getting sent home without work because of insufficient packages during scheduled work block;
- Inability to earn sufficient compensation;
- Unreliable GPS software; and
- Inadequate on-road support.²²⁸

The overall tenor of the comments was positive, however, emphasizing working whenever the driver wants, being your own boss, and not having to pick up strangers.

You can make a decent living if you don't mind putting a couple hundred miles a day on your car, and dealing with a LOT of problems that should be fixed by now. I'll detail below:

App is wrong about 5% of the time. . . . I've had an hour of a 3 hr route WASTED because the app routed me 25 minutes AWAY from the correct location. The employees at the pickup are very hit or miss. . . . [t]he staff WOULD NOT HELP YOU. There'd be 10+ people talking to each other, eating donuts, listening to headphones, and ONE person actually working (putting 30-50+ drivers through)

AM), <https://uberpeople.net/threads/we-should-be-allowed-to-see-the-destination-and-estimated-revenue-prior-to-accepting-the-ping.249383/>.

224. *See id.*

225. @Nats121, comment to *We Should Be Allowed to See the Destination and Estimated Revenue Prior to Accepting the Ping!*, UBERPEOPLE.NET (Mar. 24, 2018, 11:48 AM), <https://uberpeople.net/threads/we-should-be-allowed-to-see-the-destination-and-estimated-revenue-prior-to-accepting-the-ping.249383/>.

226. @dirtylee, comment to *We Should Be Allowed to See the Destination and Estimated Revenue Prior to Accepting the Ping!*, UBERPEOPLE.NET (Mar. 24, 2018, 1:46 PM), <https://uberpeople.net/threads/we-should-be-allowed-to-see-the-destination-and-estimated-revenue-prior-to-accepting-the-ping.249383/>.

227. *See generally* Delivery Driver/Warehouse (Current Employee) – Indianapolis, IN, *Terrible Experience*, INDEED (July 29, 2018), <https://www.indeed.com/cmp/Amazon-Flex/reviews?fcountry=US&floc=Indianapolis%2C+IN>.

228. *Id.*

The app is UNFORGIVING about tardiness. Never mind the fact that you CAN'T start earlier than 15 mins beforehand. Never mind the fact that I've had to wait until MORE THAN AN HOUR after my route was supposed to start before, because the amazon employees were backed up and/or not doing their jobs. If you are 5 mins late, you lose the route, and wasted the drive (in my case 45mins) to the depot

The app breaks constantly. I've had it dump routes on me three times now. . . routes I was in the middle of

All in all, it's a mixed bag On avg, it probably works out to where I'm getting paid for my time from pickup @ the depot to my last drop-off . . . so as long as I don't have any undeliverables I must take back to the depot, the pay is fair. Once you take out the cost of gas, and travel time to and from the depot, you make around \$10–20/hr but you do put a ton of wear on your vehicle.²²⁹

c. *YouTube Posts*

Former driver Marc Freccero commented on his experience:

After driving for Uber & Lyft for a few years, doing hundreds of rides, I've officially stopped. While this is mostly due to my DJ/Music Production and Entrepreneurship career taking off, there are a lot of reasons why I started to become frustrated with Ridesharing. These reasons not only apply to Uber & Lyft, but just about any other ridesharing app as well. I do want to say that I like Uber & Lyft, and it really helped me balance time with other endeavors while driving.²³⁰

Marc Freccero's YouTube video identifies seven "things I am not especially fond of":

- (1) You do not make as much money as before—3 times less than the \$60 per hour I could make in Boston a couple of years ago, exacerbated by Lyft Line and Uber Pool;
- (2) Zero raises and no upward mobility; bonuses are the same for everybody; no credit for experience or longevity with Uber or Lyft;
- (3) "Taxes are a nightmare"; same as other independent contractor gigs; not like W-2 employment;

229. Flex Driver/Associate (Current Employee) – Philadelphia, PA, *Nice Pay If You Can Put Up with the MANY Drawbacks*, INDEED (Mar. 25, 2018), <https://www.indeed.com/cmp/Amazon-Flex/reviews?fcountry=ALL>.

230. Marc Freccero, *The 7 Reasons Why I STOPPED Driving for Uber & Lyft*, YOUTUBE (May 12, 2017), <https://www.youtube.com/watch?v=ZHCiIJfnt1c>.

-
- (4) You can't drive anytime; you can, but there are only four times when you can make a lot of money: 7–9 AM, 5–7 PM, Friday and Saturday nights, and Saturday and Sunday during the day; Friends that work 8-to-6 jobs and want to go out on Friday and Saturday nights can't make a lot of money; may not be worth it, considering gas, maintenance, and depreciation on your car;
 - (5) Call logistics, such as finding a place to go to the bathroom, eating, sitting for hours or days without being able to stand or stretch;
 - (6) Legal implications involving insurance, employer versus independent contractor, commercial plates, licenses;
 - (7) (the most frustrating thing) no pay for drive time to pickup, even if she cancels, despite modest cancellation fee of only \$5-10, much less than surge rate.

“It’s still a great way to supplement your income,” he says. His note to the video concludes with the links to sign up for Lyft and Uber.²³¹

d. Henry Campbell’s The Rideshare Guide

Uber and Lyft drivers have published a number of small books summarizing their experiences and offering tips to other Uber drivers. Harry Campbell’s *The Ride Share Guide*²³² is the most popular based on Amazon rankings. Campbell calculates average gross earnings as consistent with the author’s experience²³³ but ranging higher, probably because of his more effective and experienced pursuit of bonus opportunities, such as surge pricing.²³⁴ He reports moderate levels of satisfaction by drivers, who generally like Lyft better than Uber.²³⁵ He agrees with the author that driver support is weak from both enterprises²³⁶ and recommends dashcams to protect drivers from passenger misbehavior.²³⁷

231. *Id.*

232. HARRY CAMPBELL, *THE RIDE SHARE GUIDE* (2018); *see also* RICHARD GUTIERREZ, *DRIVING FOR UBER* (2017).

233. *See infra* Sec. III.D.1.f.

234. CAMPBELL, *supra* note 232, at 3 (showing table of gross earnings—not deducting fuel or maintenance—ranging from \$16.19 to \$33.16 per hour).

235. *Id.* at 4, 14–15 (reporting 75.8 percent of drivers satisfied with Lyft; 49.4 percent satisfied with Uber and stating generally Lyft has better relationship with drivers; Uber has better relationship with passengers).

236. *Id.* at 32–33 (reporting uneven driver support from both Uber and Lyft).

237. *Id.* at 26–27 (recommending purchase of dashcams).

e. Driver Interviews

The author convened a small focus group of Uber and Lyft drivers on April 15, 2018. Prompted by a list of some thirty-five questions, the drivers discussed their experiences. They saw little need for regulation of the relationship between drivers and the platforms. They expressed concern that almost any form of regulation would be likely to restrict the flexibility that drew them to Lyft and Uber in the first place. One of them said “you get out of it what you put into it.” The participants had little patience for the driver complaints on the message boards. They saw little role for collective bargaining. “Drivers easily can switch from Uber to Lyft and vice versa if they are unhappy, or qualify to drive a cab or do something else. The companies are quite responsive to driver concerns. They’ve changed a lot already in response to driver complaints and suggestions.”

The group talked about estimating turnover and realized that it’s made more difficult in the Uber and Lyft context because no one ever really quits. A driver may stop driving for an extended period of time—a year or more—and then go back to it. He does not get de-activated because of inactivity. He remains on the rolls as a driver but is not performing any service. They found the levels of earnings reasonable. They estimated they made about \$18 an hour when they worked hard, especially if they strategically earned bonuses and sought out surge pricing. An important limitation on surge pricing, however, is that the surge designation often disappears before a driver can get there, as other drivers rush to the area as well.

All of the participants drove part-time and viewed their TNP work as supplemental. Accordingly, the absence of benefits did not matter much. They did not expect benefits. On the other hand, they speculated that one would have to work really hard to earn a living wage driving full-time as the only source of employment. One of the participants, a young engineer, drove for forty hours at one point and found being confined in the car and stuck behind the wheel for so long physically taxing. “It would be desirable for drivers to be able to earn at least minimum wage, but you would have to restrict the number of drivers in order to achieve that.”

None of the participants were interested in driving for AmazonFlex, Domino’s, or Pizza Hut because those platforms would require them to commit in advance to substantial blocks of time and it was the flexibility of scheduling that drew them to the gig driver markets in the first place. None of the participants recalled any significant disputes with passengers. In one instance, a driver had to ask passengers to get out of his car because they had run him back-and-forth over a considerable distance trying to find a destination different from the address they had entered into the software. They offered no resistance and got out when he asked them to, although they were angry. “The software app is okay, but it occasionally sends me to the wrong address for pickup.”

The experience with accidents and insurance coverage was far less satisfactory. Two of the drivers had been involved in accidents. In one case, another driver broadsided the Uber vehicle at an intersection. In the other case,

a Lyft passenger opened the door into a bicyclist. The intersection accident was handled more smoothly than the bicyclist accident. In the case of the intersection accident, the Uber driver reported it to Uber's insurance carrier (James River), and the insurance covered vehicle repair, less the deductible. Whatever further controversy occurred did not require the involvement of the Uber driver. In the case of the bicyclist, however, the Lyft insurer initially took the position that it was not going to cover the claim; that the driver had to look towards her own private insurer. That insurer disclaimed coverage because the accident occurred while the insured was driving for Lyft and had a passenger in the car. It took many phone calls, emails, and the informal involvement of a lawyer friend for the Lyft carrier finally to concede coverage.

"My roommate had an accident," one of the other participants said, "and it was so much of a hassle to get Uber to let him substitute a rental car while his was being repaired that he gave up." "In ten years, there won't be any more Uber or Lyft drivers; all ride hailing vehicles will be self-driving," one participant said. Separately, a delivery person for Domino's told the author:

I drive for Domino's three times a week and occasionally for Uber. I make a lot more money driving for Domino's, because I make two dollars for every mile. It's only about \$.50 per mile for Uber. The thing about Uber is that it beats up your car. In order to make out with Uber you have to qualify for bonuses, but that means you have to drive during rush hour traffic in Chicago or at the airport at rush hour, and that is stressful.²³⁸

f. Author Experience Driving for Uber and Lyft

To collect data for this article, the author signed up to become both an Uber and Lyft driver in April 2018.²³⁹ Since qualifying, he has given a number of passenger rides on both services. When the driver logs out, the application asks if he is going home and wants a fare in the same direction. Initial Uber earnings for two trips were \$26.18, or about \$13.00 per hour plus a \$20.00 tip. The author was logged in from 9 AM to just before 11 AM, performing other functions inside, while waiting for a ride order.

The Lyft software and driver support are significantly better than the Uber software and support. The author sent several questions to the Uber driver support link and typically had to wait a day or more for an answer. He once responded to a promotion seeking a delivery driver and was told that he would receive an email, which never came. Subsequently, he was asked to confirm his agreement with a delivery driver agreement. A week later he still had received nothing further to enable him to begin deliveries. Uber's software also has many blind alleys in its navigation alternatives. The Uber

238. Conversation between author and anonymous Domino's delivery driver, about forty-five years old, Apr. 13, 2018 5:05 PM.

239. See *infra* Section II.A (describing author's signup experience).

app is quite slow to calculate earnings and update time online. For instance, the author gave a ride to a customer at about 3:30 on a Sunday afternoon and it took more than an hour for the trip to be reflected on his earnings and on-duty summary. The app screen is cluttered with promotions that take up half the screen.

Lyft, on the other hand, responded within an hour to a question regarding a glitch in Lyft's software. This arose due to a message notifying him to get his car inspected, but there were no inspectors available in his region—Chicago! But he had his car inspected just two days earlier, uploaded the inspection form, and received an automated acknowledgement that the inspection was complete. The response to his query confirmed that the inspection part of the activation process was complete. While driver support functions exist for both services, communications for driver support personnel are robotic and generally unresponsive to specific driver issues.²⁴⁰ They offer several emails, text messages, and pop-up notifications in the apps each day, which focus on tips for increasing earnings. Both services have driver advisory councils, with a representative selected regionally, and both make a big show of modifying policies and their apps to respond to driver requests and concerns.²⁴¹ Both apps are excellent in the ways in which they connect drivers with passengers, assist drivers in navigating to pick up spots and destinations, and advise drivers of their earnings for each ride. Both are somewhat clumsier in facilitating direct driver-to-passenger communications, such as when a driver and passenger cannot find each other for a pickup.

The basic compensation structure is generally fair and transparent. It compensates drivers for excessive wait times and compensates them even when a passenger cancels a trip.²⁴² Even without chasing bonuses or surge pricing, the author was consistently able to earn about \$15.00 per hour while on-duty by driving sporadically, mostly at non-rush-hour times.²⁴³ Despite his infrequent and irregular driving, the author experienced no adverse actions or communications from either Uber or Lyft. Uber sent a number of messages encouraging more driving, which might be occasioned by the author's sparse record, but these messages are purely in the form of inducements

240. In one case, the author inquired about non-receipt of the Uber trade dress; in another instance, he raised a question about inconsistent display of passenger names in the Lyft Driver application.

241. Christian Perea, *Lyft's Driver Advisory Council Is Helping Lyft Build Better Things For Drivers*, THE RIDESHARE GUY (May 18, 2018) <https://therideshareguy.com/lyfts-driver-advisory-council-is-helping-lyft-build-better-things-for-drivers/>; *Building Together in 2018*, UBER <https://www.uber.com/us/en/c/180-days/feedback-and-improvement/> (last visited Aug. 22, 2019).

242. *How are Rider Cancellation Fees Charged?*, UBER HELP, <https://help.uber.com/partners/article/how-are-rider-cancellation-fees-charged-?nodeId=eabc0564-5228-4d70-997c-0fe63f0753c2> (last visited Aug. 22, 2019).

243. This rate includes wait and searching times; the rate per hour when carrying passengers is higher. See *Uber Fare Estimator*, *supra* note 51.

to drive more rather than threats. The author, who is not only a helicopter and airplane pilot but also a skilled driver, found that he drove especially carefully, more vigilant than usual about speed limit and another traffic regulations, when he had passengers in the car. He did not want to create anxiety in any passenger. He also expected that law-enforcement officers target ride-hailing vehicles, especially within the city limits of Chicago where the city government has generally been hostile to Uber and Lyft.²⁴⁴

2. Conflicts Between Workers and Customers

Conflicts with customers are an important source of driver grievance, and as the empirical evidence synthesized in this subsection will reveal, gig platforms like Uber and Lyft that link workers and customers directly are vulnerable to these types of grievances. Viewing such grievances as evidence of misallocation of resources or inequitable distribution of wealth is perilous. However, favoring drivers tilts the playing field against passengers and vice versa. Both drivers and passengers have claims for consideration by regulators.²⁴⁵ Branding and protecting the brand, moreover, are important parts of the business model. Passengers are willing to summon Uber or Lyft because they believe the software will succeed in summoning a vehicle. They believe that they will not be endangered or cheated by the driver. This is possible because Uber and Lyft maintain reputations in the consumer community and they have internal procedures which ensure their drivers fulfill customer expectations.²⁴⁶ These processes help the companies maintain and reinforce their reputations. The success of most enterprises depends on keeping their customers happy.

Customer satisfaction is more nuanced and subjective in service industries than in tangible-product industries. If a bolt of cloth or length of steel rail is defective, that fact can be determined without much ambiguity. But when the product is a haircut or a ride from point to point in urban traffic, whether the job has been performed satisfactorily is more contestable.

Consumers would prefer to deal with an enterprise where “the customer is always right.”²⁴⁷ An enterprise that takes the side of its personnel against that of its customers is less attractive in the market. This presents a particular dilemma for service enterprises that serve consumers. Delivery of a service

244. Jason Knowles & Ann Pistone, *Chicago Traffic Jams Caused by Rideshare Rule Breakers; City Cracks Down with Tickets*, ABC, INC. (May 23, 2018), <https://abc7chicago.com/automotive/chicago-traffic-jams-caused-by-rideshare-rule-breakers;-city-cracks-down-with-tickets/3514361/>.

245. *See Uber Community Guidelines*, UBER LEGAL, <https://www.uber.com/legal/community-guidelines/us-can-en/> (last visited Aug. 22, 2019).

246. *See id.*

247. Blake Morgan, *A Global View Of 'The Customer Is Always Right'*, FORBES (Sept. 24, 2018), <https://www.forbes.com/sites/blakemorgan/2018/09/24/a-global-view-of-the-customer-is-always-right/#4ffc3d3e236f>.

rather than a tangible product opens up the possibility of more ambiguous claims of dissatisfaction than would be credible with a tangible product. That consumers are the buyers rather than other businesses generally means smaller transactions, which in turn means lower tolerance for more elaborate dispute resolution protocols. At the same time, however, an enterprise for whom the consumer is always right may have difficulty obtaining and motivating personnel to serve its customers, as the analysis of TNP driver grievances indicated.²⁴⁸ Even if workers are willing to affiliate with the enterprise, they may engage in a variety of guerrilla tactics that alienate customers. Many of the driver comments, quoted in the subsection on driver forum and blog posts, indicate driver threats to engage in such behavior.²⁴⁹ Some of the threats are, no doubt, carried out.

A steel rolling mill operative's attitude toward customers does not matter much because layers of marketing and sales personnel intervene between the making of the product and the interface with the customer. When the product is a haircut, a ride, or physical therapy, a worker providing these services *is* the face of the enterprise to the customer; the enterprise has no identity, except for the worker. Accordingly, in service industries, which now make up about 80% of the American economy,²⁵⁰ customer dissatisfaction is indistinguishable from dissatisfaction focused on the worker. If the company always sides with its employee, it will damage its reputation in the consumer community. If the company always sides with the customer, it will undermine employee relations. This creates a dilemma for ride-hailing services and encourages implementation of dispute resolution procedures that are perceived by both sides as being fair and convenient. Company trials—quasi-lawsuit proceedings—may be used to resolve factual disputes, like they were used in passenger railroading at its heyday.²⁵¹ An employee who contests a customer's version of the facts is likely to want exactly that, something resembling collectively bargained arbitration preceded by a trial type proceeding before a company officer.

On the other hand, a customer filing a complaint is unlikely to be mollified by hearing that he must appear somewhere at a company hearing and present evidence. Driver complaints show that current procedures are not sufficiently transparent to be perceived as fair by drivers.²⁵² Some drivers allege

248. *See supra* Sec. III.D.1.

249. *See Uber Driver Forum*, UBERPEOPLE.NET, <https://uberpeople.net/> (last visited Aug. 22, 2019).

250. John Ward, *The Services Sector: How Best to Measure It?*, INT'L TRADE ADMIN., <https://2016.trade.gov/publications/ita-newsletter/1010/services-sector-how-best-to-measure-it.asp> (last updated Jan. 19, 2017).

251. *See Feldleit v. Long Island R.R.*, 723 F. Supp. 892, 894 (E.D.N.Y. 1989) (summarizing details of company trial by railroad).

252. *See Chris Coffey, Rideshare Drivers Fight Back Against 'Bogus' Rider Complaints*, NBCUNIVERSAL (Mar. 13, 2019), <https://www.nbcchicago.com/investi->

that the TNPs refuse to disclose the details of a passenger complaint, although notice is a fundamental starting point for any system providing due process.²⁵³ Others claim TNPs regularly refuse to believe driver-submitted evidence.²⁵⁴ The criticisms are unlikely to be resolved by tweaking the investigatory and disciplinary systems. Experience shows that losers of adjudications complain about process.

An interesting possibility worthy of further consideration, however, is to equip workplaces where workers interact with customers with video cameras, as suggested in Section IV.G.²⁵⁵ Then, if disputes arise as to what actually happened between customer and worker, the video recording will help resolve the dispute. Any such proposal will likely be met by an outcry over the invasion of privacy. But it is hard to understand a customer's claim of an expectation of privacy when he gets into a vehicle with a driver whom he does not know and who has no obligation to keep what he hears or observes private. Similarly, it is hard to understand how a driver has any expectation of privacy from a customer who has a plain view of him and is under no obligation to keep the details of the ride private.

3. Psychology of Feeling Mistreated

Just because workers complain does not mean that the law should force a change in their objective work conditions. Complaining about one's boss and one's job is a common way of dealing with inevitable minor sources of stress. Professors Boswell and Olsen-Buchanan explored feelings of mistreatment at work.²⁵⁶ They studied the relationship between these feelings and the filing of grievances, along with two kinds of withdrawal.²⁵⁷ The types of withdrawal include: considering leaving the employer (exit-related withdrawal) and on-the-job alienation (work withdrawal) such as tardiness, absenteeism, shirking, making excuses to go somewhere to get out of work, unfocused attention, and skipping meetings.²⁵⁸ The investigators controlled for organizational loyalty and supervisor support, tending to isolate the effect of perceived mistreatment.²⁵⁹

[gations/Rideshare-Drivers-Fight-Back-Against-Bogus-Rider-Complaints-507122491.html](https://www.federalregister.gov/documents/2019/05/01/gagings/Rideshare-Drivers-Fight-Back-Against-Bogus-Rider-Complaints-507122491.html).

253. *See id.*

254. *See id.*

255. *See infra* Section IV.G.

256. Wendy R. Boswell & Julie B. Olsen-Buchanan, *Experiencing Mistreatment at Work: The Role of Grievance Filing, Nature of Mistreatment, and Employee Withdrawal*, 47 *ACAD. OF MGT. J.* 129, 133 (2004).

257. *Id.*

258. *Id.*

259. *Id.* at 136.

Generally, the investigators found that feeling mistreated had a statistically significant association with exit-related withdrawal.²⁶⁰ The investigators classified types of mistreatment generally into personalized and policy-related mistreatment. Within the policy-related group were claims of unfair hiring processes, demotion in rank, and rebukes for improper attire.²⁶¹ Examples of personalized mistreatment included being disliked by supervisor, being accused of taking sick leave without being sick, and open embarrassment. Generally, these types of mistreatment are captured by the colloquialism “being disrespected.”²⁶²

Employees who experienced personalized mistreatment were more likely to engage in work withdrawal behavior than employees reporting policy-related mistreatment or those reporting no mistreatment.²⁶³ Employees experiencing policy related mistreatment were more likely to engage in exit-related withdrawal.²⁶⁴ The personalized and policy related mistreatment groups did not differ in their levels of exit-related withdrawal; in other words, mistreatment generally, regardless of its nature, correlated with exit-related withdrawal.²⁶⁵ The study concluded that the availability of grievance mechanisms had no statistically significant effect on withdrawal behavior.²⁶⁶ The conclusion is that grievance systems do not significantly help in promoting employee satisfaction.²⁶⁷ That suggests that TNP enterprises will benefit little from investing energy in improved grievance handling systems. On the other hand, the tendency of unhappy drivers to exit, and the ease of doing so, means that the problem tends to be self-correcting.

IV. REGULATORY ALTERNATIVES

A. Supply and Demand

Debate over supply and demand in labor markets is an old one. Opponents of each new proposal for regulating labor markets have warned that driving up the price of labor will reduce demand for workers and lead to unemployment.²⁶⁸ They also argued that restricting the terms on which some-

260. *Id.* at 134.

261. *Id.* at 133.

262. Boswell & Olsen-Buchanan, *supra* note 258, at 133.

263. *Id.* at 136.

264. *Id.*

265. *Id.* at 135.

266. *Id.* at 134.

267. *Id.*

268. Cary Coglianese, *Regulation and Unemployment*, WHARTON U. PENN., <https://publicpolicy.wharton.upenn.edu/issue-brief/v1n3.php> (last visited Aug. 22, 2019).

one may work interferes with individual freedom to contract.²⁶⁹ Despite these warnings, governments have consistently, though sporadically, intervened to set floors under the terms and conditions of employment.²⁷⁰ Society prospers, despite these regulatory interventions.²⁷¹ Almost always, legally prescribed labor standards have been limited to statutory employees; workers classified as independent contractors have been left to fend for themselves.²⁷² Critics of gig labor markets argue minimum worker standards are part of the overall Social Compact, and that leaving people to fend for themselves is immoral.²⁷³

A couple of underlying phenomena define how a regulated market will operate. Mandating that Uber drivers earn minimum compensation will reduce the overall demand for Uber drivers.²⁷⁴ Either the platform providers cannot earn an acceptable rate of return on their investment by having the same number of drivers while paying them more, or passengers will use other alternatives when they are forced to pay more for Uber.²⁷⁵ Increasing compensation indirectly, by restricting the supply of drivers,²⁷⁶ will directly deprive some job seekers of work until a vacancy occurs. The effect is the government saying to a potential worker, “I don’t care what you find as an acceptable wage level; its’s not good for you to work for less than the minimum, and we are not going to let you do it.”

B. State and Municipal Responses

The most significant variables in distinguishing the various regulatory schemes are:

269. See *Should the Federal Minimum Wage be Increased?*, PROCON.ORG (Aug. 25, 2015), <https://minimum-wage.procon.org/>.

270. *Summary of the Major Laws of the Department of Labor*, U.S. DEPT. LABOR, <https://www.dol.gov/general/aboutdol/majorlaws> (last visited Mar. 28, 2019).

271. See Graham Boone, *Labor Law Highlights, 1915–2015*, MONTHLY LABOR REV. (Oct. 2015), <https://www.bls.gov/opub/mlr/2015/article/pdf/labor-law-highlights-1915-2015.pdf>.

272. See *Summary of the Major Laws of the Department of Labor*, *supra* note 272.

273. See Thomas Kochan, *Wages and the Social Contract*, AM. PROSPECT (Apr. 22, 2007), <https://prospect.org/article/wages-and-social-contract>.

274. See Alison Griswold, *Simple Economics Explain Why Driving for Uber Will Never be a Great Job*, QUARTZ (Nov. 14, 2017), <https://qz.com/1129367/driving-for-uber-will-never-be-a-great-job-thanks-to-these-simple-economics/>.

275. *Id.*

276. The law can restrict the supply of drivers either by limiting the numbers who can be registered in a platform’s network, by limiting the numbers who can receive mandatory licenses from the governing entity, or by restricting the numbers of vehicles. Control of the supply of taxicabs traditionally has been effected by limiting the numbers of vehicles. See Hannah A. Posen, *Note, Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber?*, 101 IOWA L. REV. 405, 409 (2016).

-
- Requirements for minimum levels of compensation;
 - Regulation of supply – perhaps the most important variable defining taxi regulation;
 - Insurance requirements;
 - Requirements for a higher level of driver’s license; and
 - Higher intensity background checks.²⁷⁷

Most detailed ride-hailing regulation occurs at the municipal level, as an extension of the tradition that cities regulate taxicabs.²⁷⁸ Some states have enacted legislation directly regulating the industry, or explicitly setting the terms under which municipalities can regulate it. The following subsections consider both state and municipal regulation in each of the enumerated states.

1. New York

New York City has some of the most stringent regulations in the country for ride-hailing services, which give rise to for-profit intermediaries to help drivers navigate the regulatory thicket for licenses, vehicles, and insurance.²⁷⁹ New York City is actively considering a minimum wage requirement for Uber and Lyft drivers, which would result in a pay floor equivalent to \$15.00 per hour.²⁸⁰ Despite reports that imposition of the requirement was imminent, the de Blasio administration pulled back and claimed the proposal was under review, along with others to benefit ride-hailing drivers.²⁸¹ The proposal was touted as help for yellow cab drivers by the head of the taxi commission and a proponent of the proposal: “Help for yellow drivers is a

277. See Robert Hahn & Robert Metcalfe, *The Ridesharing Revolution: Economic Survey and Synthesis*, Brookings, BROOKINGS (Jan. 10, 2017), <https://www.brookings.edu/wp-content/uploads/2017/01/ridesharing-oup-1117-v6-brookings1.pdf>.

278. See Leigh Anne Schriever, *Uber and Lyft Lobby Their Way to Deregulation and Preemption*, REGULATORY REV. (June 28, 2018), <https://www.theregview.org/2018/06/28/schriever-uber-lyft-lobby-deregulation-preemption/>.

279. Emma G. Fitzsimmons & Noam Scheiber, *New York City Considers New Pay Rules for Uber Drivers*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/nyregion/uber-drivers-pay-nyc.html>.

280. “If a driver’s earnings fall below \$17.22 per hour over the course of a week, the companies would be required to make up the difference.” *Id.*

281. Dana Rubenstein, *Report Advocating a Minimum Wage for Uber Drivers Sparks Confusion in De Blasio Administration*, POLITICO (July 2, 2018), <https://www.politico.com/states/new-york/albany/story/2018/07/02/report-advocating-a-minimum-wage-for-uber-drivers-sparks-confusion-in-de-blasio-administration-496359>.

big focus of ours right now.”²⁸² New York City is also considering, for the second time, a limit on the number of ride-hailing vehicles in the city.²⁸³

2. Colorado

Colorado was one of the first states to adopt regulations specifically for TNCs.²⁸⁴ Its regulations, promulgated by the state public utilities commission, are intended to encourage Uber, Lyft, and other such platforms to operate in Denver and other cities in the state.²⁸⁵

3. Massachusetts

On August 5, 2016, Massachusetts Governor Charlie Baker approved a statute enacted by the Massachusetts General Court (the legislature)²⁸⁶ as a compromise between the positions of Uber and Lyft and the positions of the taxicab medallion holders.²⁸⁷

4. Georgia

The Georgia General Assembly adopted House Bill 225 in September 2016.²⁸⁸ The bill “creates a new framework that allows [Uber and Lyft] to grow with light regulation and common-sense policies.”²⁸⁹ It requires ride-

282. *Id.*

283. Emma G. Fitzsimmons & William Neuman, *This Time It's Uber's Turn to Wage an Uphill Battle*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/27/nyregion/uber-nyc-cap-city-council.html> (reviewing politics of proposal for a one-year moratorium on new Uber and Lyft licenses quoting Mayor de Blasio and Council speaker Johnson as supporting it).

284. See Niraj Chokshi, *Colorado Expected to Pass the First State Law Regulating UberX and Lyft*, WASH. POST (May 20, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/20/colorado-expected-to-pass-the-first-state-law-regulating-uber-and-lyft/?utm_term=.60362574303f.

285. *Regulation of Carrier Services and Transportation Network Companies*, LEG. COUNCIL STAFF 2, table 1 (Jan. 9, 2017) (citing Section 40-1-102(3) C.R.S.; 4 C.C.R. 723-6 (6208–6215), https://leg.colorado.gov/sites/default/files/17update_memo_on_regulation_of_carrier_service_and_tncs.pdf (comparing levels of PUC oversight for taxis, other common carriers, and TNCs)).

286. H.R. 4570, 190th Gen. Court of the Commonwealth of Mass. (2015–2016).

287. See Shira Schoenberg, *Gov. Charles Baker Signs Law Regulating Uber and Lyft In Massachusetts*, MASS. LIVE (Aug. 5, 2016), http://www.masslive.com/politics/index.ssf/2016/08/gov_charlie_baker_signs_law_regulating_uber_and_lyft_in_massachusetts.html.

288. 40 GA. CODE ANN. §§ 40-1-190–40-1-200 (2015).

289. Janel Davis, *Georgia Senate Passes Bill Regulating Uber, Lyft*, ATL. J. CONST. (Sept. 24, 2016), <https://www.ajc.com/news/state—regional-govt—politics/georgia-senate-passes-bill-regulating-uber-lyft/tHXGqEKw5CyWqrJv4duijl/> (quoting senate sponsor Brandon Beach).

hailing services to register with the Department of Public Safety, for a fee not exceeding \$100.00.²⁹⁰ Registered services must maintain a list of drivers within their networks,²⁹¹ provide state insurance coverage,²⁹² and provide drivers with digital information available on their smart phones. Drivers must make this information available to a law enforcement officer who has “reasonable suspicion” of improper operation.²⁹³ The bill preempts municipal regulation.²⁹⁴ It requires background checks of drivers, but allows the ride-hailing service to obtain them based on information provided by the driver.²⁹⁵ It also requires proof of liability insurance.²⁹⁶ The Georgia Supreme Court upheld the statute in *Abramyan v. State of Georgia*²⁹⁷ against claims by taxi medallion owners that the lighter regulation of ride-hailing programs constituted a taking and inverse condemnation of their property interest in their medallions.²⁹⁸ The case engendered little sympathy among lawmakers.²⁹⁹

5. Pennsylvania

The Pennsylvania General Assembly enacted Senate Bill 984 in 2016 to regulate TNCs.³⁰⁰ The statute empowers the parking authorities of cities of the first class (which includes only Philadelphia) to regulate TNCs.³⁰¹ TNCs must be registered, for a fee of \$50,000.00. It imposes insurance requirements on TNC drivers, or on TNCs “on the driver’s behalf,” that meet speci-

290. 40 GA. CODE ANN. § 40-1-90–40-1-200 (2015).

291. *Id.* § 40-1-193(b).

292. *Id.* § 40-1-193(c)(4).

293. *Id.* § 40-1-193(d).

294. *Abramyan v. State of Georgia*, 800 S.E.2d 366, 367–68 (Ga. 2017) (noting statutory preemption of local regulation).

295. 40 GA. CODE ANN. § 40-5-39(e).

296. *Id.* § 40-5-39(e)(4)(F).

297. *Abramyan*, 800 S.E.2d at 369 n.3 (citing *Minneapolis Taxi Owners Coalition*, 572 F.3d 502, 509 (II)(A) (8th Cir. 2009); *Ill. Transp. Trade Ass’n v. City of Chi.*, 839 F.3d 594, 596–97 (7th Cir. 2016)).

298. *Id.* at 367 (describing claims).

299. “I don’t know what the hell they’ve got to sue for. We didn’t take anything. If their medallions lost value, it is because of an outdated system.” Nick Sibilla, *Georgia Supreme Court Rules Taxis Must Compete With Uber, Have No Right to an ‘Unalterable Monopoly’*, INST. FOR JUSTICE (May 18, 2017), <https://www.forbes.com/sites/instituteofjustice/2017/05/18/georgia-supreme-court-rules-taxis-must-compete-with-uber-have-no-right-to-an-unalterable-monopoly/2/#23025c707264> (quoting state representative Alan Powell).

300. Act of Nov. 4, 2016, Pub. L. 1222, No. 164, Sess. of 2016, No. 2016-164, codified in 53 Pa. C.S.A. § 5701 (definitions), §§ 57A01–57A22 (chap. 57A—Transportation Network Companies).

301. *Id.* § 57A03 (giving parking authority jurisdiction to issue TNC licenses).

fied coverage limits.³⁰² It limits TNC vehicles to those less than ten model years old³⁰³ and requires regular vehicle inspection, plus random inspection of vehicles based on levels of use.³⁰⁴ It prohibits the authority from requiring a driver's license separate from the individual's driver's license.³⁰⁵ It requires TNCs to obtain background checks³⁰⁶ and to issue digital driver credentials.³⁰⁷ General authorization to operate as a TNC or a TNC driver does not extend to the airport³⁰⁸ or to the Amtrak station.³⁰⁹ One year after enactment, intense controversy continues over the content of the regulation.³¹⁰

6. San Francisco

Uber and Lyft are regulated at the state level by the California Public Utilities Commission, while taxis are regulated by cities or counties.³¹¹ The California Public Utilities Commission (CPUC) oversees statewide policies for TNCs and is currently engaged in Phase III of a rulemaking process to refine regulations for these companies.³¹² In addition to existing state regulations, there are local business registration requirements and airport permit requirements in place in San Francisco.³¹³ It has been estimated that as many as 45,000 TNC drivers may operate in San Francisco.³¹⁴

302. *Id.* § 57A07.

303. *Id.* § 57A08(a).

304. *Id.* § 57A09.

305. *Id.* § 57A12(a).

306. 53 Pa. C.S.A. § 57A12(c).

307. *Id.* § 57A15.

308. *Id.* § 57A16(n).

309. *Id.* § 57A16(o).

310. See Jason Laughlin, *Philly's For-Hire Drivers Vent Their Rage About Uber and Lyft, But Fixes Not Likely*, PHIL. INQUIRER (Sept. 1, 2017), <http://www.philly.com/philly/business/transportation/ppa-uber-lyft-regulate-20170831.html> (noting controversy over further regulation of ride-hailing services by Philadelphia Parking Authority).

311. Adopting Rules and Regulations to Protect Safety While Allowing New Entrants to the Transportation Industry, Decision 13-09-045, at 65, 71 (Cal. Pub. Util. Comm'n Sept. 19, 2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.pdf>.

312. S.F. CTY. TRANSP. AUTH., THE TNC REGULATORY LANDSCAPE: AN OVERVIEW OF CURRENT TNC REGULATION IN CALIFORNIA AND ACROSS THE COUNTRY I (2017), https://www.sfcta.org/sites/default/files/content/Planning/TNCs/TNC_regulatory_020218.pdf.

313. *Id.*

314. *Id.* at 9.

TNCs are required to complete national criminal background checks of all prospective drivers.³¹⁵ They must exclude any drivers who have been convicted within the past seven years of driving under the influence of drugs or alcohol, fraud, sexual offenses, use of a motor vehicle to commit a felony, theft, or acts of terror.³¹⁶ In California, each vehicle must undergo a nineteen-point vehicle inspection before service annually or every 50,000 miles.³¹⁷ TNCs must establish a driver training program to ensure that drivers are safely operating their vehicles prior to offering service,³¹⁸ and drivers are allowed to drive a maximum of ten hours, which resets after an eight-hour rest period.³¹⁹ TNCs in California are required to maintain commercial liability insurance policies, providing not less than \$1 million per-incident coverage, for incidents involving vehicles and drivers while they are providing TNC services.³²⁰ TNC drivers are required to provide proof of the TNC's commercial insurance in the event of a collision.³²¹ On October 4, 2017, the CPUC issued a proposed decision declining to require TNCs to conduct fingerprint (biometric) criminal background checks for its drivers.³²²

San Francisco city law requires TNC drivers operating in San Francisco to obtain a local business license.³²³ All businesses, including TNC drivers, are required to renew the Business Registration Certificates annually and pay a tax (\$91.00 for drivers with \$100,000 or less in San Francisco gross receipts) if they expect to drive on San Francisco streets for seven or more days that year.³²⁴ Furthermore, San Francisco International Airport (SFO) issues

315. CAL. PUB. UTIL. CODE § 5445.2(a)(1) (West Supp. 2019).

316. Phase III.B. Issue: Criminal Background for Transp. Network Co. Drivers, Decision 17-11-010, at 13 (Cal. Pub. Util. Comm'n Nov. 9, 2017), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M199/K073/199073743.pdf>.

317. Phase II Issues and Reserving Additional Issues for Resolution in Phase III, Decision 16-04-041, at 55 (Cal. Pub. Util. Comm'n Apr. 21, 2016), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M161/K474/161474505.pdf>.

318. THE TNC REGULATORY LANDSCAPE, *supra* note 314, at 4.

319. *Id.* at 6.

320. *Phase II Issues*, Decision 16-04-041, at 56.

321. CAL. PUB. UTIL. CODE § 5442 (West Supp. 2019).

322. THE TNC REGULATORY LANDSCAPE, *supra* note 314, at 3.

323. *Id.* at 1 n.3 (“Most state constitutions permit local jurisdictions to develop their own regulatory ordinances in areas where state and federal governments have not explicitly established exclusive regulatory power, provided that those ordinances do not conflict with state or federal laws.”).

324. See S.F., CAL., BUS. & TAX REGULATIONS CODE art. 6, § 6.2-12(h) (2018), [http://library.amlegal.com/nxt/gateway.dll/California/business/businessandtaxregulationscode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://library.amlegal.com/nxt/gateway.dll/California/business/businessandtaxregulationscode?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1); art. 8, §§ 853(a), 855(e)(1), 856.

permits to TNCs that provide transportation services at the airport.³²⁵ SFO was one of the first airports in the country to create an airport permit process for TNCs.³²⁶ To operate at SFO, TNCs must: (1) receive a permit from the CPUC; (2) apply for and obtain an Airport operating permit; and (3) comply with all CPUC and SFO Rules and Regulations.³²⁷ Similar to the CPUC, the Airport issues permits to TNCs, not individual drivers.³²⁸ Drivers must comply with the requirements of their TNC's operating permit and the Airport's Rules and Regulations concerning parking and traffic.³²⁹ In 2016, SFO collected \$21,817,219 in TNC fee revenue from a total of 5,709,336 trips (based on the current \$3.80 figure).³³⁰

To promote safety, TNCs are required to provide driver training programs and report the number of drivers completing the course.³³¹ The San Francisco Bicycle Coalition has also provided additional safety training videos to the TNCs for use by TNC drivers to reduce conflicts with bicyclists in San Francisco.³³² In California, 0.33% of a TNC's gross California revenues, plus a \$10.00 administrative fee, are collected by the CPUC on a quarterly basis as part of overall fees.³³³ These funds are then paid into the CPUC's Transportation Reimbursement Account, for the purpose of funding

325. Rules and Regulations § 4.7(G)(2), S.F. INT'L AIRPORT (Oct. 21, 2014), <http://media.flysfo.com/media/sfo/about-sfo/sfo-rules-and-regulations.pdf>.

326. See Press Release, SFO Announces Agreements with Lyft and UberX, S.F. Int'l Airport (Oct. 20, 2014), <https://www.flysfo.com/media/press-releases/sfo-announces-agreements-lyft-and-uberx>. The California State Aeronautics Act of the Public Utilities Code grants the State agency powers and jurisdiction over airports in California. See CAL. PUB. UTIL. CODE § 21631 (West 2013).

327. Under San Francisco Administrative Code § 2A.171(b), the issuance and revocation of operating permits at SFO is at the sole discretion of the Airport Director. See S.F., CAL., ADMIN. CODE ch. 2A, art. IX, § 2A.171(b) (2018), [http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrative_code?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrative_code?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1).

328. Rules and Regulations § 4.7(G)(2), S.F. INT'L AIRPORT.

329. *Id.* § 4.7(G)(3).

330. THE TNC REGULATORY LANDSCAPE, *supra* note 314, at 8.

331. *Id.* at 4 (“There is no publicly available data on whether and how TNCs have complied with the CPUC requirements, and further, to what degree drivers are watching the safety training videos made available for them.”).

332. *Driver Education Now Reaching Hundreds of Thousands*, S.F. BICYCLE COALITION (Sept. 22, 2016), <https://sfbike.org/news/driver-education-now-reaching-hundreds-of-thousands/>.

333. THE TNC REGULATORY LANDSCAPE, *supra* note 214, at 5; see Adopting Rules and Regulations to Protect Safety While Allowing New Entrants to the Transp. Indus., Decision 13-09-045, at 33 (Cal. Pub. Util. Comm'n Sept. 19, 2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.pdf>.

any expenses incurred by the CPUC in regulating TNCs, TNC drivers, and TNC vehicles.³³⁴ Further, there is currently no limit to the number of TNC drivers or vehicles that can be associated with each TNC permit.³³⁵

Information that has been reported is not currently available to other public agencies, or to the general public. In June 2017, San Francisco City Attorney Dennis Herrera filed a public records request to the CPUC to release all annual reports submitted by TNCs since 2013.³³⁶ This request also sought other data the CPUC collected on congestion, public safety, greenhouse gas emissions, effect on public transit operation and parking, and other areas relevant to maintaining San Francisco's transportation networks.³³⁷ The CPUC declined to provide this information.³³⁸ As a user of public rights-of-way, TNCs are also affected by transportation engineering decisions. The San Francisco Municipal Transportation Agency is responsible for making decisions about the installation and modification of traffic control devices, including traffic signs, traffic striping, traffic signals, and color curb markings.³³⁹

7. Los Angeles

In Los Angeles, only vehicles manufactured in 2002 or later may be used by TNC drivers.³⁴⁰ In 2016, Lyft reported that in Los Angeles and San Francisco, more than 130,000 people who applied to become Lyft drivers did not have qualifying cars.³⁴¹ Both Uber and Lyft presently contract with private companies to conduct background checks where they search multi-state

334. THE TNC REGULATORY LANDSCAPE, *supra* note 314, at 5.

335. *Id.*

336. *Herrera Secures Agreement with Lyft on Subpoenaed Operational Data*, CITY ATT'Y S.F. (Feb. 14, 2018), <https://www.sfcityattorney.org/2018/02/14/herrera-secures-agreement-lyft-subpoenaed-operational-data/>.

337. *Herrera Orders Uber, Lyft to Provide Data on Driver Practices, Accessibility and Service*, CITY ATT'Y S.F. (June 5, 2017), <https://www.sfcityattorney.org/2017/06/05/herrera-orders-uber-lyft-provide-data-driver-practices-accessibility-service/>.

338. *Id.*

339. *See History of the SFMTA*, S.F. MUN. TRANSP. AGENCY, <https://www.sfmta.com/about-us/history-sfmta> (last visited Aug. 22, 2019).

340. *Vehicle Requirements Los Angeles*, UBER, <https://www.uber.com/drive/los-angeles/vehicle-requirements/> (last visited Aug. 22, 2019).

341. John Swartz, *Lyft, GM Expand Car-Rental Deal Into 3 Markets*, USA TODAY (July 11, 2016), <https://www.usatoday.com/story/tech/2016/07/11/lyft-gm-expand-express-drive-program-3-markets/86777234/>.

and multi-jurisdictional criminal record databases.³⁴² Uber and Lyft are the two largest TNC companies in Los Angeles.³⁴³

Each TNC in California must file its insurance policies under seal³⁴⁴ with the Safety and Enforcement Division as part of applying for a license.³⁴⁵ Since July 1, 2015, there have been new insurance requirements which defined TNC services as having three periods.³⁴⁶ Period one is when the app is on, but the driver has not yet accepted a ride request.³⁴⁷ For period one, TNCs must have primary insurance of at least \$50,000.00 for death and personal injury per person, \$100,000 for death and personal injury per incident, and \$30,000.00 for property damage.³⁴⁸ The TNC must also have \$200,000 in excess coverage.³⁴⁹ Periods two and three, respectively, cover the period when the driver has accepted a ride but has not yet picked up a passenger and when the driver is transporting the passenger. During these two periods, primary commercial insurance of \$1 million for death, personal injury, and property damage is required.³⁵⁰ In addition, TNCs shall maintain \$1 million of uninsured motorist insurance from the moment the passenger enters the vehicle until the passenger exits the vehicle.³⁵¹

Under Los Angeles International Airport (LAX) regulations, TNC drivers must adhere to certain terms to ensure that they avoid fines of up to \$1 million.³⁵² All drivers must pass the LAX quiz in order to get an LAX permit, and Uber drivers can take this quiz directly from the Uber Driver App by scrolling down on the home screen.³⁵³ In order to receive trip requests to pick

342. See CAL. PUB. UTIL. CODE § 5445.2(a)(1) (West Supp. 2019).

343. See Liam Dillon, *Meet the Man Driving the Future of Uber and Lyft in the California Legislature*, L.A. TIMES (June 16, 2017), www.latimes.com/business/technology/la-pol-sac-future-of-uber-taxi-law-20170615-htmlstory.html.

344. Meaning there is no public access.

345. Adopting Rules and Regulations to Protect Safety While Allowing New Entrants to the Transportation Industry, Decision 13-09-045, at 59 (Cal. Pub. Util. Comm'n Sept. 19, 2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.pdf>.

346. Decision Modifying Decision 13-09-045, Decision 14-11-043, at 24 (Cal. Pub. Util. Comm'n Nov. 20, 2014), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M143/K313/143313104.pdf>.

347. CAL. PUB. UTIL. CODE § 5433(c).

348. *Id.* § 5433(c)(1).

349. *Id.* § 5433(c)(2).

350. *Id.* § 5433(b)(1).

351. *Id.* § 5433(b)(2).

352. *Instructions for Driver-Partners Los Angeles International (LAX) Airport*, UBER, <https://www.uber.com/drive/los-angeles/airports/los-angeles-international-airport/> (last visited Aug. 22, 2019).

353. *Id.*

up riders at LAX, driver-partners must be inside the designated TNC Airport Assignment area.³⁵⁴ The Airport Assignment Area operates on a first-in, first-out basis, and drivers may not drive around the central terminal area or wait anywhere else in the neighborhood.³⁵⁵ Furthermore, LAX does not allow for drivers with the following convictions in the past seven years: (1) driving under the influence; (2) fraud; (3) a crime involving property damage or theft; or (4) other acts of violence.³⁵⁶

8. Phoenix

Under Arizona statutes, a person may not act as a TNC driver unless the TNC has been issued a permit by the Department of Transportation.³⁵⁷ A TNC must implement a zero-tolerance policy on the use of drugs and alcohol while a TNC is providing transportation network services or the TNC driver is logged in to the app but is not providing transportation network services.³⁵⁸ Under the driver requirements section, the TNC company must conduct, or have a third party conduct, a local and national criminal background check for each applicant that includes a search of multi-jurisdiction criminal records database and a national sex offender registry database.³⁵⁹ All vehicles used by TNC drivers must meet vehicle safety and emissions standards for private vehicles and have annual brake and tire inspections performed by a qualified third party.³⁶⁰ Further, a TNC may not allow a person to act as a company driver who has had more than three moving violations or one major violation pursuant to this title in the preceding three years.³⁶¹

A TNC in Arizona shall also maintain an individual's trip records for at least one year after the date each trip was provided and transportation network company driver records until the one-year anniversary of the date of the driver's activation on the TNC's digital network and make the records available to the department on request.³⁶² The Arizona state legislature changed the outdated Arizona Department of Transportation rules that did not differentiate between the regulation of TNC companies, such as Uber and Lyft, and vehicles for hire, such as Taxis.³⁶³ This change replaced those outdated rules

354. *Id.*

355. *Id.*

356. *Id.*; see CAL. PUB. UTIL. CODE § 5445.2.

357. ARIZ. REV. STAT. ANN. § 28-9552(A) (Supp. 2018).

358. *Id.* § 28-9554(A).

359. *Id.* § 28-9555(A)(2).

360. *Id.* § 28-9555(A)(4).

361. *Id.* § 28-9555(B)(1).

362. *Id.* § 28-9556(B).

363. *Vehicle for Hire Licensing Recent Licensing Changes: House Bill 2135*, ARIZ. DEP'T TRANSP., <https://www.azdot.gov/motor-vehicles/professional-services/>

with ones consistent with statutory changes that lessened regulatory requirements on TNCs.³⁶⁴ In other news, Arizona Governor Doug Ducey suspended Uber's self-driving vehicle testing privileges in March 2018, in the wake of a pedestrian fatality in a Phoenix suburb.³⁶⁵ After this accident on March 18, 2018, Uber immediately suspended its self-driving testing in Arizona, Pittsburgh, San Francisco, and Toronto.³⁶⁶

9. Dallas/Fort Worth

In 2017, Governor Greg Abbott signed Texas House Bill 100, which created a single set of ride-hailing rules throughout Texas.³⁶⁷ As a result, TNC drivers may accept trip requests anywhere in Texas without worrying about varying city-to-city requirements. House Bill 100 states that the regulation of TNCs, drivers logged into a digital network, and vehicles used to provide digitally prearranged rides is an exclusive power and function of the state of Texas.³⁶⁸ It may not be regulated by a municipality or other local entity, including by: (1) imposing a tax; (2) requiring an additional license or permit; (3) setting rates; (4) imposing operational or entry requirements; or (5) imposing other requirements.³⁶⁹ But an airport owner, operator, or the governing governmental body with jurisdiction over a cruise ship terminal, may impose regulations, including a reasonable fee, on a TNC that provides rides from the terminal.³⁷⁰

A person may not operate a TNC in Texas without obtaining and maintaining a permit issued by the Department of Transportation.³⁷¹ A TNC is then required to pay an annual fee to the Department in order to maintain a valid permit in Texas.³⁷² TNCs must confirm that the TNC driver is at least eighteen years old, maintains a valid U.S. driver's license, and possesses proof of registration and automobile financial responsibility for each motor vehicle to be used to provide rides.³⁷³ Also, each TNC is required to conduct a

vehicle-for-hire-licensing/recent-licensing-changes/house-bill-2135 (last visited Aug. 22, 2019).

364. *See id.*

365. *Arizona Gov. Doug Ducey Suspends Uber from Autonomous Testing*, CBS NEWS (Mar. 26, 2018), www.cbsnews.com/news/arizona-governor-doug-ducey-suspends-uber-autonomous-testing-letter-today-2018-03-26/.

366. *Id.*

367. *See* H.B. 100, 85th Leg., Reg. Sess. (Tex. 2017).

368. *Id.* § 2402.003.

369. *Id.*

370. *Id.*

371. *Id.* § 2402.051.

372. *Id.* § 2402.052.

373. Tex. H.B. 100 § 2402.107.

commercial multi-state and multi-jurisdictional criminal record background check and a national sex offender check and may not permit an individual to drive for their company if the individual: (1) has been convicted of more than three offenses classified by the Department of Public Safety as moving violations within the past three years; or (2) has been convicted of (a) fleeing or attempting to elude a police officer; (b) reckless driving; or (c) driving without a valid driver's license within the past three years.³⁷⁴ A driver is not permitted to work for a TNC if the driver has been convicted in the preceding seven-year period of any of the following: (1) driving while intoxicated; (2) use of a motor vehicle to commit a felony; (3) a felony crime involving property damage; (4) fraud; (5) theft; (6) an act of violence; or (7) an act of terrorism.³⁷⁵ Furthermore, House Bill 100 provides that each TNC company shall adopt a policy that prohibits a driver logged in to the company's digital network from: (1) discriminating on the basis of a passenger's or potential passenger's location or destination, race, color, national origin, religious belief or affiliation, sex, disability, or age; and (2) refusing to provide service to a passenger with a service animal.³⁷⁶

Getting access to a Dallas/Fort Worth International Airport (DFW) is simple for a TNC driver. A TNC driver must take his/her vehicle to the Ground Transportation Office at DFW and fill out the appropriate form to provide the driver's personal and vehicle details.³⁷⁷ The driver must show the Ground Transportation representative his driver app, and then he is given a DFW permit to be placed on the vehicle's windshield.³⁷⁸

In 2015, Texas lawmakers passed House Bill 1733, which introduced a set of insurance liability requirements for TNCs and TNC drivers. This legislation went into effect on January 1, 2016.³⁷⁹ This law requires TNC drivers to carry primary automobile insurance to operate as TNC drivers.³⁸⁰ The TNC, TNC driver, or a combination of both, can maintain the automobile insurance.³⁸¹ During the time a TNC driver is logged on to the TNC's digital network and is available to receive network requests but is not engaged in a ride, the automobile insurance policy must provide at least: (1) \$50,000 for

374. *Id.*

375. *Id.*

376. *Id.* § 2402.112.

377. *DFW Airport Permit*, UBER, <https://www.uber.com/drive/dallas/resources/dfw-airport-permit/> (last visited Aug. 22, 2019).

378. *Id.*

379. Michael Theis, *How a Texas-Sized Fight over Laws Regulating Uber, Lyft Might Play Out*, AUSTIN BUS. J. (May 10, 2016, 8:13 AM), www.bizjournals.com/austin/blog/techflash/2016/05/how-a-texas-sized-fight-over-laws-regulating-uber.html.

380. H.B. 1733, 84th Leg., Reg. Sess. § 1954.051 (Tex. 2015).

381. *Id.*

bodily injury to or death for each person in an incident; (2) \$100,000 for bodily injury to or death of a person per incident; and (3) \$25,000 for damage or destruction of property of others in an incident.³⁸² When the TNC driver is engaged in prearranged ride, the automobile insurance policy must provide, at a minimum, coverage with a total aggregate limit of liability of \$1 million for death, bodily injury, and property damage for each incident.³⁸³

10. Seattle

Seattle has attempted to permit ride-hailing drivers to band together to engage in collective bargaining with their platform companies. The City of Seattle adopted an ordinance to permit ride-hailing drivers to engage in collective bargaining.³⁸⁴ The U.S. Court of Appeals for the Ninth Circuit summarized the ordinance:

The Ordinance requires “driver coordinators” to bargain collectively with for-hire drivers. *Id.* § 1(I). A “driver coordinator” is defined as “an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public.” Seattle, Wash., Municipal Code § 6.310.110. The Ordinance applies only to drivers who contract with a driver coordinator “other than in the context of an employer-employee relationship”—in other words, the Ordinance applies only to independent contractors. *Id.* § 6.310.735(D).

The collective-bargaining process begins with the election of a “qualified driver representative,” or QDR. *Id.* §§ 6.310.110, 6.310.735(C). An entity seeking to represent for-hire drivers operating within Seattle first submits a request to the Director of Finance and Administrative Services (the Director) for approval to be a QDR. *Id.* § 6.310.735(C). Once approved by the City, the QDR must notify the driver coordinator of its intent to represent the driver coordinator’s for-hire drivers. *Id.* § 6.310.735(C)(2).

382. *Id.* § 1954.052.

383. *Id.* § 1954.053.

384. Ordinance 124968 amends § 6.310.110 of the Seattle Municipal Code and adds section 6.310.735 to the Code. *See* SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2018); *For-Hire Driver Collective Bargaining*, CITY OF SEATTLE (2018), <https://www.seattle.gov/business-regulations/taxis-for-hires-and-tncs/for-hire-driver-collective-bargaining> (summary of provisions of ordinance); Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html> (reporting unanimous city council approval of ordinance and mayoral skepticism).

Upon receiving proper notice from the QDR, the driver coordinator must provide the QDR with the names, addresses, email addresses, and phone numbers of all “qualifying drivers.” *Id.* § 6.310.735(D). This disclosure requirement applies only to driver coordinators that have ‘hired, contracted with, partnered with, or maintained a contractual relationship or partnership with, 50 or more for-hire drivers in the 30 days prior to the commencement date’ set by the Director. *Id.*

The QDR then contacts the qualifying drivers to solicit their interest in being represented by the QDR. *Id.* § 6.310.735(E). Within 120 days of receiving the qualifying drivers’ contact information, the QDR submits to the Director statements of interest from qualifying drivers indicating that they wish to be represented by the QDR in collective-bargaining negotiations with the driver coordinator. *Id.* § 6.310.735(F)(1). If a majority of qualifying drivers consent to representation by the QDR, the Director certifies the QDR as the “exclusive driver representative” (EDR) for all for-hire drivers for that particular driver coordinator. *Id.* § 6.310.735(F)(2).

Once the Director certifies the EDR, the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; *the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers*; minimum hours of work, conditions of work, and applicable rules. *Id.* § 6.310.735(H)(1) (emphasis added).

If an agreement is reached, the driver coordinator and the EDR submit the written agreement to the Director. *Id.* § 6.310.735(H)(2). The Director reviews the agreement for compliance with the Ordinance and Chapter 6.310 of the Seattle Municipal Code, which governs taxicabs and for-hire vehicles. *Id.* In conducting this review, the Director is to ‘ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance[s] the public policy goals set forth in Chapter 6.310 and in the [Ordinance].’ *Id.*

The Director’s review is not limited to the parties’ submissions or the terms of the proposed agreement. *Id.* Rather, the Director may gather and consider additional evidence, conduct public hearings, and request information from the EDR and the driver coordinator. *Id.*

The agreement becomes final and binding on all parties if the Director finds the agreement compliant. *Id.* § 6.310.735(H)(2)(a). The agreement does not take effect until the Director makes such an affirmative determination. *Id.* § 6.310.735(H)(2)(c). If the Director finds the agreement noncompliant, the Director remands it to the parties with a written explanation of the agreement's failures, and may offer recommendations for remedying the agreement's inadequacies. *Id.* § 6.310.735(H)(2)(b).

If the driver coordinator and the EDR do not reach an agreement, "either party must submit to interest arbitration upon the request of the other," in accordance with the procedures and criteria specified in the Ordinance. *Id.* § 6.310.735(I). The interest arbitrator must propose an agreement compliant with Chapter 6.310 and in line with the City's public policy goals. *Id.* § 6.310.735(I)(2). The term of an agreement proposed by the interest arbitrator may not exceed two years. *Id.*

The interest arbitrator submits the proposed agreement to the Director, who reviews the agreement for compliance with the Ordinance and Chapter 6.310, in the same manner the Director reviews an agreement proposed by the parties. *Id.* § 6.310.735(I)(3).

The parties may discuss additional terms and propose amendments to an approved agreement. *Id.* § 6.310.735(J). The parties must submit any proposed amendments to the Director for approval. *Id.* The Director has the authority to withdraw approval of an agreement during its term, if the Director finds that the agreement no longer complies with the Ordinance or furthers the City's public policy goals. *Id.* § 6.310.735(J)(1).

. . . .

[T]he Director designated Teamsters Local 117 (Local 117) as a QDR on March 3, 2017. On March 7, 2017, Local 117 notified Uber, Lyft, Eastside, and nine other driver coordinators of its intent to serve as the EDR of all qualifying drivers who contract with those companies, and requested the qualifying drivers' contact information.³⁸⁵

The chamber of commerce and associated pro-business groups challenged the validity of the ordinance in two lawsuits.³⁸⁶ In both, the plaintiffs

385. Chamber of Comm. of United States v. City of Seattle, 890 F.3d 769, 777–79 (9th Cir. 2018).

386. Chamber of Comm. of United States v. City of Seattle, 274 F. Supp. 3d 1140, 1147 (W.D. Wash. 2017), No. C17-0370RSL, 2017 WL 3641901 (W.D. Wash. Aug. 24, 2017) (denying injunction pending appeal; noting that antitrust claims had been found meritless), appeal dismissed, No. 17–35371, 2017 WL 5197158 (9th Cir. Sep. 6, 2017); Chamber of Comm. of United States v. City

argued that the ordinance violated the antitrust laws and that it was preempted by the NLRA.³⁸⁷ In one case, the district court found sufficient probability of success on the merits of the antitrust claim to grant a preliminary injunction against enforcement of the ordinance.³⁸⁸ The court found insufficient probability of success on the merits of the NLRA preemption claims.³⁸⁹ Its injunction prohibited disclosure of driver information to the Teamsters union.³⁹⁰ The other case was reversed on appeal to the Ninth Circuit.³⁹¹ The appellate court rejected the argument, embraced by the trial court, that the ordinance was immune from antitrust liability by the state action exemption under *Parker v. Brown*.³⁹² The court held that the Seattle ordinance failed to reflect a clearly articulated state (as opposed to municipal) policy to displace competition and that its implementation be closely supervised by the state.³⁹³

On the labor law preemption questions, however, it rejected the challenger's two arguments. The first argument, which the court of appeals labeled "Machinists preemption," was that the ordinance was preempted by the NLRA's exclusion of independent contractors.³⁹⁴ By allowing independent contractors to engage in collective bargaining, the argument went, the state of Washington was thwarting a federal determination that independent contractors should not engage in collective bargaining.³⁹⁵ This is because independent contractors are businessman rather than workers who are shielded by the labor exemptions to the antitrust laws.³⁹⁶ The court of appeals held that, while independent contractors are excluded from the NLRA and its provisions regulating collective-bargaining,³⁹⁷ one could not infer from that exclusion a determination that independent contractors should not be regulated by any labor law.³⁹⁸ An equally plausible inference was that the Congress left it

of Seattle, 274 F. Supp. 3d 1155 (W.D. Wash. 2017), *rev'd*, 890 F.3d 769 (9th Cir. Feb. 2018).

387. *City of Seattle*, 274 F. Supp. 3d at 1147.

388. *Id.* at 1155.

389. *Id.* at 1149.

390. *Id.* at 1155.

391. *City of Seattle*, 890 F.3d at 795.

392. *Id.* at 779–80; *Parker v. Brown*, 317 U.S. 341, 350 (1943).

393. *City of Seattle*, 890 F.3d at 789.

394. *Id.* at 791.

395. *Id.* at 792.

396. *Id.*

397. *Id.*

398. *Id.* at 793.

to the states to regulate the employment the relations of independent contractors and those that hire them.³⁹⁹

The second NLRA preemption argument, labeled the “Garmon preemption” by the court of appeals, asserted that the ordinance would impermissibly draw local agencies into a determination of who qualifies as an employee and who qualifies as an independent contractor.⁴⁰⁰ This, however, was arguably a determination reserved exclusively to the National Labor Relations Board (NLRB). Both the district and appellate courts rejected that argument because the ordinance excluded employees, and the plaintiffs had made no showing that the drivers might be employees.⁴⁰¹

The plaintiff may petition the Supreme Court for a writ of certiorari to obtain review of the court of appeals labor law preemption findings, but the deadline for such petitions has not yet occurred as of this writing.⁴⁰² The Supreme Court is unlikely to hear the labor law preemption questions by themselves, but are more likely to wait at least until the antitrust claims are subjected to further litigation. Rigorous assessment of the effectiveness of collective bargaining for ride-hailing drivers in Seattle is not yet possible because the implementation of the ordinance is blocked by the antitrust challenges.

C. Enforceability

Sometimes the regulators decide that they cannot regulate an industry effectively as the market has shaped it. Then, they may require that it be reengineered so that regulation can be more effective. This is exactly what happened with the prohibition of industrial homework. The Fair Labor Standards Act could not be enforced effectively when the work was dispersed so widely into small production units: the workers’ homes.⁴⁰³ So, Congress and the Labor Department prohibited industrial homework.⁴⁰⁴ The benefit was heightened compliance with labor standards; the cost was the loss of flexible work opportunities for the population.

399. *City of Seattle*, 890 F.3d at 793–94 (noting that some categories of workers excluded from scope of NLRA have been found to be subject to state regulation).

400. *Id.* at 794.

401. *Id.*

402. *See* SUP. CT. R. 13 (setting time limit of ninety days for filing petition for writ of certiorari). The court of appeals case was decided on May 11, 2018. So, the deadline for filing a petition is August 11, 2018. *City of Seattle*, 890 F.3d at 769.

403. Analyst in Labor Policy (name redacted), *Child Labor in America: History, Policy, and Legislative Issues*, CONGRESSIONAL RESEARCH SERV. (Nov. 18, 2013), https://www.everycrsreport.com/files/20131118_RL31501_008741c7351fd72ae2a262198ba9c0e44921a60a.pdf.

404. *Id.*

Similarly, gig work could be forced into a factory matrix. Although it is not entirely clear what this would mean for urban on-demand transportation, it would likely resemble traditional taxicab regulation with its monopolistic character. That would be a considerable setback for new technologies' power to make work more flexible and accessible to a wider variety of people. The English Taylor Review put it well with respect to the goal of preserving flexibility: "If a change of this type were to result in a loss of the flexibility so many platform workers desire, this would represent failure. As such, these changes must be accompanied by a new approach that supports genuine two-way flexibility enabled by digital platforms."⁴⁰⁵

The following subsections consider each traditional type of labor protective regulation and consider the need for it to address the grievances of gig workers. They also consider the likely distortions in efficiency that would result from adopting it. Forcing TLPs into a taxicab model is also likely to be justified on the grounds that that enforcement resources are limited and, therefore, compliance is rarely perfect. A taxicab commission can have very stringent limits on the number of cabs allowed to be on the street, working hours of drivers, and vehicle inspections, but only a handful inspectors are available to enforce the requirements. The likelihood of cheating is high. Enforcement can be enhanced by requiring for-hire vehicles to have distinctive paint schemes, special equipment on their roofs and inside, and distinctive license plates. These requirements preclude drivers from using their personal cars and precludes drivers from using these modified cars for other purposes. Requiring meters in the cab would enhance enforcement of duty-time limitations without detection.

The network technologies used by platform providers significantly change the enforcement and compliance part of any regulatory equation. The Uber app, for example, tracks speed and acceleration as well as routes.⁴⁰⁶ It thus easily can be programmed to detect speeding violations by drivers.⁴⁰⁷ It also can be programmed to detect violations of pick-up-location requirements.⁴⁰⁸ The traditional practice of having a complex web of regulatory requirements, backed up by a battalion of inspectors, is obsolete. A template for a simpler set of regulations can be built into software routinely used by workers.

405. TAYLOR ET AL., *supra* note 10, at 36.

406. Jacob Bogage, *Someone is Watching your Uber Driver*, WASH. POST (July 5, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/07/05/some-one-is-watching-your-uber-driver/?noredirect=on&utm_term=.20cdc7943e54. The author received a pop-up notice on his Uber driver app shortly after he began driving for Uber telling him that his stopping and starting practices in traffic were consistent with good practices.

407. *Id.*

408. *Id.*

D. Types of Worker Protection

This article consistently argues for risk-based regulation: a model in which legal intervention is justified only by specific instances of resource misallocation or inequitable distribution arising from market failure. An inventory of all of the types of traditional labor and employment regulation suggests that most of them are unsuitable for the ride-hailing industry.⁴⁰⁹ Classification of ride-hailing drivers as employees would subject them to the categories of traditional labor and employment regulation discussed below and would force a considerable modification of existing practices. Yet the categories of protection analyzed below do not match very well with what the drivers themselves say they are concerned about—mostly levels of compensation and adjustment of disputes with passengers.

TNPs have significantly different levels of power to control different elements of the work of their drivers.⁴¹⁰ Application of the right-to-control tests on an element by element basis results in different levels of regulatory intervention compared with reliance on market forces to govern each element of the relationship. The right to control test is the centerpiece of the multi-factored formula for distinguishing independent contractors from employees.⁴¹¹ For example, TNPs have nearly unlimited power to control the elements and level of compensation paid to drivers.⁴¹² They decide on the pay formulas and program them into their app software, beyond reach of negotiation between drivers, lower-level personnel of the TNPs, and passengers.⁴¹³

In contrast, TNPs have very little control over driver safety. The driver provides his own tools for work—his privately-owned automobile⁴¹⁴—and decides for himself how safely he will drive it. TNPs can make rules for safe driving, in addition to highway traffic safety regulators, but the drivers ulti-

409. Alyssa M. Stokes, *Driving Courts Crazy: A Look at How Labor and Employment Laws Do Not Coincide with Ride Platforms in the Sharing Economy*, 95 NEB. L. REV. 853 (2016), <http://digitalcommons.unl.edu/nlr/vol95/iss3/7>.

410. Alex Rosenblat, *The Truth About How Uber Manages Drivers*, HARV. BUS. REV. (Apr. 6, 2016), <https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers>.

411. *IRS 20 Factor Test –Independent Contractor or Employee?*, OREGON.GOV, <https://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/20FactorTestforIndependentContractors.pdf> (last visited Aug. 22, 2019). However, rigorous application of the Hohfeldian terminology for classifying legal relationships, suggests this is a *power*, not a *right*.

412. Rosenblat, *supra* note 412. Even if a driver and the passenger were to bilaterally negotiate a deal different from that programmed into the software, in violation of the terms of service, the software would bill the passenger the prescribed rate and pay the driver the prescribed rate.

413. *Id.*

414. *Uber and Lyft Car and Driver Requirements*, HYRECAR (Dec. 14, 2017), <https://hyrecar.com/blog/uber-lyft-car-and-driver-requirements/>.

mately determine whether they will follow them. Unlike a factory environment, one cannot justify imposing employee health and safety obligations on the TNPs because they, unlike factory owners, do not control and have no power to control the instrumentalities of work.

Other elements of the work relationship may be associated with significant power to control, but there is little evidence that the power is being, or can be, misused. The equal employment opportunity is an example. All of the empirical evidence, backed up by the author's experience, supports the inference that TNPs do not practice discrimination based on race, national origin, gender, religion, or sexual orientation. The workforce is quite diverse on all of these characteristics.⁴¹⁵ Virtually no complaints about racially, ethnically, religiously, or gender-based discrimination can be found. Little justification appears for subjecting TNPs to burdensome notice and reporting obligations under title VII aimed at employers. Disability discrimination represents a more plausible problem. Few instances of disability discrimination accusations have surfaced.⁴¹⁶ But if they do, they could be handled within the framework of Title II of the ADA, accepting that ride hailing drivers are independent contractors, rather than employees.

1. Adequate Compensation

A grievance theme for factory workers in the 19th century was the absence of a living wage. This complaint led the law in the 19th century to allow collective bargaining and later, in the 20th century, to set a minimum wage.⁴¹⁷ The risk is that the market will not allow workers to be paid "enough" and that they will be practically unable to seek other, more remunerative, work. This proposition makes two assumptions. The first presupposes some objective level of adequate compensation. The other is that a worker dissatisfied with his compensation is stuck with a stingy purchaser of his work, for some reason.

At the most general level, the cause of low worker compensation is too many workers compared to the level of demand for their work. Accordingly, reformers who seek to raise the level of compensation often propose measures to restrict the supply of workers.⁴¹⁸ This is the case with craft unions that will not allow someone to work who has not been selected by the union

415. *Taxi Drivers & Chauffeurs*, DATA USA, <https://datausa.io/profile/soc/533041/> (last visited Aug. 22, 2019).

416. Chris McGuinness, *Local Uber Driver Sues Company for Discrimination*, NEWS TIMES SAN LUIS OBISPO (Sept. 20, 2018), <https://www.newtimeslo.com/sanluisobispo/local-uber-driver-sues-company-for-discrimination/Content?oid=6263943>.

417. *National Labor Relations Act*, NAT. LABOR RELATIONS BD., <https://www.nlr.gov/how-we-work/national-labor-relations-act> (last visited Aug. 22, 2019).

418. *Craft Union*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/craft-union> (last visited Aug. 22, 2019).

and completed a multi-year apprenticeship program.⁴¹⁹ It is the case with occupations—more than one hundred in Illinois⁴²⁰—that have persuaded legislators to restrict entry to the labor market unless the worker obtains some kind of license, often requiring ridiculously long and complicated periods of study. It is the case with traditional taxis, primarily by limiting the number of medallions that can be outstanding, but also imposing qualification requirements on drivers.⁴²¹ Conceptually, supply restrictions also can include restricting the number of vehicles.

A substantial portion of the complaints by Uber drivers relates to the perceived inadequacy of compensation.⁴²² The available data, limited though it is, suggests that the foundational reality is that the prices that consumers are willing to pay for services like those provided by Uber and Lyft are not high enough to support very generous compensation for drivers. The author's experience validates other evidence that drivers can earn \$13.00–\$15.00 an hour, gross.⁴²³ A driver working forty hours per week therefore would earn on the order of \$31,000.00 annually.⁴²⁴ That places TNP driving in the mid-

419. Jack Barbash, *Union Interests in Apprenticeship and Other Training Forms*, 3 J. HUMAN RESOURCES 63, (Winter 1968), https://www.jstor.org/stable/144648?seq=1#metadata_info_tab_contents.

420. See generally 225 ILL. COMP. STAT. ANN. 2-745 §§ 1–199 (West 1997) (prescribing licensing requirements for scores of occupations, ranging from athletic trainers to audiologists, to genetic counselling, to shorthand reporters, to auctioneers, to hair braiders, to charity solicitors).

421. *Driving a Taxi*, DMV.ORG, <https://www.dmv.org/special-licenses/driving-a-taxi-cab.php> (last visited Aug. 22, 2019).

422. The limited data available shows that Uber drivers do not make much money. See Len Sherman, *How MIT Dragged Uber Through Public Relations Hell*, FORBES (Mar. 7, 2018), <https://www.forbes.com/sites/lensherman/2018/03/07/how-mit-dragged-uber-through-public-relations-hell/#2ed8de0115f2> (reporting on flawed MIT study, admitted by MIT to be incorrect; corrected to show driver hourly earnings of \$8.55–\$10 per hour, with 41–54% of drivers making less than minimum wage in their state).

423. This is about twice what was calculated by MIT researchers. See Stephen Zoepf et al., *The Economics of Ride-Hailing: Driver Revenue, Expenses and Taxes*, MIT CCEPR Working Paper Series (Feb. 2018), https://orfe.princeton.edu/~alaink/SmartDrivingCars/PDFs/Zoepf_The%20Economics%20of%20RideHailing_OriginalPdfFeb2018.pdf (author's revision statement reporting revised median profit for Uber drivers of \$8.55/hour; see Sherman *supra* note 424 (regarding controversy over MIT study)).

424. Net earnings would be lower, taking into account vehicle expenses and depreciation.

dle of low-skill occupations⁴²⁵ but considerably higher than the federal poverty level for individuals.⁴²⁶

Most Uber and Lyft drivers do not make an explicit calculation of how much depreciation and maintenance on their vehicles costs.⁴²⁷ Assume a driver buys a new Toyota Camry for \$25,000⁴²⁸ and that the car has a resale value of \$10,000 after five years.⁴²⁹ Also assume straight-line depreciation at \$4,000 per year, \$333.33 per month, or about \$76.92 per week. That is consistent with a lease rate of \$299 per month.⁴³⁰ Maintenance on a new car should not run more than, say, \$500 per year, or another \$10 per week. So, four hours of driving per week is necessary to pay the vehicle expense. That is 10% of a forty-hour week, which brings the net compensation down to about \$13.50 per hour.

The law could intervene and require paying drivers a minimum wage, but that would necessitate price increases in a highly elastic consumer market.⁴³¹ The result would be a diminution in TMP services and job opportuni-

-
425. The U.S. Bureau of Labor Statistics computes the median average annual income from all occupations as \$44,720. *See* U.S. BUREAU OF LABOR AND STATISTICS: LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2018–2019), <https://www.bls.gov/cps/cpsaat37.htm> (reporting median weekly earnings for 2017 full-time employment as \$860); U.S. BUREAU OF LABOR AND STATISTICS: LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2017–2018), <https://www.bls.gov/cps/cpsaat38.htm> (reporting median weekly earnings from part-time employment as \$260); *see generally* U.S. BUREAU OF LABOR AND STATISTICS: MAY 2016 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES UNITED STATES (2016), https://www.bls.gov/oes/2016/may/oes_nat.htm#00-0000 (showing detailed data on wages for hundreds of occupations).
426. *Federal Poverty Level*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/federal-poverty-level-FPL/> (last visited Aug. 22, 2019) (showing \$12,140 for individuals, and \$25,100 for a family of four).
427. JC, *How Much Does it Really Cost to Drive Your Car for Uber and Lyft?*, RIDESTER (Sept. 18, 2018), <https://www.ridester.com/uber-lyft-driver-costs-and-expenses/>.
428. *See, e.g.*, NORTHBROOK TOYOTA, https://www.northbrooktoyota.com/?gclid=CjwKCAjwq_vWBRACEiwAERreprM2WLySSXw3njPVgDXYP2ob4WwVv77meUkE_etOnX3A1DfinkyuA87BoCCcgQAvD_BwE (showing prices for 2018 Toyota Camrys for \$23,000 to \$25,000).
429. *See* KELLEY BLUE BOOK, <https://www.kbb.com/toyota/camry/2013/> (showing price range from \$9,800 to \$12,950).
430. *See Car, Truck, SUV & Hybrid Lease Deals*, TOYOTA, <https://www.toyota.com/deals/lease/> (last visited Mar. 3, 2019) (showing 2018 Camry SE lease price of \$299 per month with no cash at signing).
431. *But see* Lagos, *An Analysis of the Market for Taxicab Rides in New York City*, *supra* note 131 (noting two studies showing that demand for taxi rides is “perfectly inelastic”). Even if demand for on-demand transportation in price inelas-

ties for drivers. That in many ways is the story of American railroads, where labor costs and labor market restrictions caused substantial loss of market share to trucks and barges, with concomitant reductions in rail industry employment.⁴³² Increases in compensation also may have perverse results. The empirical data suggests that higher wages do not necessarily draw forth more supply.⁴³³

a. Minimum Wage and Overtime Premiums

The Fair Labor Standards Act, and its ubiquitous state counterparts, set a floor on hourly wages, requiring that employers pay a premium for work in excess of a regular work week—usually defined as forty hours.⁴³⁴ The justification is that competition among employers encourages a race to the bottom, while switching costs and barriers to entry limit employee alternatives to accepting low wages.⁴³⁵ A similar case for setting a minimum wage in gig labor markets is weak because market failure is not evident and there are enforceability problems. Even if alternative buyers of driver services exist, switching costs may nevertheless cause the drivers to be stuck with their current arrangements and render the market less competitive than it might seem.

This is not the case, however. Switching costs are quite low. Both Uber and Lyft permit their drivers to drive for other ride-hailing services and permit them to hold other jobs, gig or traditional.⁴³⁶ Nothing in the Uber or Lyft rules or municipal regulation so far ties a driver's car to a particular service, and all of the equipment, mainly driver cell phones, is usable for anything

tic, cross elasticities, as between different forms of on-demand transportation are likely to be substantial.

432. *A Short History of U.S. Freight Railroads*, ASS'N AM. RAILROADS (May 2018), <https://www.aar.org/data/short-history-u-s-freight-railroads/>.

433. See Orley Ashenfelter et al., *A Shred of Credible Evidence on the Long-Run Elasticity of Labour Supply*, 77 *ECONOMICA* 637, 641 (2010) (data from New York taxi drivers indicates that response to fare increase is to drive less; evidence implies that long-run elasticity of labor supply is -0.2); accord, Lagos, *An Analysis of the Market for Taxicab Rides in New York City*, *supra* note 131, at 432 n.14 (“sources says that some drivers will work fewer hours if they make more per hour, preferring the leisure time”).

434. *Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)*, U.S. DEPT. LABOR, <https://www.dol.gov/whd/flsa/> (last visited Aug. 22, 2019).

435. Economic dependence is the usual way of testing whether the employee has alternatives. The criteria for distinguishing employees from independent contractors under minimum wage law emphasizes an economic realities test of economic dependence. See *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311–13 (11th Cir. 2013) (listing criteria).

436. Nat, *How to Drive for Uber and Lyft (at the Same Time)*, RIDESTER, <https://www.ridester.com/drive-for-uber-and-lyft/> (last updated Jan. 21, 2019).

else as well as driving for Uber or Lyft.⁴³⁷ The training and human capital associated with both services is modest; it amounts to little more than following safe driving practices.⁴³⁸ No apparent basis exists for minimum wage regulation based on market failure. Minimum wage standards must be justified, if at all based on some distributional fairness concept. Moreover, this form of regulation is pretty straightforward when it is applied to a workplace where employees arrive in a particular starting time, punch a time clock, and leave at an appointed time, clocking out as they do so. An unambiguous record exists as to their hours of work. Driving for Uber is completely different. It should be extended to other aspects of traditional employment law. Harris and Krueger would leave independent workers outside the Fair Labor Standards Act and similar state laws.⁴³⁹

If one cannot reliably calculate how long the worker is on duty, one cannot reliably calculate his average pay rate. For the same reason, one cannot determine when premium overtime pay is triggered. To be sure, the Uber software keeps track of how many hours a driver is online, and it records the time involved in each passenger trip.⁴⁴⁰ It does not, however, consider other drivetime may be associated with the drivers positioning his vehicle to an area where he thinks he will have the most attractive trips, or the time involved in his returning home or some other personal destination after he logs out.⁴⁴¹ To the driver it is the total time when he may not engage in other activities that matters in terms of his personal compensation for the effort he is expending.⁴⁴² Yet any standard regime is unlikely to consider the time not online as work time. Further, an Uber driver is not only selling his labor, but also the use of his automobile. The former results in depreciation and maintenance costs that increase with mileage.⁴⁴³ Should a regulatory regime aimed at establishing foreign earnings take these costs into account? Wage and hour administrators struggled for decades with when to consider a work-related expenditure for personal clothing and equipment as a deduction from the wage paid.

These are significant problems with respect to calculating minimum wage. Resolving these problems will almost certainly be politically driven, rather than by rational economic calculation. When it comes to premium pay for overtime, the problems loom larger. What is a standard workweek for an

437. *Id.*

438. *Uber and Lyft Car and Driver Requirements*, *supra* note 416.

439. Harris & Krueger, *A Proposal for Modernizing*, *supra* note 14.

440. *Introducing a New Feature: Driving Hours Limit*, UBER BLOG: SOUTH AFRICA (Apr. 23, 2018), <https://www.uber.com/en-ZA/blog/driving-hours-limit/>.

441. *Id.*

442. *Id.*

443. *How Much Does it Really Cost to Drive Your Car for Uber and Lyft?*, *supra* note 429.

Uber driver? Some work only a few hours a week, while others work sixty or eighty hours a week, and work time is likely to be considered longer by the driver than the passenger, because of the deadheading time considered in the preceding paragraphs.

b. Wage Payment Statutes

Historically, a common grievance against employers was that they failed to do what they had said they would do.⁴⁴⁴ Temporal asymmetry between performance of the work and payment exacerbated the risk, particularly when payment is long deferred, as it is with respect to pension payments. The market did not prove very effective in controlling this risk, even though law-and-economics enthusiasts argue that the importance of reputation and choice by workers of whom to work for provides adequate protection.

Wage payment statutes require employers to make timely payment of promised wages in cash money.⁴⁴⁵ They do not prescribe the level of such payments. Accordingly, they are basically mechanisms to reduce the transaction costs of enforcing contracts of employment. Instead of having a lawyer file suit in the regular courts, an employee denied the payment of promised wages can file a simplified complaint with a state administrative agency. The employee then undertakes an investigation and, if necessary, adjudicates the claim. Wage-payment statutes also protect against employers deducting pay.

The analysis of gig workers grievances in Section III.D.1 shows that many of them relate to claims of wrongful deductions from compensation. These take the form of the charging of an exceptional or undisclosed fee for a particular service by the platform or failing to pay the driver a share of a payment received from a passenger for a particular service. These resemble wage payment claims filed by employees under wage payment statutes. Moreover, gig workers have a limited ability to hire lawyers and litigate breach of contract lawsuits for small amounts of money.⁴⁴⁶ So, it is sensible to ensure gig workers access to a forum in which they may complain about platform failures to pay monies owed. TNPs unilaterally set various elements of compensation in complex and varying formulas; the law should require

444. “BLS reported that wage payment legislation was needed because numerous employers made it difficult for workers to collect compensation which caused ‘unrest, dissatisfaction, and hardship’ for both kinds of workers; those who were fired and those released after completion of a specific work assignment.” *Smith v. Superior Court (L’Oreal)*, 39 Cal. 4th 77 (2006), 34 W. ST. U. L. REV. 284, 286 (2007) (quoting California Bureau of Labor Statistics report from 1911).

445. See 820 ILL. COMP. STAT. ANN. 115 § 1 (West 1986); Tex. Labor Code §§ 61.051–61.067.

446. *Helping the Gig Economy Work Better for Gig Workers*, INT’L LABOR ORG., https://www.ilo.org/washington/WCMS_642303/lang—en/index.htm (last visited Aug. 22, 2019).

them to keep their promises. The relevant question for gig labor markets is whether special protections are needed. For example, if Uber promises to charge a rider a fare of \$10.00, and to remit \$4.00 of it to the driver, does the driver have meaningful relief available in the regular courts?

If additional governmental action is justified, it is likely limited to making access to adjudicatory machinery for wage and benefit claims more accessible. One possibility is simply to relax the definition of employee under wage payment statutes, giving independent contractors standing. Another possibility is to examine the barriers to access in the small claims court system. Such barriers disadvantage both workers and small claimants. The society would benefit from reducing or eliminating them. On the other hand, the argument “it’s not worth the trouble to go to small claims court” is not a persuasive reason for adding a new layer of regulatory protection, unless there is an economic barrier.

c. Employee Retirement Income Security Act of 1974

Employee Retirement Income Security Act of 1974 (ERISA)⁴⁴⁷ was enacted primarily in response to highly publicized failures of the union sector to make promised retirement pension payments, and the perception that pension fund trustees looting the funds.⁴⁴⁸ The statute was written far more broadly than this risk and covers “benefit plans” as well as “pension plans.”⁴⁴⁹ Now, much of the litigation under ERISA involves healthcare benefits rather than benefits under defined-benefit pension plans.

Nothing in ERISA requires employers to make pensions or healthcare benefits available; it simply provides a federal mechanism for enforcing those promises if they are made and are for assuring the financial integrity of defined-benefit pension plans, if they are established.⁴⁵⁰ ERISA is fundamentally a federal scheme for reinforcing common-law contract and trust law.⁴⁵¹ It does not bar employers from providing pension for welfare benefits such as health care insurance. Rather, it generally leaves it to the employers to design the terms of benefits when they do elect to provide them. Employers are subject to some general vesting requirements for pension plans, which are

447. 29 U.S.C. §§ 1001–1461 (1974).

448. William J. Isaacson, *Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights*, 59 COLUM. L. REV. 96, 96 (1959) (examples of negligence, mismanagement, and wrongdoing, establish a “compelling need” to enact legislation).

449. 29 U.S.C.A. § 1002(3) (1974) (definition of employee benefit plan); *see, e.g., id.* § 1022(a) (applying disclosure requirements to all employee benefit plans).

450. *Frequently Asked Questions (FAQs)*, U.S. DEPT. LABOR, <https://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=225&faqsub=ERISA&faqtopy=Retirement+Plans+%26+BenefBen&topicid=4>.

451. Colleen E. Medill, *The Federal Common Law of Vicarious Fiduciary Liability under ERISA*, 44 U. MICH. J.L. REFORM 249, 250 (2011).

aimed at assuring their solvency and further reinforcing an employer's ability performance promises more detail regulation of healthcare plans is the province of state insurance regulation and the affordable care act not ERISA. ERISA is also a disclosure statute, requiring "summary plan descriptions" and "plans" to formalize employer benefit promises, thus alerting employees to them and enforcing them when they are not fulfilled.⁴⁵²

It is not clear what meaningful additional protection to drivers would result from extending ERISA coverage to their platform providers. On the other hand, merely extending the statute would impose few additional costs on a platform that did not itself elect to provide benefits. Some platform providers may be inclined to provide some kind of healthcare protection and then whether they should become covered may become a more interesting question.⁴⁵³

d. Disclosure of the Terms of Work

American labor and employment law does not generally require employers to post the terms and conditions of work.⁴⁵⁴ When collective bargaining agreements exist, they generally provide terms and conditions in great detail, but collective bargaining does not have a significant presence in the U.S. private sector anymore. Many employers also provide and publish employee handbooks that address certain employment related matters, but they generally do not contain details about wage levels and payments because those are so varied and are often determined on an individual basis. However, vacation and sick leave pay may be prescribed.

Franchise regulation is not altogether unlike franchise work, which is not altogether unlike gig work; accepted franchisees undeniably are independent contractors rather than employees under the traditional test.⁴⁵⁵ Despite their status as independent contractors, federal and state governments have enacted legislation to protect them against overreaching by their franchisors. These regulatory regimes are centered on disclosure of the terms of the franchise. A similar arrangement might be appropriate for gig workers, at

452. 29 U.S.C. 1022(a) (1974).

453. See Douglas Ver Mulm (@DouglasVerMулm), TWITTER (Nov. 6, 2018, 11:36 AM), <https://twitter.com/DouglasVerMулm/status/1059892296798425089>; see *Welcome Lyft Drivers*, LYFT EHEALTH, <https://www.ehealthinsurance.com/individual-health-insurance?rte=allC&allid=lyf244000> (portal to enable Lyft drivers to shop for individual plans).

454. See *generally Workplace Posters*, U.S. DEPT. LABOR, <https://www.dol.gov/general/topics/posters>.

455. See *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at *1 (NAT'L LABOR RELATIONS BD. Jan. 25, 2019); see also Martin H. Malin, *Protecting Platform Workers in the Gig Economy: Look to the FTC*, 51 IND. L. REV. 377 (2018) (arguing that gig workers should be protected like franchisor/franchisees and that the employer/independent contractor debate largely misses the point).

least for those who work for large platforms under contract. Ride-hailing services prescribe the detailed terms and conditions for payment, and they are embedded in the software.⁴⁵⁶ The Uber and Lyft apps currently provide breakdowns of the elements of compensation for each ride and for weekly payments.⁴⁵⁷ Requiring the platform to disclose those to the workers using the platform would not be burdensome. The benefit could be substantial, as it would reduce misunderstandings where employees are aggrieved because they were denied something the platform never promised. It also would facilitate enforcement of wage payments and detailed terms of service that customers, Uber, Lyft, and Amazon Flex require drivers to agree to—which most drivers do not read. The terms of service are mostly silent on the specifics of compensation, and that is what the drivers might care the most about.

2. Occupational Safety and Health

Conventional labor and employment law protects employees from work-related injuries and illnesses through two distinct regulatory regimes: workplace safety rules and systems for compensating injured employees.⁴⁵⁸

a. Safety Rules

The Occupational Safety and Health Act⁴⁵⁹ exists because employers, having the power to control the details of work in traditional workplaces, ultimately determine how safe the workplace is. Employees have little to say about it, except in the exceptional case of strong union representation. The case for additional regulations to protect worker safety in the gig labor-market context is weak. Uber and Lyft drivers are exposed to risks to their personal safety, but those are no different than the risks any other motor vehicle driver is exposed to. The risks can be—and are expected to be—reduced primarily by careful and skilled driving in vehicles that are in a safe condition. An Uber driver has complete control over how safely he drives. The fact that he provides the vehicle also means that he has complete control over the safety characteristics of the vehicle.

To the extent that the naked market is perceived as providing insufficient assurance of motor vehicle safety, elaborate regulatory regimes are in place with respect to both driver qualification and behavior and motor vehicle characteristics. Uber drivers are subject to these. It is not apparent why any additional driver safety-oriented obligations need to be imposed on Uber

456. See *Lyft Terms of Service*, LYFT, <https://www.lyft.com/terms> (last updated Feb. 6, 2018); *U.S. Terms of Use*, UBER, <https://www.uber.com/legal/terms/us/> (last updated Dec. 13, 2017).

457. *Lyft Terms of Service*, LYFT, <https://www.lyft.com/terms> (last updated Feb. 6, 2018); *U.S. Terms of Use*, UBER, <https://www.uber.com/legal/terms/us/> (last updated Dec. 13, 2017).

458. See *Summary of the Major Laws of the Department of Labor*, *supra* note 272.

459. 29 U.S.C. §§ 651–678 (1970).

and Lyft themselves. This is quite different from the situation in the traditional factory environment where employers provide the machinery. There, employers have control over design and how the machines are operated that may pose a safety risk to employees. Likewise, in process industries, employers provide the chemicals and the rules for their use that may jeopardize or protect employee health.

Gig work is performed almost entirely at premises that are not under the control of the platform provider, namely, in the automobiles and trucks of Uber, Lyft and Amazon Flex drivers, on the premises' mechanical Turk workers, and, most often, in the homes of Task Rabbit workers.⁴⁶⁰ Seeking to impose obligations on the platform is infeasible. How is the Occupational Safety and Health Administration to assure that any employee working at home has a fire extinguisher ready at hand? In addition, in many cases where there are safety hazards, regulation already exists and no further regulation is needed.

While it would be an overstatement to say that gig workers are not exposed to safety and health threats, the threats they are exposed to are not heightened by their working. This is entirely unlike an environment in which an employer provides a complicated machine with many moving parts and extreme temperatures that can snag workers or expose him to exotic chemicals that will give him cancer. It is one thing to regulate a ladder or personal protective gear provided by the employer, it is another matter entirely to regulate equipment that a worker provides for himself, such as a personal automobile.

b. Worker's Compensation

Worker's compensation was one of the first labor reforms adopted, beginning at the end of the 19th century.⁴⁶¹ It provides insurance protection for a worker's injuries or illness incurred during the scope of their employment.⁴⁶² These reforms have been surrounded by disputes between workers and their employers over what is job-related and the seriousness of a worker's compensable incident. Although the solvency of workers compensation funds and the level of employer premiums have been the subject of controversy, the system achieves its intended purpose. These systems, however, are compatible with factory-like environments, where it is generally straightforward to decide whether a worker got hurt "on-the-job," and more spatially dispersed work where an injury to the employee is almost certain to be occasioned by employer-provided heavy equipment such as a railroad lo-

460. See Lin Gensing-Pophal, *What You Need to Know About the Gig Economy*, FORBES (Apr. 29, 2018), <https://www.forbes.com/sites/adp/2018/04/29/what-you-need-to-know-about-the-gig-economy/#445aec5b3d4d>.

461. Price V. Fishback & Shawn E. Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 305 (1998).

462. See *id.* at 305–06.

comotive or car. To extend the system into an environment where all of the work is outside of the TNP's premises and in the worker's own vehicle, or using other worker-provided tools, is difficult and largely unprincipled.

In most states, the workers' compensation systems are distressed because of the near insolvency of backup state funds.⁴⁶³ The strains on these systems are exacerbated by the abuse of the system by fraudulent employee claims and undue employer resistance to legitimate claims. Gig workers have far less need for workers' compensation protection than the factory workers of the early 20th century because of the availability of insurance for gig workers and the likely extension of healthcare coverage, notwithstanding the Trump Administration's efforts to dismantle the Affordable Care Act. The only exception might be an automobile accident while a passenger is in the car or while an Amazon package is in the trunk. Lyft and Amazon Flex require proof of insurance and offer supplemental insurance, so the need for the existence of any gap that workers' compensation needs to fill is questionable.

3. Discrimination

Conventional employment law protects employees from exclusion from the labor market because of their race, gender, ethnicity, religion, age, national origin, or sexual orientation.⁴⁶⁴ Centuries of American history show that markets are not good at mitigating these risks. Discrimination based on one or more of these characteristics has been rampant in different periods of American history. Thus, legislatures enacted Title VII of the Civil Rights Act,⁴⁶⁵ the Age Discrimination in Employment Act,⁴⁶⁶ and the Americans With Disabilities Act,⁴⁶⁷ along with state counterparts. In addition to these regulatory regimes, which mostly limit their protections to employees, a wide and complex array of similar protections exist for others in society: clients of governmental agencies, customers of private places of public accommodation, and customers of housing units.

The handful of cases excluding independent contractor workers not only from the protections of employment law but also from protections of public accommodations and commercial-establishment law are irrational and should be repudiated. Explicitly affording antidiscrimination protection to gig workers is unobjectionable. The scope of anti-discrimination protection is already much broader than statutory employees. To exclude workers who are inde-

463. See generally Meg Fletcher, *Guaranty Funds not Guaranteed for Self-Insured Comp Claims*, BUS. INS. (Mar. 15, 2009), <https://www.businessinsurance.com/article/20090315/STORY/100027305/Guaranty-funds-not-guaranteed-for-self-insured-comp-claims>.

464. 42 U.S.C. § 2000e-2 (1964).

465. *Id.* §§ 2000e-2000e-17.

466. 29 U.S.C. §§ 621-634 (1967).

467. 42 U.S.C. §§ 12101-12213 (1990).

pendent contractors from the protection of antidiscrimination law applicable to commercial entities and places of public accommodation is not backed up by any discernible logic. This practice creates an irrational gap in protection.

4. Unemployment Compensation

Unemployment compensation systems are premised on the idea that workers should be able to draw on insurance when they lose their jobs.⁴⁶⁸ Losing a job presupposes involuntary termination. No unemployment compensation system allows a worker to draw benefits when he voluntarily quits, making this central concept work in the gig labor market context likely impossible. But it may be feasible to distinguish between a driver going off-line from a situation in which the driver is online but gets no pick up orders, or an Amazon flex driver who goes to the warehouse to be available for his scheduled block and get some packages is infeasible. This in turn would require designing an insurance system to protect workers against a decline in piecework. Moreover, most gig workers are paid on a piecework basis—a notoriously difficult problem for regulators attempting to calculate minimum wage.⁴⁶⁹ Calculating the effective minimum wage for piecework always has been a problem for wage and hour regulators.⁴⁷⁰

If one cannot determine when gig workers are working, one cannot determine when they have been laid off or otherwise become unemployed and thus entitled to receive benefits. It is clear that an Uber driver who decides to be online and thus available to give rides less often has not been “terminated” under existing unemployment compensation rules. Likewise, if his access to the system is deactivated, termination has occurred. But platform-initiated deactivation is almost always for-cause, which would disqualify the driver from unemployment compensation anyway.⁴⁷¹ Uber drivers would presumably like to be insured against the simple loss of opportunity occasioned by a falloff in demand or, more likely, an excess of supply, but deciding upon triggers for unemployment compensation for these reasons is fraught with difficulty. It would effectively impose a tax on platform providers for facing insufficient demand or contracting with too many drivers. The existing unemployment compensation system is unsuitable for gig labor markets.

468. See I.R.C. §§ 3301–3311 (2018).

469. See Karla Walter & Kate Bahn, *Raising Pay and Providing Benefits for Workers in a Disruptive Economy*, CTR. FOR AM. PROGRESS (Oct. 13, 2017), <https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/>.

470. *Id.*

471. See *New Uber Driver Deactivation Policy Created from Lawsuit Settlement*, BECOMEARIDESHAREDRIVER.COM (May 19, 2018), <https://becomearidesharedriver.com/new-uber-driver-deactivation-policy/>.

5. Tax Withholding

Requiring platforms to withhold taxes for gig workers would benefit workers and impose minimal burdens on employers and employees. Withholding tax ensures that non-employee workers pay their tax obligations.⁴⁷² It also spares them from getting tangled up in enforcement actions flowing from inadvertent failures to pay estimated taxes.⁴⁷³ It imposes some additional burdens, but hiring entities must already obtain paperwork such as W-4 forms and provide 1099 forms to independent contractors.⁴⁷⁴

6. Collective Action

Collective bargaining is a helpful labor market institution, fully consistent with a cultural preference for decentralized, privatized, and market-oriented regulation.⁴⁷⁵ The gig economy faces threats not unlike those faced by the newspaper markets of the 1950s.⁴⁷⁶ Likewise, to the extent that markets are not satisfying distributive goals with respect to incomes, there is nothing

472. Howard Gleckman, *Making Sure Gig Workers Pay the Right Amount of Tax*, TAX POLICY CTR. (Oct. 30, 2018), <https://www.taxpolicycenter.org/taxvox/making-sure-gig-workers-pay-right-amount-tax>.

473. *See id.*

474. *Id.*

475. It is a straightforward way to “remedy the individual worker’s inequality of bargaining power.” *See Nat’l Labor Relations Bd. v. Hearst Pubs.*, 322 U.S. 111, 126–27 (1944). “The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to ‘employees’ within the traditional legal distinctions separating them from ‘independent contractors.’ Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation’s economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand.” *Id.* at 126–27.

476. *Id.* at 111 (reversing court of appeals and enforcing NLRB order to bargain over working conditions of “independent contractor” newsboys). “The newsboys work under varying terms and conditions. They may be ‘bootjackers,’ selling to the general public at places other than established corners, or they may sell at fixed ‘spots.’ They may sell only casually or part-time, or full-time; and they may be employed regularly and continuously or only temporarily. The units which the Board determined to be appropriate are composed of those who sell full-time at established spots. Those vendors, misnamed boys, are generally mature men, dependent upon the proceeds of their sales for their sustenance, and frequently supporters of families. Working thus as news vendors on a regular basis often for a number of years, they form a stable group with relatively

structurally distinct about the gig economy that matters. The action by the Seattle City Council to allow ride-hailing drivers to engage in collective bargaining is a potential model.⁴⁷⁷ Collective bargaining for ride-hailing drivers can proceed in a modified form. For example, if it is a creature of state and local law, there is no reason selection of a bargaining representative need be accompanied by exclusive representation rights. Individual drivers could decide for themselves whether they want to be represented by an agent or to take care of themselves.

Mancur Olsen's *The Logic of Collective Action*⁴⁷⁸ teaches that such an arrangement would be fragile. This is because of the tendency toward free riding, and the experience of the late 19th century suggests that competing representatives can multiply work stoppages and other disruptions. The scope of mandatory subjects of bargaining might be different for gig workers than for workers under the NLRA. The formula crafted in *Fibreboard* and *First National Maintenance*⁴⁷⁹ might be different because of the different considerations in the "partnership" between gig workers and their network platforms and because of their direct contacts and relations with the final customers.

Ultimately, the power of workers in any system of free collective bargaining is determined by their ability to interrupt their opponent's operations. This is determined by a combination of group solidarity on the worker side and labor market conditions. If group solidarity is high, few members of the workgroup will cross picket lines and perform struck work; if it is low, any strike will not be effective. If labor market conditions are tight, the platform will have difficulty finding replacement workers, but if conditions are slack, significant numbers will be willing to cross picket lines and "scab." Bargaining under the NLRA or a new regime is not a magic bullet for empowering workers. Ultimately, worker welfare depends on supply and demand in the labor markets. But affording them the privilege of engaging in concerted action gives them a sense of empowerment and evens out the balance of power in many gig workplaces. Section IV.G.3 explores more fully the idea of ex-

little turnover, in contrast to schoolboys and others who sell as bootjackers, temporary and casual distributors." *Id.* at 115–16.

477. See *infra* Sec. IV.B.10 (describing framework for collective bargaining under ordinance and reviewing judicial challenges).

478. MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 11 (1965); see Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 313, 343 n.157 (2012) (citing Mancur Olsen and using his analysis of collective action to explore psychology of union organizing).

479. *Fibreboard Paper Products Corp. v. Nat'l Labor Relations Bd.*, 379 U.S. 203, 210–15 (1964) (including decision over whether to contract out work within mandatory subjects of bargaining under NLRA); *First Nat'l Maint. Corp. v. Nat'l Labor Relations Bd.*, 452 U.S. 666, 687–88 (1981) (distinguishing effects bargaining from bargaining over decision to terminate a business relationship itself).

tending the labor exemption to the antitrust laws to permit collective bargaining at the local level by workers classified as independent contractors: the critical open issue relating to the Seattle City Council initiative.

E. Third-Party Protection: Vicarious Liability

The distinction between employer and independent contractor is often crucial in the tort context. For example, in deciding whether masters should be vicariously liable for the acts of their servants has nothing to do with fair treatment of workers. Of course, gig workers will have accidents, and the employer/independent contractor distinction remains relevant to tort law. Employee status makes the hiring entity vicariously liable.⁴⁸⁰ Independent contractor status leaves the hiring entity without liability unless it has engaged in an independent act that is wrongful, such as negligent hiring or negligent specification of work.⁴⁸¹ The respondeat superior doctrine assigns liability to an employer.⁴⁸² Employee status for third-party tort purposes does not necessarily mean employee status for labor and employment law entitlements.⁴⁸³ But the boundary line for the one has historically been treated as appropriate for the other.

Here, the justification for legal intervention would not be that a hiring entity is legally responsible for damages because its powers to control the work makes it responsible for accidents. Rather, it is that the hiring entity has deeper pockets, and therefore is more likely than the driver to be able to compensate the victim. This justification is diminished when drivers have liability insurance. The possibility that the driver may evade such a requirement and be judgment proof is eliminated by requiring the TNP to provide liability insurance covering its drivers, to the extent that the drivers own insurance does not provide coverage.

F. Customer Disputes and Video Cameras

The Uber-driver blogs and gripe sites show that one common source of complaint by drivers is the perceived unfairness of Uber's system for dealing

480. *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 781 (N.D. Cal. 2016).

481. *Id.* at 788.

482. *See id.* at 780 (enumerating claims against Uber for sexual assault by driver, including respondeat superior claims and negligent hiring, supervision, and retention and denying motion to dismiss most of them).

483. “[A] person who, for instance, is held to be an ‘independent contractor’ for the purpose of imposing vicarious liability in tort may be an ‘employee’ for the purposes of particular legislation, such as unemployment compensation.” *Nat’l Labor Relations Bd. v. Hearst Pubs.*, 322 U.S. 111, 122 (1944) (agreeing with NLRB that newsboys, formally classified as independent contractors, should be treated as employees under the NLRA).

with customer complaints.⁴⁸⁴ Drivers complain that Uber always treats the customer as right, even when the customer is wrong.⁴⁸⁵ One way to protect drivers against false or exaggerated passenger claims is to install video and audio recording equipment in cars. Drivers can buy their own cameras for less than \$200 and install them themselves.⁴⁸⁶ Some degree of experimentation might be necessary to get the camera angle right to capture interactions between the driver and passenger regardless of where the passenger is sitting.

Three possible objections to the self-help camera approach exist. First, capturing imagery of the passengers violates statutory rights of publicity or constitutes common-law invasion of privacy.⁴⁸⁷ The likelihood of a passenger asserting such a claim is low, but the claim of invasion of such rights could be negated if the driver posts notice saying, “if you ride in this vehicle, you are consenting to having a video and audio recording made of your ride, which will be used only for the purpose of resolving any dispute that might arise with respect to the ride.”⁴⁸⁸ Second, adding such equipment to the Uber approved vehicle violates the contract between the driver and Uber.⁴⁸⁹ The current Lyft rules contain no express prohibition of recording equipment. The third objection could be expressed on an ad hoc basis by riders through complaints to Uber about the driver. This may prompt Uber to modify its policies to prohibit recording.

On the other hand, when passengers and drivers have disputes, the possibility always exists that a passenger’s attempt to impose liability on the driver can spill over to Uber, no matter how strongly Uber tries to structure the relationship to minimize that risk. Having unambiguous evidence as to what happened will give Uber additional defenses – assuming that most of its drivers behave appropriately most of the time.⁴⁹⁰ Even if Uber does not pro-

484. See, e.g., *Complaints*, UBERPEOPLE.NET, <http://uberpeople.net/forums/Complaints/>.

485. Harry Campbell, *Why Do So Many People Quit Driving for Uber?*, THE RIDESHARE GUY (July 11, 2016), <https://therideshareguy.com/why-do-so-many-people-quit-driving-for-uber/>.

486. See *Car and Driver—Minio Pro CDC-628 Dash Cam—Silver*, BEST BUY, <https://www.bestbuy.com/site/car-and-driver-minio-pro-cdc-628-dash-cam-silver/6075001.p?skuId=6075001&cmp=RMX&extStoreId=313&ref=30&loc=4320&gclid=CLH6p-7vntoCFQumZQodQy4HNq&gclid=ds>.

487. See Emily L. Dyer, *Need a Ride? Uber: The Trendy Choice that Could Turn Threatening*, 17 NEV. L.J. 239, 262 (2016).

488. *Id.* at 265.

489. *Can I Use a Video Camera?*, *supra* note 210.

490. The judgment required of police departments whether their officers should wear body cameras evokes a similar calculus. If the department believes that most claims of police brutality are frivolous or exaggerated, cameras are a good idea; if it believes that most of them are valid, cameras are a bad idea from the standpoint of the police department. See generally German Lopez, *Police Body*

hibit recording equipment, it can take adverse action against drivers who are the subject of complaints in this regard, thereby discouraging the practice. A more rigorous regulatory approach would approve, and perhaps mandate, cameras as part of a broader regulatory regime for transportation network providers. Section IV.H also discusses cameras.

G. Legal Regimes

1. Governmental Level of Regulation

Most gig product markets vary greatly in different regions of the country. Accordingly, the need for regulation at the federal level cannot be established. There is little interregional competition for gig services and any race to the bottom, such as occurred with labor protective legislation in the textile industry in the 19th century, is unlikely.⁴⁹¹ The tradition of regulating taxis at the municipal level suggests that continued regulation at the municipal level may be the appropriate choice. While regulatory capture by the taxicab monopolies is a significant problem, Uber, Lyft, and Amazon Flex are big enough to take care of their own interests. Voters at the municipal level can decide for themselves whether they want the benefit of Uber and Lyft and other gig-delivered services.

Chicago, for example,⁴⁹² regulates taxis,⁴⁹³ limousines,⁴⁹⁴ and TNPs⁴⁹⁵ under separate regulatory regimes. All three must obtain a license from the city to offer services.⁴⁹⁶ They may not use drivers who do not possess chauffeur licenses,⁴⁹⁷ but the chauffeur licensing requirement for TNP drivers is simple.⁴⁹⁸ The ordinance requires insurance to satisfy claims by third parties

Cameras, Explained, VOX (Aug. 22, 2016), <https://www.vox.com/2014/9/17/6113045/police-worn-body-cameras-explained>.

491. See David R. Meyer, *The Roots of American Industrialization, 1790–1860*, EH.NET (Mar. 16, 2008), <https://eh.net/encyclopedia/the-roots-of-american-industrialization-1790-1860/>.

492. Deanna Dupuy, *The Regulation of Transportation Network Companies*, AGORA 114–22 (2017), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/136582/Dupuy_TheRegulationOfTransportationNetworkCompanies.pdf?sequence=1&isAllowed=y (summarizing approach of different U.S. municipalities).

493. CHICAGO, IL. MUN. CODE § 9-112-020 (2013).

494. *Id.* § 9-114.

495. *Id.* § 9-115.

496. *Id.* § 9-112-020.

497. *Id.* § 9-112-260 (requirements for taxi drivers); § 9-114-285 (requirements for limo drivers); § 9-115-150(a) (requirements for TNP drivers).

498. *Illinois — Chicago Driver Application Requirements*, LYFT, <https://www.lyft.com/driver-application-requirements/chicago-il> (last visited Mar. 4, 2019) (The Lyft application process administers the necessary “instruction” to drivers

and passengers.⁴⁹⁹ Taxi and TNP drivers may not drive more than twelve out of twenty-four hours.⁵⁰⁰ Taxis and TNPs must disclose the details of their pricing and the identity of drivers to passengers.⁵⁰¹

The taxi ordinance alone prescribes the level of fares to passengers and charges to drivers.⁵⁰² The city's commissioner of business affairs and consumer protection sets specific prices for taxi rides.⁵⁰³ The ordinance empowers the commissioner to set lease rates that the driver pays the taxi enterprise.⁵⁰⁴ This provides "adequate revenues to pay the lessor's reasonable expenses and receive a just and reasonable rate of return on the lessor's investment" and to "provid[e] lessees [the drivers] with an opportunity to earn a fair and reasonable income."⁵⁰⁵ The taxi ordinance prohibits discrimination against drivers⁵⁰⁶ and bans retaliation against them for acting to promote compliance with the ordinance and other applicable laws.⁵⁰⁷

In no event should new regulation be implemented at the federal level. The original justification for federal labor legislation was the inherently national markets by enterprises for which employees worked. Labor legislation in Massachusetts could not be effective when textile capital was free to escape those labor standards by absconding to the South and erecting factories there instead. On-demand automobile transportation is entirely unlike that. It is inherently local in nature. New York has imposed costly restrictions on Uber and Lyft well beyond what any other major metropolitan area has implemented.⁵⁰⁸ Platform companies unhappy with New York's regulatory regime cannot serve New York markets from somewhere else. Ultimately, they

by disclosing about two pages worth of tips on safety mandates by the city, as part of the basic driver application process online).

499. CHICAGO, IL. MUN. CODE § 9-112-330 (taxis); § 9-114-170 (specific levels of liability coverage for limos); § 9-115-090 (TNP operators required to cover whatever drivers' insurance does not).

500. *Id.* § 9-112-250 (taxi drivers' hours of service); § 9-115-190 (TNP drivers' hours of service).

501. *Id.* § 9-112-490 (taxis); § 9-112-510 (taxi fare meter); § 9-115-200 (disclosure of TNP service charges and fare rates). This requirement is unnecessary for limos presumably because the terms of a limousine ride are negotiated in advance between passenger and the service.

502. *Id.* § 9-112-600 (fares).

503. *Id.*

504. *Id.* § 9-112-220; § 9-112-230.

505. CHICAGO, IL. MUN. CODE § 9-112-220(a).

506. *Id.* § 9-112-180.

507. *Id.* § 9-112-190.

508. Shoshana Wodinsky, *In Major Defeat for Uber and Lyft, New York City Votes to Limit Ride-Hailing Cars*, THE VERGE (Aug. 8, 2018), <https://www.theverge.com/2018/8/8/17661374/uber-lyft-nyc-cap-vote-city-council-new-york-taxi>.

simply can exit the New York market and leave it unserved. This may be the very purpose behind municipalities' actions and is presumably a reflection of local attitudes on this issue.

2. Class Actions

The workers in the gig economy always have access to class action lawsuits to seek relief against abuse, but they cannot be successful unless the plaintiffs are asserting some underlying legal right. One example is the 2010 class action suit by owner operators against brokers in Florida, *Owner-Operator Independent Drivers Association, Inc. v. Landstar System, Inc.*⁵⁰⁹ The *O'Connor* case is another.⁵¹⁰ They are discussed in Section III.D.

3. Extending the Labor Exemption from the Antitrust Laws

Allowing collective action by workers without their risking antitrust liability has the advantage of allowing the workers to decide whether market forces alone within status-quo market structures provide them adequate work environments. If they believe the status quo is insufficient, the level of grievance will make it easier to organize them, and the inherently local nature of the service will permit them to be effective in exerting pressure with a modicum of solidarity. It avoids regulation based on the interests of someone else—entrenched taxi interests—rather than the gig workers.

One area in which change may be appropriate is collective bargaining. Gig workers should have the privilege to act together to discuss their working conditions with their platform providers without running the risk of antitrust liability. That does not mean, however, that the full panoply of NLRA or Railway Labor Act mechanisms should be brought into play. Instead, worker preference functions and priorities should be allowed to shape institutions for worker representation. If legal intervention turns out to be necessary, it can be shaped around particular problems, once they actually emerge.

Realizing this objective entails the prospect that antitrust liability for collective action by independent contractors must be dealt with. The scope of the labor exemption to the antitrust laws could be expanded beyond the realm of collective bargaining under the NLRA and the common-law definition of employee.⁵¹¹ It would permit groups of workers forced to work under a con-

509. 622 F.3d 1307 (11th Cir. 2010).

510. *O'Connor v. Uber Techs., Inc.*, No. CV 13-3826-EMC (N.D. Cal. Nov. 17, 2014).

511. See Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 *FORDHAM L. REV.* 1727 (2018) (promoting idea of Uber Guild and similar quasi unions to protect gig workers); Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 *U.C. DAVIS L. REV.* 1543 (2018) (arguing for expansion of labor exemption so gig workers can engage in collective bargaining); accord, SETH D. HARRIS & ALAN B. KRUEGER, *A PROPOSAL FOR MODERNIZING LABOR LAWS FOR*

tract of adhesion to organize and to bargain collectively over the terms and conditions of their work.⁵¹² Only employees are privileged to participate in collective bargaining.⁵¹³ Independent contractors are outside the scope of the labor exemption.⁵¹⁴ Therefore, if they work together to achieve uniform and improved terms and conditions of work, they violate the antitrust laws.

Most labor lawyers assume that independent contractors are outside the scope of the labor exemption, on the strength of *Allen Bradley*,⁵¹⁵ *Columbia River Packers*,⁵¹⁶ and a number of lower court opinions. However, the case

TWENTY-FIRST-CENTURY WORK 15 (2015) (“Antitrust laws should be amended to allow independent workers to organize”, but not proposing coverage by NLRA).

512. Uber and Lyft already have established institutions for collective driver consultations. Dara Kerr, *Uber Creates Advisory Forum to Get Drivers' Lowdown*, CNET (Dec. 12, 2017), <https://www.cnet.com/news/uber-creates-driver-advisory-forum-for-drivers-feedback-early-tester/> (reporting on establishment of Driver Advisory Forum comprising of driver representatives from all parts of the country that the company will fly to Seattle twice annually to discuss driver concerns with the CEO and other executives); Christian Perea, *What Happened at the Uber Driver Advisory Forum*, THE RIDESHARE GUY (Jan. 24, 2018), <https://therideshareguy.com/what-happened-at-the-uber-driver-advisory-forum/> (reporting that first meeting with thirty-five representatives was 50% PR and 50% genuine focus groups discussing topics such as driver earnings, support, in-app navigation, and Uber's vision for the future); *Meet the Lyft Drivers Advisory Council*, LYFT, <https://thehub.lyft.com/dac/> (last visited Aug. 22, 2019) (describing 2016 establishment of seven-member council with driver representatives from seven regions, with applications open to join the council every six to nine months); *March 2018 Driver Advisory Council Monthly Update*, LYFT (Apr. 3, 2018), <https://thehub.lyft.com/blog/2018/4/3/march-2018-dac-update> (reporting that out of 100 driver requests, twenty have been completed and forty-one are being designed, tested, or coded).
513. Nat'l Labor Relations Bd. v. Uber Technologies, Inc., 216 F. Supp. 3d 1004, 1006 (N.D. Cal. 2016) (noting that Uber drivers are covered by the NLRA only if they are “employees”; enforcing NLRB subpoena).
514. “[T]he owners themselves must be considered independent businessmen rather than employees of WTA. While there is nothing illegal in the desire of this ‘group of entrepreneurs’ to have a single agent represent them, that desire does not exempt them from the anti-trust prohibitions against group boycotts.” Wash. Trotting Ass’n v. Pennsylvania Harness Horsemen’s Ass’n, 428 F. Supp. 122, 126 (W.D. Pa. 1977); see *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 146 (1942) (holding that disputes among businessmen are outside scope of labor exemption to antitrust laws); *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124, 127 (3d Cir. 1974) (holding that association of trucker owner-operators was outside labor exemption because case did not involve “employer-employee relationship”).
515. *Allen Bradley Co. v. Int’l Broth. of Electrical Workers*, 325 U.S. 797 (1945).
516. *Columbia River Packers Ass’n*, 315 U.S. at 143.

law supporting that proposition is not as strong as one might assume. To be sure, the language in *Columbia River Packers* says that businessmen are not entitled to the protections of the labor laws, but the businessmen involved in *Columbia River Packers* were employers and not mere workers like Uber drivers.⁵¹⁷ Furthermore, the *Columbia River* Court observed that “by the terms of the statute there may be a ‘labor dispute’ where the disputants do not stand in the proximate relation of employer and employee.”⁵¹⁸

The labor exemptions originate in the Norris LaGuardia Act,⁵¹⁹ which builds on the Clayton Act’s recitation that “labor is not an article of commerce,”⁵²⁰ by stating that “public policy . . . [is to give] aid to ‘the individual unorganized worker . . . commonly helpless . . . to obtain acceptable terms and conditions of employment.’”⁵²¹ The Act contains an explicit exemption from the antitrust laws.⁵²² One can take that language and consider the nature of the exchange between worker in Uber and Lyft services. An Uber driver exchanges their labor and the use of the driver’s vehicle for contact with passengers and a share of what the passengers pay. One can plausibly argue that kind of exchange is within the scope of Norris-LaGuardia and is clearly what the statute meant to protect.

The law could simply recalibrate the line separating independent contractors from employees under the NLRA and permit workers to bargain collectively. This need not imply any particular treatment under other statutory and common law regimes. Alternatively, a new labor exemption could be crafted in the context of antitrust adjudication that would address the needs of gig workers without saddling them with a century’s worth of baggage from collective bargaining practices developed in factory settings. For example, worker representatives might not enjoy the right of exclusive representation. They could decide whether they want to join an organization and give the organization power to negotiate for them. Others might elect to join other organizations or to deal for themselves.

If the labor exemption were expanded to cover gig workers, the law would have to reconsider the hallmarks of collective bargaining: not only exclusive representation, but also the scope of bargainable subjects, permissible ends and means of concerted economic pressure, good-faith bargaining obligations, and discrimination based on membership in worker organizations. It is neither necessary nor appropriate to throw open the gates to concerted action by all types of small businesses. Any expansion of the labor

517. *Id.* at 143 (noting that some of the fishermen had employees of their own).

518. *Id.* at 146.

519. 29 U.S.C. §§ 101–115 (1932).

520. *Allen Bradley*, 325 U.S. at 804 (characterizing Section 6 of Clayton Act).

521. *Columbia River Packers Ass’n*, 315 U.S. at 145 (quoting statute 29 U.S.C. § 102).

522. 29 U.S.C. § 105 (1932) (which has come to be known as the “statutory exemption”).

exemptions should be predicated on the insistence of contracts of adhesion, making workers dependent on those with whom they seek to bargain.

4. Common Law

Wrongful dismissal protection is not limited to common-law employees.⁵²³ The public policy tort conceptually covers any termination of an at-will legal relationship under circumstances that undermine public policy.⁵²⁴ The implied-in-fact contract theory of wrongful dismissal simply accommodates traditional common law breach of contract law to situations in which a party buying labor services makes promises of employment security that it does not keep. The implied covenant of good faith and fair dealing applies to all contractual relationships. The caselaw on its application in the employment context at most suggests it might have a more restricted application to common-law employees than to independent contractors. Deviations from promised compensation, a common source of ride-hailing driver complaint, can be adjudicated in common-law breach-of-contract actions.⁵²⁵

H. Cameras in the Car

The accuracy of the process for resolving disputes between drivers and passengers can be improved if drivers put video cameras in their cars, as suggested by section IV.F. Drivers can buy their own cameras for less than \$100 and install them themselves.⁵²⁶ Some degree of experimentation might be necessary to get the camera angle right capture interactions between driver and passenger regardless of where the passenger is sitting. Audio as well as video obviously is desirable. Three possible objections exist to the self-help camera approach. The first is that capturing imagery of the passengers violates statutory rights of publicity or constitute common-law invasions of privacy.⁵²⁷ The likelihood of a passenger asserting such a claim is low, and any possible claim can be negated if the driver posts a notice saying “if you ride in this vehicle, you are consenting to having a video and audio recording made of your ride, which will be used only for the purpose of resolving any dispute that might arise with respect to the ride.”

523. See generally HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* 2–5 (4th ed. 1988) (analyzing common law theories for wrongful dismissal).

524. See *id.*

525. See *infra* Sec. III.D.1.a.ii.–v.

526. *Car and Driver—Minio Pro CDC-628 Dash Cam—Silver*, *supra* note 488.

527. See 4 *INTELLECTUAL PROPERTY COUNSELING & LITIGATION* § 57.07 (2018) (discussing publicity rights); see *Survey of Deceased Celebrity Rights*, 25 *ENT. & SPORTS LAW* 20 (2007) (discussing common-law invasion of privacy in a multitude of jurisdictions).

The second objection might be that adding such equipment to the Uber approved vehicle violates the contract between the driver and Uber. An Uber “partner” help screen expressly allows cameras:

Can I use a video camera? Uber allows driver-partners to install and use video cameras to record riders for purposes of safety. Please note that local regulations may require individuals using recording equipment in vehicles to fully disclose to riders that they are being recorded in or around a vehicle and obtain consent. Please check local regulations in your city to determine if these apply.⁵²⁸

The third objection could be expressed on an ad hoc basis by riders through complaints to Uber about the driver, and that might motivate Uber to modify its policies to prohibit recording. On the other hand, when passengers and drivers have disputes, the possibility always exists that a passenger’s attempt to impose liability on the driver can spill over to Uber, no matter how strongly Uber tries to structure the relationship to minimize that risk. Having unambiguous evidence as to what happened will give Uber additional defenses—assuming that most of its drivers behave appropriately most of the time.⁵²⁹ A more rigorous regulatory approach would approve, and perhaps mandate, cameras as part of a broader regulatory regime for transportation network providers.

V. NEW CATEGORY OF “DEPENDENT CONTRACTOR?” OR REINTERPRETATION OF “EMPLOYEE”

Uber and Lyft drivers should not be classified as employees. They do not satisfy the traditional legal criteria for that status under either the right to control test or the economic realities test.⁵³⁰ And to do so would be bad policy. An analysis of market structure and practices by the two platform providers shows that existing labor markets are working pretty well. Drivers easily can switch between Uber and Lyft or drive for both of them. The intensity of advertising for new drivers indicates that labor market conditions confer reasonable bargaining power on the drivers. Though drivers cannot negotiate their own terms individually, both companies are sensitive to driver

528. *Can I Use a Video Camera?*, *supra* note 210.

529. The judgment required is like that of a police department deciding whether to equip its police officers with body cameras. If it believes that most claims of police brutality are frivolous or exaggerated, cameras are a good idea; if it believes that most of them are valid, cameras are a bad idea—from the standpoint of the police department.

530. See Robert T. Szyba, *Determining Employment Status: How Do You Know Whether a Worker is an Employee, Independent Contractor, or Perhaps an Independent Worker?*, AM. BAR ASS’N 1–6 (2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/err/papers/syzba_paper.pdf (discussing the “right to control” and “economic realities” test).

complaints and suggestions, regularly soliciting feedback, listening to driver representatives through driver advisory councils, and making changes to their policies and app software to add features the drivers want. Within the last year alone, they have permitted tipping,⁵³¹ allowed drivers to accept only those ride requests that get the driver closer to a destination he specifies,⁵³² and started re-admitting drivers to their places in airport queues after they have been stuck with a short ride.⁵³³ Part IV.B's review of the traditional elements of labor and employment regulation reveals that most of the elements are ill-suited for gig labor markets, unnecessary, and likely to interfere with the flexibility the workers are so drawn to. Moreover, the labor markets are local and thus the traditional justification for federal regulation is lacking whatever regulation occurs should occur at the municipal or metropolitan level.

Two sets of commentators largely agree with this outcome. They have sensibly concluded that, if gig labor markets need regulatory protection for their workers, it should not take the form of simply imposing traditional labor and employment regulation. Among the commenters are two former Obama administration economic policy officials. They proposed, in 2015, a separate legal regime for protecting the interests of workers in gig labor markets.⁵³⁴ They proposed a new category of "independent worker."⁵³⁵ This proposition was based on: the uncertainty of employee/independent contractor determinations; the unsuitability of these traditional categories for much of what gig workers do; and the need to assure that all work falls within the "social compact" developed over the last century and a half for American workers.⁵³⁶ They would afford independent workers the right and privilege of collective-bargaining, but keep them outside the existing NLRA and, by implication, the Railway Labor Act because of the uncertainties associated with protection under those statutes and because of the accumulation of bureaucratic

531. Connie Loizos, *Uber is Implementing Tipping, But How Well It Works Will be Critical*, TECH CRUNCH (Jun. 20, 2017), <https://techcrunch.com/2017/06/20/uber-is-implementing-tipping-but-how-well-it-works-will-be-critical/>.

532. Alison Griswold, *Uber is Letting Some Drivers Pick and Choose Where They Drive*, QUARTZ (Aug. 16, 2017), <https://qz.com/1055050/uber-is-testing-a-drop-off-area-filter-that-lets-drivers-choose-where-they-drive/>.

533. *Pro-Tips for Giving Airport Rides*, LYFT, <https://help.lyft.com/hc/en-us/articles/115013080368-Pro-Tips-for-Giving-Airport-Rides> (last visited Aug. 22, 2019).

534. See Harris & Krueger, *A Proposal for Modernizing*, *supra* note 14, at 15–21 (proposing new legal category of "independent worker," who would be protected by rights to bargain collectively, prohibitions against discrimination, tax withholding and unemployment taxes, and workers compensation, but not minimum wage and overtime rules).

535. The Taylor Review proposed a similar category: "dependent contractor." TAYLOR ET AL., *supra* note 10, at 35.

536. Harris & Krueger, *A Proposal for Modernizing*, *supra* note 14, at 15.

rigidity under the often partisan decisions of the NLRB.⁵³⁷ They would then allow collective bargaining to be shaped by gig labor markets organically.⁵³⁸ This proposal would put teeth to what Uber is already doing with its Drivers Advisory Council and reflect the Seattle initiative.⁵³⁹

Harris and Krueger are agnostic on how far they should extend their proposed regime into independent contractor territory.⁵⁴⁰ They propose extending anti-discrimination protection under the civil rights laws to gig workers. They propose applying payroll tax withholding obligations to platforms that hire gig workers. The reasoning behind Harris and Krueger's exclusion of independent workers from minimum wage and overtime protection⁵⁴¹ is sound, recognizing the difficulty in measuring work time in gig labor markets. These difficulties in distinguishing between worktime and non-worktime also makes application of workers compensation, which Harris and Krueger favor,⁵⁴² as Section IV.B.7 explains. The same considerations militate against affording unemployment compensation protection to gig workers, which Harris and Krueger also propose.⁵⁴³ Harris and Krueger's proposal is similar to the proposal by the Taylor Review in England for a new category of "dependent contractor."⁵⁴⁴ The Taylor proposals are developed with somewhat less concreteness, however, with a significantly different starting point.

In no event should regulators attempt to subject gig labor markets to minimum wage and overtime premium standards. The New York City initiatives represent bad policy. Application of such standards is a poor fit for the flexible working conditions and hours of gig workers. And, as Section IV.D.2.a explains, health and safety regulation designed for traditional workplaces is also ill-suited for work that takes place in the field with worker-provided equipment. Attempting to regulate Uber and Lyft now is likely to damage not only those labor markets but labor markets for gig workers more generally. Because of their prominence, any regulatory regime is likely to

537. *Id.*

538. *Id.*

539. *See infra* Sec. IV.B.10 (summarizing municipal grant of collective bargaining privileges to ride-hailing drivers).

540. *See Harris & Krueger, A Proposal for Modernizing, supra* note 14, at 21–24 (considering taxi drivers, temporary staffing agencies such as Kelly Services and Manpower, labor contractors, union hiring halls, outside sales employees and direct sales workers and suggesting that some, but not all, should be classified as independent workers).

541. *Id.* at 20.

542. *Id.* (proposing that gig workers be able to opt in).

543. *Id.*

544. *See TAYLOR ET AL., supra* note 10, at 36 ("dependent contractors" must maintain flexibility).

reflect the particular characteristics of ride-hailing markets, but the temptation will be strong for regulators to extend coverage to gig labor markets generally. The structure of the labor market for Mechanical Turk, Taskrabbit, or Airbnb is vastly different from the structure of ride-hailing markets. If they need regulatory protection for workers, the type of protection they need will almost certainly be substantially different. Courts can extend the labor exemptions to gig workers without legislation. Enough ambiguity and flexibility exists in the case law on the labor exemptions to allow them to be molded around the conditions of particular labor markets, and applying competition policy to markets for gig workers is surely a case of first impression.

An important advantage of limiting reforms to collective bargaining and anti-discrimination is the fact that either can be adopted without the necessity of federal legislation. Gig workers can organize and seek to bargain with their platform providers and await an antitrust action filed by the platforms. Then, they may assert that they acted within a labor exemption to the antitrust laws, as they should be properly understood. Antitrust laws expose violators to potential criminal penalties, but the likelihood of conviction and incarceration for good faith efforts to engage in bargaining over terms and conditions of work is low.

Antidiscrimination protection can be afforded by judicial and agency interpretation of existing public accommodation and commercial establishment law, without reclassifying gig workers as statutory employees. Gig workers subjected to discrimination can assert claims under the commercial-establishment and public-accommodations sections of the civil rights laws and the Americans With Disabilities Act. Such aggrieved parties may manage to persuade federal and state courts to include gig workers within the protections of those statutory provisions. Tax withholding would require a change in Internal Revenue Service regulations.⁵⁴⁵ To the extent that worker protective regulation is justified, the most efficient way to implement it through the existing municipal regulatory regimes for transportation network providers.

545. *See* Internal Revenue Service Release No. 200835025, Index No. 3121.04-01, 3306.05-00, 3401.04-02 at pp. 3–4 (May 21, 2008) (discussing relationship between statutory definitions and IRS regulations in determining employee status).