Employed by an Algorithm: Labor Rights in the On-Demand Economy

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ABSTRACT

This Article analyzes the viability of legislation extending labor rights to workers currently excluded from protection in the on-demand economy. Uber, perhaps the most well-known business operating in the on-demand economy, classifies its drivers as independent contractors, which strips them of federal rights to organize a union. Uber argues that its algorithm-based business model has essentially transformed the employment relationship, suggesting traditional labor laws are no longer necessary. This argument is belied by the economic realities of the workers who make those algorithms possible and profitable. While some prefer working multiple "gigs," many on-demand workers struggle to piece together full-time hours and minimum wages; they possess neither the individual bargaining power of contractors nor the collective bargaining power of employees.

In the absence of federal leadership to correct this imbalance, state and local governments have begun taking steps toward regulating the on-demand economy. The Seattle City Council passed an innovative ordinance in 2015 giving drivers for rideshare companies like Uber and Lyft the right to form unions and collectively negotiate labor contracts. The ordinance was swiftly challenged with a lawsuit by the U.S. Chamber of Commerce, and the viability of such measures to withstand legal challenge remains undetermined. Last year, more than 35,000 Uber drivers in New York City formed a modern-day "guild," a move that just narrowly preceded the high profile class action settlement—which was later overturned—by Uber drivers in California who challenged their independent contractor designation. As more and more workers are classified as independent contractors, some scholars and labor advocates have suggested replacing traditional employment-based benefits, such as

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disability insurance, retirement accounts, and paid sick days with a set of "portable benefits." But none of these patchwork solutions guarantee to on-demand workers the firm establishment of collective bargaining rights—the traditional cornerstone of American labor law.

Though the technology fueling the on-demand economy is new, the restructuring of work to evade labor law protections is not. The author's prior research on the use of outsourcing, subcontracting, and misclassification in the late 1990s established a framework for analyzing when such workers—*dependent contractors*—should be endowed with the same labor protections as their employee counterparts, and when they should be considered to be truly independent contractors. This analytical approach has found new relevance in the age of Uber and the on-demand economy. This Article analyzes the relationships created within the on-demand economy and provides an in-depth analysis of the federal preemption and antitrust issues raised by collective bargaining laws like Seattle's in order to determine whether state and local attempts to regulate working conditions in the on-demand economy may survive legal challenge.

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INTRODUCTION

Stepping confidently to the curb and boldly extending an arm—once the mark of a true New Yorker—has been replaced with a swipe and a click, as there are now more Uber drivers on Manhattan's streets than yellow cabs.[1] Yet it is not merely the choreography that has changed. As the undisputed leader of the on-demand economy—an economic system that uses online platforms to connect workers and sellers with clients and consumers—Uber's innovative business model navigates around traditional workplace laws.[2] By classifying its drivers as independent contractors, the company legally evades millions of dollars in payroll taxes and prevents its workers from accessing critical employment protections, such as wage and hour standards, safety requirements, anti-discrimination laws, and the right to form a labor union.[3]

Responding to increasing community pressure to correct this imbalance, the Seattle City Council—demonstrating that local governments can also innovate in this new economy—voted unanimously, in December 2015, to give drivers for rideshare companies like Uber and Lyft the right to form a union and bargain collectively over the terms and conditions of their work.[4] The U.S. Chamber of Commerce, a powerful employer lobby, swiftly filed a lawsuit on the industry's behalf to block implementation of the ordinance.[5] Meanwhile, attempts to litigate the employment status of Uber and Lyft drivers have, to date, resulted only in

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1. *See* Melkorka Licea, Elizabeth Ruby & Rebecca Harshbarger, *More Uber Cars than Yellow Taxis on the Road in NYC*, N.Y. POST (Mar. 17, 2015), http://nypost.com/2015/03/17/more-uber-cars-than-yellow-taxis-on-the-road-in-nyc/ [https://perma.cc/C2EQ-KBTH].

2. *See* Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 98–102 (2015); *see also* Oisin Hanrahan, *We Must Protect the On-Demand Economy to Protect the Future of Work*, WIRED, Nov. 9, 2015, at 9.

3. Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor v. Employee* 3 (Policy Brief of the Nat'l Emp. Law Project 2016), http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf [https://perma.cc/5VNS-XE33].

4. Daniel Beekman, *Seattle First U.S. City to Give Uber, Other Contract Drivers Power to Unionize*, SEATTLE TIMES (Dec. 14, 2015), http://www.seattletimes.com/seattle-news/politics/unions-for-taxi-uber-drivers-seattle-council-votes-today/.

5. Press Release, U.S. Chamber of Com., U.S. Chamber Files Lawsuit Challenging Seattle's Drivers' Union Ordinance (Mar. 3, 2016), https://www.uschamber.com/press-release/us-chamber-files-lawsuit-challenging-seattle-s-drivers-union-ordinance [https://perma.cc/U6KY-268T].

legal settlements that provide limited gains to drivers, but no judicial clarity to the murky classification of drivers as independent contractors.[6]

Though the technology fueling the on-demand economy is new, the structuring of work in order to obscure or obviate labor law protections is not. Prior research on the use of outsourcing, subcontracting, and misclassification in the late 1990s, as well as frameworks that can help determine when so-called "dependent contractors" should be protected by labor and employment laws, has found new relevance in the age of Uber.[7] This Article analyzes the relationships created within the on-demand economy, using those prior frameworks, in order to determine under what circumstances independent contractors working in on-demand industries should have the right to form a union and bargain collectively.

Section I provides an overview of the "on-demand dilemma"—the inherent tension created between the structure of on-demand employment, which is based on an exclusive independent-contractor model, and national labor policy that is predicated on a more inclusive employment model. It further details the particular nature of work in the on-demand economy and identifies the gaps in existing labor and employment law for protecting on-demand workers. This section concludes that the construction of alternate work arrangements in order to avoid and evade workplace regulation is not a new phenomenon. The nation's labor history is replete with examples of the misclassification of marginalized workers to evade labor laws, as well as the application of antitrust law to defeat

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6. Drivers for Uber have enjoyed greater success challenging their independent contractor status outside of the United States. In October, a UK employment tribunal ruled that Uber drivers are employees, not independent contractors, calling the company's characterization of its relationship with drivers "a pure fiction which bears no relation to the real dealings and relationships between the parties." Aslam v. Uber, [2016] Emp. Tribunals (Eng.), https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf [https://perma.cc/C7EW-892J]; Natasha Lomas, *Uber Loses Employment Tribunal in the UK*, TECH CRUNCH (Oct. 28, 2016), https://techcrunch.com/2016/10/28/uber-loses-employment-tribunal-in-the-uk/ [https://perma.cc/E3J9-RGKQ]. A similar legal challenge in Spain has made its way to Europe's top court, the European Court of Justice, which is scheduled to rule this year on whether Uber is a digital platform or a transportation company. A decision against Uber would require the company to comply with national labor regulations of the twenty-eight EU Member States. Natasha Lomas, *Uber Drivers Deemed to be Employees by Swiss Insurance Provider*, TECH CRUNCH (Jan. 5, 2017), https://techcrunch.com/2017/01/05/uber-drivers-judged-to-be-employees-by-swiss-insurance-provider/ [https://perma.cc/R9LN-C234].

7. *See* Elizabeth J. Kennedy, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors*,*"* 26 BERKELEY J. EMP. & LAB. L. 143, 144–168 (2005); *see also* ARAN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM (MIT Press 2016); Françoise Carré, *(In)dependent Contractor Misclassification*, ECON. POL'Y INST. 1 (June 8, 2015), http://www.epi.org/publication/independent-contractor-misclassification/ [https://perma.cc/66LQ-WRB4]; Tim Fitzsimons, *In a Sharing Economy, Labor Laws Fall Short*, NPR MARKETPLACE (Apr. 23, 2015), http://www.marketplace.org/2015/04/23/tech/sharing-economy-labor-laws-fall-short [https://perma.cc/D9PJ-BSQE].

nascent attempts to organize unions and bargain collectively. Today's on-demand dilemma evokes the prior decade's "dependent contractor dilemma," the past generation's "domestic worker dilemma," and the pre-Wagner Act's "labor dilemma."[8]

Section II profiles recent initiatives at the state and local level to regulate wages and working conditions for independent contractors in the on-demand economy. Rather than wait for the federal government to clarify the employment status of on-demand workers or to modernize the classification system itself, state and local governments have begun asserting their police powers to tackle the impacts of the on-demand dilemma. The most notable and closely watched example is that of Seattle, which enacted a groundbreaking collective bargaining law in December 2015.[9] This ordinance, which extends the right to form a union to drivers for rideshare companies like Uber and Lyft, is closely watched by jurisdictions around the country to see whether it will survive legal challenges. Meanwhile, other states and cities have taken various legislative and executive approaches to fill the gaps in federal workplace protection into which many of their own citizens fall.[10]

Given the importance of the Seattle law in our understanding of what is possible in this new era of workplace organization and regulation, Section III provides a detailed analysis of the antitrust and federal preemption issues raised by challengers of the law. Seattle's approach has been the most innovative, extensive, and successful of the state and local initiatives. Yet, the arguments raised by the U.S. Chamber of Commerce echo many of the same arguments made by employers throughout U.S. labor history used to undermine any legal expansion of workers' rights. As Section III explains, the historically successful use of federal antitrust law to defeat union organization does not predict defeat of the Seattle ordinance. However, a very careful understanding of the particular conditions relevant to the rideshare industry will be important in determining whether or not the extension of collective bargaining rights to on-demand contractors can withstand legal challenges. This section draws upon my prior dependent contractor framework to better understand the tensions and legal issues inherent in the current economy, as well as the viability of city and state regulatory innovation.

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8. *See* Harris v. Quinn, 134 S. Ct. 2618, 2640–41 (2014); *see also* Kennedy, *supra* note 7; sources cited *infra* note 67.

9. Beekman, *supra* note 4.

10. *See* discussion *infra* Part II.

I. THE ON-DEMAND DILEMMA

A. The Economic Landscape

Each new treatise, article, and manifesto produces a new moniker: the "sharing economy," "gig economy," "1099 economy," "Uber economy,"[11] or "online platform economy."[12] Each attempts to describe an economic system that uses online platforms to connect workers and sellers with clients and consumers. These platforms, which take the form of smartphone applications, tout flexibility and convenience for participants—workers and sellers are not bound to any particular schedule, hours of work, or long-term rental agreement (yet neither are they guaranteed any). The most well-known company operating in this economy is Uber, which connects private drivers with individual riders.[13] Online platforms can be labor-based, such as Uber, Handy, or TaskRabbit, or capital-based, such as Etsy or AirBnB.[14] Customers pay "piece-rate" for the goods or services, and the online intermediary takes a fee for facilitating the transaction.[15] This Article refers to the emerging economy as the "on-demand economy," an economic structure projected to be worth $335 billion by 2025.[16]

Discussion of the on-demand economy has focused largely on the benefits to consumers. After all, powerful consumer demand drives and

11. *See* Ilaria Maselli, Karolien Lenaerts & Miroslav Beblavý, *Five Things We Need to Know About the On-Demand Economy*, CEPS 2 (Jan. 8, 2016), https://www.ceps.eu/system/files/CEPS%20Essay%20No%2021%20On%20Demand%20Economy.pdf [https://perma.cc/TL8W-ZQJV].

12. *See* DIANA FARRELL & FIONA GREIG, J.P. MORGAN CHASE & CO. INST., PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 5 (Feb. 2016), https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf [https://perma.cc/724S-TBM6] [hereinafter BIG DATA ON INCOME VOLATILITY].

13. *See* Arvind Malhotra & Marshall Van Alstyne, *The Dark Side of the Sharing Economy . . . and How to Lighten It*, 57 COMM. ACM 24, 24 (Nov. 2014). Other on-demand businesses include Lyft, Handy, TaskRabbit, Mechanical Turk, and AirBnB.

14. *See* BIG DATA ON INCOME VOLATILITY, *supra* note 12.

15. *Id.* at 20.

16. *See* PRICEWATERHOUSECOOPERS LLP, THE SHARING ECONOMY 12 (2015), https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf [https://perma.cc/M3PS-YM8L]. One recent analysis of aggregate national data concluded that while "we all share a strong intuition that the nature of work has fundamentally changed, contributing to the deterioration of labor standards . . . it has been hard to find evidence of a strong, unambiguous shift toward nonstandard or contingent forms of work—especially in contrast to the dramatic increase in wage inequality." Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 25 (Nat'l Bureau of Econ. Res., Working Paper No. 22843, 2016), https://irs.princeton.edu/sites/irs/files/An%20Analysis%20of%20the%20Labor%20Market%20for%20Uber%E2%80%99s%20Driver-Partners%20in%20the%20United%20States%20587.pdf [hereinafter *Labor Market Analysis*] (citing Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* 107 (Inst. for Res. in Lab. & Emp., Working Paper No. 100–14, 2014), http://irle.berkeley.edu/files/2014/Labor-Standards-and-the-Reorganization-of-Work.pdf).

defines this economy as well as its relationship to the future of work.[17] Consumers cite ease of use, independent consumer reviews, and competitive pricing as benefits of transacting in the on-demand economy.[18] Yet, as a marketplace for work, high start-up costs push entrepreneurs to seek aggressive cost savings. In that pursuit, employment taxes and other workplace liabilities appear to be low-hanging fruit.[19] Central to the business model of most on-demand companies is the characterization of its workforce as "independent contractors," rather than employees, "breaking jobs into small tasks that create erratic schedules and fluctuating income, and making it difficult for workers to take collective action."[20]

Indeed, the profitability for entrepreneurs of smartphone applications, such as Uber, depends almost entirely upon the efficiency with which such applications extract labor from the workers who provide the goods or services promised. While companies like Uber and Lyft claim to be in the technology business, the technological platform itself is valueless without the labor powering its application.[21] These companies

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17. *See* Hanrahan, *supra* note 2 ("The innovative ideas that have emerged in this sector have created new ways for consumers to obtain the services they need while simultaneously creating great new opportunities for the people who are ready to supply those services. In the case of our platform, Handy, we've made it easier for people who need home services (such as plumbing or cleaning) to connect with qualified professionals who provide those services. More importantly, we're connecting professionals to new opportunities to make money.").

18. *See* Charles Colby & Kelly Bell, *The On-Demand Economy is Growing, and not Just for the Young and Wealthy*, HARV. BUS. REV. (Apr. 14, 2016), https://hbr.org/2016/04/the-on-demand-economy-is-growing-and-not-just-for-the-young-and-wealthy [https://perma.cc/YX2Q-TDET].

19. *See* Nancy Cremins, *The Rise of the On Demand Economy: The Tension Between Current Employment Laws and Modern Workforce Realities*, BOS. BAR J., Winter 2016, at 27, 27 ("Building the infrastructure for an on demand business that serves many customers in multiple cities, or even multiple countries, is an incredibly expensive endeavor.").

20. REBECCA SMITH & SARAH LEBERSTEIN, NAT'L EMP'T L. PROJECT, RIGHTS ON DEMAND: ENSURING WORKPLACE STANDARDS AND WORKER SECURITY IN THE ON-DEMAND ECONOMY 3 (2015), http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf [https://perma.cc/9CK6-TW3T] [hereinafter RIGHTS ON DEMAND]. *See also* Sec. Tom Perez, Remarks at the Dep't of Labor Future of Work Symposium, in Washington D.C. (Dec. 10, 2015), https://www.dol.gov/newsroom/speech/20151210 [https://perma.cc/K95L-BRLH] ("The challenges associated with the on-demand economy in many ways aren't really new ones, and they're not unique to app-driven digital platforms. We've been dealing with them for decades, before a phone could fit in your pocket, well before you could order groceries by touching an icon on a hand-held device.").

21. Uber has invested heavily in driverless technology, though its initial rollout in its hometown of San Francisco found the company running afoul once more with regulators. Unlike its competitors, such as Google and Tesla, Uber failed to obtain the autonomous vehicle permit from the DMV, a requirement in place since 2014. Rather than battle the State, Uber simply placed its test vehicles on flatbed trucks and drove them to Arizona, whose governor had already signaled on social media that the company and its innovative vehicles would be welcomed. Eric Newcomer & Ellen Huet, *Uber Ships Self-Driving Cars to Arizona After California Ban*, BLOOMBERG (Dec. 22, 2016), https://www.bloomberg.com/news/articles/2016-12-22/uber-pulls-self-driving-cars-from-california-for-arizona [https://perma.cc/9TQX-LPZ2].

deliver to their customers not technology, but cheapened labor, making them closer to Manpower than to Microsoft. It is the laborer, however, and not the so-called "tech company" that is shouldering all of the risk and reaping few of the rewards.[22]

The success of on-demand companies like Uber have led some industry analysts to conclude that their algorithm-based business models have transformed the employment relationship,[23] making traditional labor laws unnecessary.[24] Emerging data on the economic realities experienced by on-demand workers, however, belie this assertion, as wage insecurity and vast disparities in bargaining power have become inherent in the expanding industry.[25] Importantly, most but not all on-demand businesses classify their workers as independent contractors rather than employees, which excludes those workers from protections under most labor laws, including the right to form a union.[26] While the smartphone technology fueling the growth of this economy is new, the use of independent contractors to evade employment law is not.[27] For decades, employers from Silicon Valley to Detroit have pursued aggressive strategies of subcontracting and outsourcing, which has shifted work from employees to independent contractors.[28] The Bureau of Labor Statistics (BLS) stopped conducting its Contingent Worker Survey in 2005, but Secretary Tom Perez announced that the BLS is working with the Census Bureau to

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22. This premise extends to on-demand industries in which property, not labor, is the central component of the business model. In the case of AirBnB, a "short-term home rental service," the company sued New York City over legislation that fines apartment dwellers $7,500 for illegally listing their apartment on a rental platform such as AirBnB. New York City does not allow a tenant to rent out their apartment for a period of less than thirty days. While the company opposed the fines, it capitulated once an agreement was reached with the City, pursuant to which only the hosts may be fined and not the company. Katie Benner, *AirBnB Ends Fight with City over Fines*, N.Y. TIMES, Dec. 3, 2016, at A4.

23. Irving Wladawsky-Berger, *The On-Demand Economy Is Reshaping the Firm, and Society as We Know It*, WALL ST. J.: CIO J. (Dec. 25, 2015), http://blogs.wsj.com/cio/2015/12/25/on-demand-economy-is-reshaping-the-firm-and-society-as-we-know-it/ [https://perma.cc/WR8P-HAXD].

24. *See* Hanrahan, *supra* note 2, at 9; Rogers, *supra* note 2.

25. *See generally* DIGITAL LABOR: THE INTERNET AS PLAYGROUND AND FACTORY (T. Scholz ed., Routledge 2016); Steven Greenhouse, *Uber: On the Road to Nowhere*, AM. PROSPECT (Dec. 7, 2015), http://prospect.org/article/road-nowhere-3 [https://perma.cc/5J2Z-LQS7]; John Herrman, *The Uber Counterculture: Chatter and Dissent in the Trenches of the Sharing Economy*, AWL (Nov. 17, 2015), https://theawl.com/the-uber-counterculture-ad0674aba359#.d9mt7lwcr [https://perma.cc/MGJ3-HL6X]; Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. COMM. 3758 (2016. *See also* Perez, *supra* note 20.

26. *See* RIGHTS ON DEMAND, *supra* note 20, at 4; *see also* Fitzsimons, *supra* note 7.

27. *See* Carré, *supra* note 7.

28. *See* Eli Dourado & Christopher Koopman, *Evaluating the Growth of the 1099 Workforce*, MERCATUS CTR., GEORGE MASON U. (Dec. 10, 2015), https://www.mercatus.org/publication/evaluating-growth-1099-workforce [https://perma.cc/PM3G-CAJJ]; *see also* HARVARD WORKERS CTR., OUTSOURCING, ITS DISCONTENTS, AND SOME SOLUTIONS 1 (2001), http://isites.harvard.edu/fs/docs/icb.topic1320223.files/outsourcing%20report.pdf.

rerun the Contingent Worker Supplement to the May 2017 Current Population Survey.[29]

Even without that data, however, we can compare the experiences of on-demand workers to those of independent contractors in the beginning of the last decade. For example, the 2005 survey found that independent contractors were less likely to have health insurance coverage than traditional employees.[30] While the passage of the Affordable Care Act has significantly expanded coverage for all workers, about half of the drivers for Uber receive employer-provided health insurance from their employer at another job, their spouse's job, or another family member's job.[31]

Taking Uber as an example, once applicants qualify to work for (or, in Uber-speak, "partner with") the company, they are free to spend as much or as little time as they like picking up passengers in any given month.[32] Though many drivers cite this flexibility as a draw, within a month of driving for the company 11% are inactive.[33] After a year, the number of drivers who started the year working for Uber and remain active drops to roughly 70%.[34] These figures tell a story not only of the retention rates of Uber but also of the continued instability of the larger economy, given that many of these drivers are using the online platform to bridge income gaps between other primary sources of employment.[35] Moreover,

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29. Sec. Tom Perez, *Innovation and the Contingent Workforce*, DEP'T OF LAB. BLOG (Jan. 25, 2016), https://blog.dol.gov/2016/01/25/innovation-and-contingent-workforce [https://perma.cc/QH3W-6XD5]. This supplemental survey, last conducted in February 2005, seeks to capture the number of workers in alternative employment arrangements, such as independent contractors, on call workers, temporary help agency workers, and workers provided by contract firms. In its four-year strategic plan, released in September 2016, the Equal Employment Opportunity Commission (EEOC) added a new priority, focusing on "issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy." U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN: FISCAL YEARS 2017–2021, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm [https://perma.cc/GBX7-8SH8].

30. *See Labor Market Analysis*, *supra* note 16, at 12. It is unclear how many additional driver-partners purchase health insurance from a health insurance exchange or from another source. *Id.* Uber provides driver-partners with access to a service called Stride Health to help them select health insurance coverage that is appropriate for their situation. Almost 19,000 Uber driver-partners in the six eligible states have visited the Stride Health website so far. *Id.*

31. *See id.* at 12.

32. *See id.* at 1 n.3. "Although the requirements vary by city, before they can utilize the Uber platform, potential driver-partners typically must: (1) pass a background check and a review of their driving record; (2) submit documentation of insurance, registration, and a valid driver's license; (3) successfully complete a city-knowledge test; and (4) drive a car that meets a quality inspection and is less than a certain number of years old."

33. *See id.* at 16; *see also* Brian Solomon, *The Numbers Behind Uber's Exploding Driver Force*, FORBES (May 1, 2015), http://www.forbes.com/sites/briansolomon/2015/05/01/the-numbers-behind-ubers-exploding-driver-force/#51d4c4c84901.

34. *See Labor Market Analysis*, *supra* note 16, at 16.

35. *See id.*

Uber drivers are typically not drawn from the same pool as other workers in the taxi and limousine industry; they are more similar in terms of age and education to the general workforce than to taxi drivers and chauffeurs.[36]

Comparing the experience of on-demand workers with that of independent contractors as a whole is not particularly illuminating. The independent contractor classification includes relatively high-income-generating lawyers, doctors, and architects, as well as insurance agents, graphic design freelancers, and real estate brokers.[37] Not surprisingly, the median annual income for independent contractors as a whole is typically higher than private sector wage and salary workers.[38] However, there exists a critical subset of independent contractors who lack the educational background, marketable skills, and economic independence of their brethren. This group, which includes many landscapers, childcare providers, residential construction workers, and truck drivers, frequently endure poverty-level wages and unsafe working conditions.[39] Likewise, while the most recent BLS survey found that 82.3% of independent contractors prefer their work arrangement to being an employee, it is likely that those who experience chronic wage and employment instability would prefer a more formal employment arrangement.[40]

During the months in which individuals actively participated in on-demand platforms, earnings were a sizable yet still secondary source of income.[41] For individuals providing labor through these platforms, average monthly earnings were $533; for those selling or renting property, average monthly earnings were $314.[42] If viewed as a primary source of income, work in the on-demand economy comes with far fewer workplace protections and benefits than traditional employment. This fundamental shift is arguably part of a larger movement away from the social contract established by the New Deal,[43] which has led some to propose the creation

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36. *See id.* at 24.

37. *See* Bernhardt, *supra* note 16, at 7.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* BIG DATA ON INCOME VOLATILITY, *supra* note 12 at 24 ("In September 2015, among all individuals who participated over the three-year period (active or not in that particular month), the vast majority—82 percent of labor platform participants and 96 percent of capital platform participants—relied on platform earnings for less than 25 percent of their income.").

42. *Id.*

43. New Deal programs, policies, and legislation enacted to mitigate intense economic depression helped to construct a "social contract" between the federal government, employers, and workers, which resulted in higher wages and more stable benefits. Josh Freedman & Michael Lind, *The Past and Future of America's Social Contract*, ATLANTIC (Dec. 19, 2013), http://www.theatlantic.com/business/archive/2013/12/the-past-and-future-of-americas-social-contract/282511/ [https://perma.cc/27QP-F8GQ]. Under this framework of a "social contract,"

of a new class of independent workers with a new "portable benefits" approach toward renewing and revising that broader social contract.[44] Such a system of portable benefits could, if adopted, allow individual workers to accrue traditionally employer-tied benefits, such as retirement, social security, and health insurance, across a range of intermittent or part-time employers or gigs.[45]

Workers in the on-demand economy typically experience high levels of income volatility.[46] Estimates of the scale of the on-demand economy vary widely, but a recent three-year study found that an estimated 10.3 million people—4.2% of the adult population and more than the total population of New York City—earned income through online platforms.[47] Interestingly, while the economy is expanding rapidly in terms of the sheer number of people participating (47-fold over the course of the three-year study), income from these platforms remained secondary for each individual participant.[48]

For many workers looking for temporary employment or for employment to supplement another income, the on-demand economy offers a flexible and accessible on-ramp.[49] In the case of Uber, workers need only a conforming automobile,[50] insurance, and a desire to work. So

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workers could expect to enter into a long-term relationship with employers, the economic benefits of which would extend beyond the period of employment and into retirement. Today, that system has been fundamentally altered with the rise of "independent contractor" arrangements, through which no retirement benefits or other means of economic stability are guaranteed.

44. Dana Rubinstein, *Council Bill Would Provide Health Benefits for Taxi, Uber Drivers*, POLITICO (Sept. 6, 2016), http://www.politico.com/states/new-york/city-hall/story/2016/09/city-council-aims-to-revive-health-care-fund-for-taxi-uber-drivers-105199 [https://perma.cc/8DY8-EA62]; *see also Labor Market Analysis*, *supra* note 16. New York is at the forefront of a movement in favor of portable benefits. The New York City Council is preparing to introduce a bill that would provide Uber and other taxi drivers access to portable benefits for health care, disability insurance, and life insurance. At the state level, Senator Diane Savino is expected to introduce state legislation this winter that would allow companies to classify their workers as independent contractors so long as they (a) contributed 2.5% of each transaction to a portable benefits fund, (b) state in the contract that they are independent contractors, (c) allow workers to choose their own schedules and work for competitors, and (d) provide that workers pay the taxes and provide their own tools. Josh Eidelson, *It's a New Game for Uber Drivers if New York Passes This Law*, BLOOMBERG (Jan. 10, 2017), https://www.bloomberg.com/news/articles/2017-01-10/it-s-a-new-game-for-uber-drivers-if-new-york-passes-this-law [https://perma.cc/CN5G-566S].

45. *See* Sara Horowitz, *Why Portable Benefits Should Be a Priority in the New Economy, Fast Company*, FC LEADERSHIP (Dec. 8, 2015), https://www.fastcompany.com/3054226/the-future-of-work/why-portable-benefits-should-be-a-priority-in-the-new-economy [https://perma.cc/69C9-F2MM].

46. *See* BIG DATA ON INCOME VOLATILITY, *supra* note 12, at 7.

47. *See id.*

48. *See id.*

49. *See Labor Market Analysis*, *supra* note 16.

50. The requirement that Uber drivers have their own vehicle is also quickly changing with the advent of Uber's new car leasing program, in which Uber offers drivers sub-prime auto loans and directly deducts payment from their earnings, leading some critics to call the program a "modern-day

long as they comply with company rules and maintain a high level of customer ratings, these workers can generate supplemental income with Uber to remedy dips in other income or to mitigate unexpected costs and expenses.[51] In that sense, providing labor via the on-demand economy is a smarter financial decision than incurring additional debt. Correspondingly, on-demand economy participation is highest "precisely among those who experience the highest levels of income volatility—the young, the poor, and individuals living in the West."[52]

It is precisely these groups of workers—the most marginalized—who are the focus of much of traditional labor policy in the U.S. Those workers who lack the education, skills, and other economic leverage with which to negotiate for decent wages and working conditions are, in theory, provided with a framework to negotiate collectively with employers as a means of ensuring economic security and labor peace. Though on-demand companies such as Uber and Lyft make persuasive arguments that the workers contracting through their platforms are independent contractors, the economic assumptions that underlie much of our employment relationship models are certainly not borne out by the corresponding economic data. As the following section demonstrates, current regulation of on-demand labor is based largely on these flawed assumptions.

B. The Regulatory Landscape

1. On-Demand Workers Classified as Independent Contractors

The cornerstone of the organizational structure of most on-demand firms is the classification of its workforce as independent contractors, rather than as employees. The decision to structure the workplace in this way has immediate, as well as collateral consequences for workers, consumers, and the economy as a whole. Under U.S. law, employers have considerable incentive to classify their workers as independent contractors rather than as employees. Employers are required to pay employment taxes for employees, but not for independent contractors.[53] In addition, employers are required to respect minimum wage and overtime standards

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sharecropp[ing]" scheme. *See* Sarah Leberstein, *Uber's Car Leasing Program Turns Its Drivers into Modern-Day Sharecroppers*, QUARTZ (June 6, 2016), http://qz.com/700473/ubers-car-leasing-program-turns-its-drivers-into-modern-day-sharecroppers/ [https://perma.cc/C7GT-4D9G].

51. *See* BIG DATA ON INCOME VOLATILITY, *supra* note 12, at 8–9.

52. *Id.* at 7. The high rate of participation among the youngest cohort of workers is also consistent with that generation's preference toward flexible arrangements and a greater degree of work–life balance. *Id.* at 8.

53. *See* U.S. Dep't of the Treasury, Internal Revenue Serv., *Independent Contractor (Self-Employed) or Employee?*, IRS (Nov. 28, 2016), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee [https://perma.cc/SHF5-XHHJ].

for employees, but not for independent contractors.[54] Federal labor and employment laws impose other financial and legal obligations on employers, including liability for discrimination under Title VII of the Civil Rights Act of 1963,[55] the Age Discrimination in Employment Act,[56] and the Americans with Disabilities Act;[57] a duty to provide employees with unpaid leave pursuant to the Family and Medical Leave Act;[58] requirements with regard to pension plans;[59] and an obligation to negotiate wages and working conditions with eligible employees under the National Labor Relations Act (NLRA).[60]

Employees are covered by these laws while independent contractors are not for one simple reason: independent contractors are presumed to have the power—economically, professionally, and individually—to negotiate the terms and conditions of work that employees, on their own, typically lack. That may be true of many independent contractors—doctors, lawyers, architects, and the like—but what happens when an Uber driver is injured while transporting a passenger or when a handy worker hurts herself assembling Ikea furniture? Should they alone bear the full risk of those injuries or should the online platforms shoulder some of that responsibility?

The technology industry is no stranger to this issue. In *Vizcaino v. Microsoft*,[61] freelance computer programmers were used to produce software alongside regular employees, sharing supervisors and completing identical assignments. The freelancers were fully integrated into the existing Microsoft workforce.[62] While the problems related to the misclassification of employees as independent contractors pre-date the on-demand economy, the classification of most on-demand workers as independent contractors has raised a red flag.[63] On-demand workers have filed numerous lawsuits alleging employer misclassification, which is likely to increase as the economy expands.[64]

Determining whether a worker should be classified as an employee or independent contractor is complicated. Courts assess employment status under each individual twig in a worker's bundle of workplace rights,

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54. *See, e.g.*, Cal. Dep't of Ind. Relations, *Independent Contractor Versus Employee*, CA.GOV (2017), http://www.dir.ca.gov/dlse/faq_independentcontractor.htm [https://perma.cc/34K5-3LW9].

55. *See* 42 U.S.C. §§ 2000e to2000e-17 (2004).

56. *See* 29 U.S.C. § 623(a)(1).

57. 42 U.S.C. §§ 12101–12213 (2004).

58. 29 U.S.C. §§ 2601–2654 (2004).

59. 29 U.S.C. § 1002(6).

60. 29 U.S.C. § 152(3); *see* N.L.R.B. v. United Ins., 390 U.S. 254 (1968).

61. *See* Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1190 (9th Cir. 1996).

62. *See* Kennedy, *supra* note 7, at 151.

63. *See* Carré, *supra* note 7.

64. *Id.*

using alternate legal tests. For example, to determine whether or not an on-demand worker is an employee for purposes of the NLRA, courts engage in a fact-based inquiry[65] that focuses on the employer's ability to control the worker, in particular whether or not the employer controls the manner and means by which the worker accomplishes the work.[66]

The NLRB uses a similar test to determine employee status.[67] This right of control test, still used today by the NLRB to determine whether a worker is a common law employee, relies on the medieval master–servant concept that an employer has a legal right to control an employee.[68] Among the factors relevant to the inquiry are:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[69]

No one factor is decisive,[70] and courts have recognized that it is rare that all of the factors will point decisively to one side or another.[71]

While determining employee status can be murky, the effects of misclassifying employees as independent contractors is clear. The impacts of employee misclassification are most strongly felt by state and local governments, which lose billions of dollars of potential city payroll tax revenue annually.[72] Moreover, local and state governments are also shouldering the burdens of an expanding independent contractor underclass, which relies disproportionately on local safety nets during times of income volatility.

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65. *See* N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1096 (9th Cir. 2008).

66. *See* J. Huizinga Cartage Co., Inc. v N.L.R.B., 941 F.2d 616, 620 (7th Cir. 1991).

67. While the National Industrial Recovery Act (NIRA) established an informal National Labor Board (NLB) in 1933, the passage of the Wagner Act in 1935 established a set of substantive rights that the NLRB was empowered to enforce. *The NLB and the "Old NLRB,"* NAT'L LAB. REL. BOARD, https://www.nlrb.gov/who-we-are/our-history/nlb-and-old-nlrb [https://perma.cc/B8H5-HJH6].

68. *See, e.g.*, Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 166 (2003).

69. *Id.* at 167.

70. *See* FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 496 (D.C. Cir. 2009); *Friendly Cab Co., Inc.*, 512 F.3d at 1097; Time Auto Transp., Inc. v N.L.R.B, 377 F.3d 496, 499 (6th Cir. 2004).

71. *Friendly Cab Co., Inc.*, 512 F.3d at 1096.

72. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT (July 2015), http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf [https://perma.cc/6UAC-GHDC].

Independent contractors subject to irregular work hours may need to rely on state financial assistance even though they are technically employed. For example, drivers for Uber or Lyft may freely choose the number of hours they work for the company; such "piece work" arrangements are not dispositive of employment status. In a case concerning workers who addressed and affixed signatures to form letters, the court held that they were employees—based on the degree of control they had over their work—even though the workers were paid on a per-letter basis.[73] Conversely, the existence of an incentive system—most prevalent in employer–employee relationships—is not necessarily proof of employment status under the NLRA.[74] As the court in *FedEx Home Delivery v. National Labor Relations Board* found, "a contractual willingness to share a small part of the risk—for instance . . . income for making a vehicle available—does not an employee make."[75]

In determining whether on-demand workers for Uber, Lyft, and the like are independent contractors or employees, courts also look at the degree to which the exercise of entrepreneurial skill by the driver will likely result in additional profits. A court will further consider the skill required to participate in the platform, how and whether drivers are compensated for additional duties (returning passengers' personal items left behind, for example), as well as ownership and maintenance of the automobile and any other equipment.[76] As discussed above, the exclusion of independent contractors from collective bargaining rights makes it much more difficult for on-demand workers to play an active role in defining the scope and conditions of labor performed within this emerging new economy.

2. Wholesale Exclusion of On-Demand Employees from the NLRA

Until litigation or legislation clarifies the status of on-demand workers, on-demand workers will continue to lack the right to bargain collectively with hiring firms. This wholesale exclusion of workers who are neither true independent contractors nor traditional employees is a dilemma first ascribed to subcontracted workers in the 1990s and early 2000s.[77] These subcontracted workers were self-employed but lacked the

73. Mitchell v. Boisseau, 118 F. Supp. 480 (E.D. La. 1954), *rev'd on other grounds* 218 F.2d 734 (5th Cir. 1955).

74. *FedEx Home Delivery*, 563 F.3d at 502 (citing C.C. Eastern, Inc. v. N.L.R.B., 60 F.3d 855, 860 (D.C. Cir. 1995), for the premise that, "an incentive system designed 'to ensure that the drivers' overall performance meets the company standards' . . . is fully consistent with an independent contractor relationship").

75. *Id.* at 514.

76. *See, e.g.*, N.L.R.B. v. A Duie Pyle, Inc., 606 F.2d 379 (3rd Cir. 1979).

77. Kennedy, *supra* note 7.

autonomy and privileges of self-employment. Like many employees, they lacked the power to negotiate individually with their employer; unlike other employees, they lacked the legal right to bargain collectively. These workers were more accurately described as "dependent contractors," a category of workers not originally contemplated by the framers of our nation's labor and employment laws. On-demand workers now face this dependent contractor dilemma, as the wholesale exclusion of many on-demand workers from labor protections has perpetuated an imbalance of economic bargaining power that labor and employment laws were intended to redress.[78]

Scholars and legal advocates have proposed various new tests for assigning and assessing employment status, such as whether a worker uses executive decision-making,[79] and entire new classifications, such as the "independent worker."[80] However, as the National Employment Law Project accurately notes, a simple classification change does little to address the persistent problem of misclassification, and it instead suggests the development of a new framework oriented toward portable and government-sponsored benefits.[81] The following section closely examines the most viable proposal put forth for establishing collective bargaining rights for on-demand workers and assesses the likelihood that it will survive legal challenge.

II. STATE AND LOCAL INCUBATORS OF ON-DEMAND ECONOMY REGULATION

As labor advocates have noted, the growth of the on-demand economy has created a critical demand for better wages and working conditions for its workers.[82] With no real movement at the federal level, state and local governments have begun taking action.[83] Some, such as New York City and Philadelphia, have actively opposed the operation and

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78. Bernhardt, *supra* note 16. "Since Congress has made clear by its many exemptions, such as, for example, the broad categories of agricultural labor and domestic service . . . that it was not its purpose to make the Act cover the whole field of service to every business enterprise, the sections in question are to be read with the exemptions in mind. The very specificity of the exemptions, however, and the generality of the employment definitions indicates that the terms 'employment' and 'employee,' are to be construed to accomplish the purposes of the legislation." United States v. Silk, 331 U.S. 704, 711–12 (1947).

79. *See* Grant E. Brown, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. ENDNOTES 15, 29 (2016).

80. *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker,"* HAMILTON PROJECT (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/3RBW-HCBG].

81. *See* RIGHTS ON DEMAND, *supra* note 20, at 9.

82. *Id.*

83. Greenhouse, *supra* note 25.

expansion of on-demand businesses.[84] Others have taken legislative steps toward affirmatively regulating the on-demand economy. These measures range from investigative studies[85] to criminal background checks and fingerprinting requirements.[86] Others, like Seattle, have sought to preserve flexibility and value for consumers while reducing economic insecurity for workers.[87] This section examines in more detail these state- and city-based experiments in regulating the on-demand economy, specifically transportation network companies (TNCs).

It is evident from this patchwork of state regulation that there is a struggle to create a new legal lexicon for ridesharing; for example, new concepts are defined such as "digital dispatch," "digital network," "digital platform," "connection method," and "prearranged rides"[88] and are created to distinguish between a "pre-trip acceptance period" and a "trip acceptance period."[89] Most of statewide TNC regulation includes model language regarding insurance coverage favored by Uber and Lyft, while some of the more stringent requirements, such as fingerprinting, appear more frequently in municipal legislation.[90]

Massachusetts is the most recent state to enact TNC legislation, which is most notable for its taxation structure.[91] The bill levies a twenty-cent tax on every fare paid through a ridesharing application like Uber, Lyft, or any of their smaller competitors, such as Fasten.[92] Five cents of that tax will be given to the traditional taxicab industry, ten cents will

84. Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA HIGH TECH. L.J. 23, 45–46 (2015).

85. S.B. 254, 2015 Leg. Reg. Sess. (N.H. 2015) (establishing a committee to study the adequacy and safety of services to the public through Uber and existing taxi services).

86. H.B. 187, 148th Gen. Assemb., Reg. Sess. (Del. 2015) (adjusting the criminal background check and review period for taxi and limousine drivers to equal what is expected of a driver for a transportation network company such as Uber or Lyft, and coming on the heels of the state and Uber agreeing to a memorandum of understanding (MOU), that officially allowed the company to operate in Delaware); S.B. 117, 2015 Leg., Reg. Sess. (Kan. 2015) (overriding a veto by the governor); H.B. 4049, 189th Gen. Ct. (Mass. 2016) (establishing state certification and background checks).

87. Beekman, *supra* note 4.

88. *See,* e.g., H.P. 934-L.D. 1379, 127th Leg. Reg. Sess. (Me. 2015), http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0934&item=3&snum=127 [https://perma.cc/4VXG-WZ2S].

89. *See,* e.g., SB 172, 2015 Leg., Reg. Sess. (La. 2015), https://www.legis.la.gov/legis/ViewDocument.aspx?d=935305 [https://perma.cc/BHD7-8XYS].

90. Lindsay Vanhulle, *Proposed Legislation Clarifies Insurance Rules for Uber, Lyft*, CRAIN'S DET. BUS. (Nov. 6, 2016), http://www.crainsdetroit.com/article/20161106/BLOG020/161109904/proposed-legislation-clarifies-insurance-rules-for-uber-lyft [https://perma.cc/7CHQ-47J7].

91. David Ingram, *Massachusetts to Tax Ride-Hailing Apps, Give the Money to Taxis*, REUTERS (Aug. 19, 2016), http://www.reuters.com/article/us-massachusetts-uber-idUSKCN10U1ST [https://perma.cc/K8H5-PPJP].

92. *Id.*

go to cities and towns, and the remaining five cents will go to a statewide transportation fund.[93]

In the case of Texas, which has yet to adopt broad regulation of TNCs, Uber has fought vigorously, yet unsuccessfully, to prevent or repeal fingerprinting requirements that it deems an unnecessary and a significant barrier to entry for new drivers.[94] Last May, the company pulled its operations out of Austin, a city that passed a fingerprinting bill in 2014.[95] Uber is currently engaged in a similar standoff with Houston.[96]

In Maryland, the General Assembly passed a fingerprinting requirement for rideshare services, but Uber and Lyft applied for, and recently received, waivers from the Public Service Commission, so both companies have agreed to remain in the state.[97] Notably, Uber does not operate in a single U.S. municipality that requires fingerprinting, other than New York City, whose market for taxicab services has proved too great for the company to walk away from.[98]

A. Class Action Litigation over Employment Status

State unemployment agencies and local labor commissions are increasingly tasked with determining the employment status of on-demand workers for the purpose of unemployment benefits or wage and hour standards enforcement. In May 2015, the Florida Department of Economic Opportunity found that Uber driver, Darrin McGillis, was an employee of Uber, and thus eligible for unemployment insurance.[99] The following month, the California Labor Commission, which investigates wage claims, also found that one of Uber's drivers was an employee and thus entitled to reimbursement for certain expenses incurred while driving for the company.[100] The Commission also found that in another case involving

93. *Id.*

94. Harriet Taylor, *Uber and Lyft are Getting Pushback from Municipalities All over the U.S.*, CNBC (Sept. 2, 2016), http://www.cnbc.com/2016/09/02/uber-and-lyft-are-getting-pushback-from-municipalities-all-over-the-us.html [https://perma.cc/EN9S-XANN].

95. *Id.*

96. *Id.*

97. Kevin Rector & Sarah Gantz, *Maryland Regulators Won't Force Uber, Lyft to Conduct Fingerprint-Based Background Checks*, BALT. SUN (Dec. 22, 2016), http://www.baltimoresun.com/business/bs-md-uber-fingerprint-decision-20161222-story.html [https://perma.cc/L3FH-LHYS].

98. Taylor, *supra* note 94.

99. Douglas Hanks, *For Uber, Loyal Drivers and a New Fight for Benefits*, MIAMI HERALD (May 21, 2015), http://www.miamiherald.com/news/business/article21599697.html [https://perma.cc/9E2G-XGC2].

100. Order of the Labor Commissioner, Berwick v. Uber Techs., Inc., No. 11-46739 EK (Cal. Mar. 10, 2015), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical [https://perma.cc/E4U8-58DN].

Uber, the driver was an employee and thus eligible for unemployment insurance.[101]

The decisions in these individual cases appeared only to bolster claims made in larger Uber and Lyft class action lawsuits. In 2013, drivers for Uber filed a class action lawsuit alleging misclassification as independent contractors and demanding reimbursement for expenses like gas and vehicle maintenance.[102] The lawsuit also took on Uber's policy of marketing the service to customers as "gratuity-included," when no such tip is ever provided to the driver.[103] Uber immediately filed a motion for summary judgment, arguing that the drivers were independent contractors as a matter of law and thus not entitled to expenses or tips.[104] On March 11, 2015, Judge Edward M. Chen of the Federal District Court in San Francisco denied Uber's motion and signaled that he was inclined to view the drivers as employees.[105] The court concluded that the drivers "are Uber's presumptive employees because they 'perform services' for the benefit of Uber," and reaffirmed that under California law, the question of whether an individual should be classified as an employee or independent contractor is a mixed question of law and fact that must be determined by a fact finder.[106]

While the decision rested on well-established principles of California law, it was notable for shedding light on the very specific ways in which work is organized by Uber, a leader in the on-demand economy. The plaintiff, Douglas O'Connor, worked for two different limo companies in the Bay Area, each of which gave him access to the type of "black car" necessary for Uber's "UberBlack" service.[107] Depending on the intermediary, O'Connor either paid the company a flat fee for use of the car or agreed to turn over up to 60% of the wages he earned.[108]

Uber's argument that it is a "technology company" that owns no vehicles and employs no drivers was deemed "fatally flawed" by the court, which also noted that Uber owns a U.S. trademark on "Everyone's Private

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101. *Id.*

102. O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989 (N.D. Cal. 2014).

103. *Id.*

104. Order Denying Defendant Uber Technologies, Inc.'s Motion for Summary Judgment, O'Connor v. Uber Techs., Inc., No. 211 (N.D. Cal. Mar. 11, 2015), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1935&context=historical [https://perma.cc/J483-P2QF].

105. *Id.* at 27.

106. *Id.* at 1.

107. *Id.* at 2.

108. Two other named plaintiffs, Matthew Manahan and Elie Gurfinkel, drive for Uber's "uberX" service, using their own personal vehicles (which must meet the company's standard for hybrid or other "mid-range" cars). Both of these men initially worked in other fields, using wages from Uber to supplement their income. One eventually left his position as a project manage to driver for Uber full time. *Id.* at 2.

Driver," and has previously referred to itself as an "On-Demand Car Service."[109] As the court observed, "Uber simply would not be a viable business entity without its drivers."[110] For a technology company, its CEO appears to have been hoisted by his own technological petard when the court gave weight to his comments on the official Uber blog, which stated that the company was "rolling out a *transportation system* in a city near you."[111]

The court also found much to criticize in Uber's insistence that it exercises minimal control over how its "transportation providers" (which it contends are independent contractors and not employees) actually provide services to customers.[112] While the court ultimately left the determination for a jury, Judge Chen signaled that the company would have to overcome the factual indicia of employment that plaintiffs had presented.[113] For example, the court noted that Uber regularly terminates the accounts of drivers who do not perform up to its standards—one of the chief complaints of drivers seeking workplace protection in the form of a labor union.[114]

The court reserved its greatest derision for Uber's claim that it exerted little to no control over its "partners," which was the fundamental basis of its argument that its drivers should be considered independent contractors and not employees.[115] The court plucked out specific requirements that the company indicated for its drivers including that drivers dress professionally, text the passenger one to two minutes prior to pick-up, open the door for the client, and "make sure the radio is off or on soft jazz or NPR."[116] Though Uber argued that all of these details were mere suggestions for its drivers, the plaintiffs were able to present compelling evidence that the company not only actively monitors compliance with these "suggestions," but that drivers are frequently admonished or even deactivated for failing to comply.[117]

Importantly, the evidence presented in the *O'Connor* Case shed light on the role that technology is likely playing throughout many workplaces in the U.S. Though ostensibly alone, and arguably "unsupervised," today's Uber driver is in many ways more closely monitored than any traditional

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109. *Id.* at 4, 10–11. The decision deemed Uber's self-definition as a technology company "unduly narrow" in its focus on the technological underpinnings of the platform, rather than the reality that the technology is merely a tool connecting drivers with riders.

110. *Id.* at 11.

111. *Id.* at 5.

112. *Id.* at 3.

113. *Id.* at 6.

114. *Id.* at 12.

115. *Id.* at 25.

116. *Id.* at 21.

117. *Id.* at 22–23.

line worker could have possibly been observed by any foreman. Recalling the 1990s Hair Club for Men advertisements—in which the company's CEO revealed, "I'm not just the President, I'm also a client!"—today's Uber customers are not only the company's client, they are its managers and HR directors, providing pervasive micro-feedback in the form of driver ratings that far exceeds the level of supervision experienced by most traditional employees.[118]

Following defeat on its motion for summary judgment, Uber continued to argue that the case should not be heard in federal court based on the mandatory arbitration clause in the Partner Agreement that drivers agreed to.[119] The court held that Uber's arbitration clause was unenforceable, issued its final order certifying the drivers as a class action lawsuit, and set a trial date of June 20, 2016.[120] However, on April 5th, the Ninth Circuit granted Uber's request for an immediate appeal of the district court's ruling that Uber's arbitration clause was unenforceable.[121] With the possibility of decertification as a class, as well as an ultimate finding that the drivers were employees, the plaintiffs and Uber agreed to a $100 million settlement of the misclassification claims.[122] Pursuant to the agreement, Uber agreed to policy changes, including:

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118. Comparing the level of monitoring in *O'Connor* to the level of monitoring in *Alexander v. FedEx*, the Court found that while the quarterly "ride-alongs" required for FedEx drivers were sufficient to find that the drivers were employees as a matter of law, the evidence presented in *O'Connor* regarding app-based monitoring arguably exceeded the amount of control in *Alexander*. While it left the determination to a jury, the Court cited Michel Foucalt and found that "a reasonable jury could conclude that Uber's more persistent performance monitoring . . . weighs in favor of finding that Uber drivers are Uber's employees [as a matter of law]." *Id.* at 24.

119. Defendant Uber Technologies, Inc.'s Motion to Compel Arbitration, O'Connor v. Uber Techs., Inc., No. 346 (N.D. Cal. Sept. 10, 2015).

120. Defendant Uber Technologies, Inc.'s Motion to Compel Arbitration, O'Connor v. Uber Techs., Inc., No. 460 (N.D. Cal. Jan. 12, 2016). While Uber's attempts to compel mandatory arbitration were stymied by the New York district court (*See, e.g.*, Meyer v. Kalanick, 15 Civ. 9796, 2016 U.S. Dist. LEXIS 99921 (S.D.N.Y. July 29, 2016) (holding that Uber failed to provide sufficient notice to the plaintiff for the mandatory arbitration process to be legally binding)), the company finally found a sympathetic judicial ear in September 2016, when the Court of Appeals for the 9th Circuit in San Francisco reversed the California district court's earlier ruling that the arbitration agreements signed by Uber drivers were unenforceable. In that case, the 9th Circuit found that drivers who began working for Uber in 2013 and 2014 must pursue their claims using arbitration, which affected some members of the class action. While the plaintiffs later submitted a separate argument to the court that the arbitration agreements were unenforceable as they violate workers' National Labor Relations Act's Section 7 right to engage in concerted activity, the 9th Circuit ruled that the submission of those arguments was untimely, and the panel denied rehearing *en banc*. Mohamed v. Uber Techs., Inc., 836 F.3d 1102 (9th Cir. 2016) (2016 WL 7470557).

121. Tracey Lien, *Court Lets Uber Appeal a Class-Action Lawsuit Filed by its Drivers*, L.A. TIMES (Apr. 5, 2016), http://www.latimes.com/business/technology/la-fi-tn-0406-uber-lawsuit-20160405-story.html [https://perma.cc/T67Y-3AC2].

122. Tracey Lien, *Uber Will Pay up to $100 Million to Settle Suits with Drivers Seeking Employee Status*, L.A. TIMES (Apr. 21, 2016), http://www.latimes.com/business/technology/la-fi-tn-0422-uber-settlement-story.html [https://perma.cc/JN3C-7S98].

- Uber will recognize a Driver Association and engage in good faith discussion (on a quarterly basis) of issues of driver concern;[123]
- Uber will no longer be able to deactivate drivers at will—drivers may only be terminated for just cause (which will not include low acceptance rates);[124] and
- Drivers will be permitted to place signs in their cars notifying passengers that tips are not included, and are appreciated.[125]

The settlement agreement, which was ultimately rejected by the federal district court as "not fair, adequate and reasonable," would have covered 385,000 drivers in California and Massachusetts and was followed by the announcement of a formation of an Independent Drivers Guild (the Guild) in New York City.[126] The Guild was organized by the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), a union that already represented so-called "black car" taxi and limousine drivers.[127] The formation of the Guild sidesteps the issue of employee classification entirely, presuming that the drivers are independent contractors and creating an organizational structure outside of the NLRA.[128] While membership in the Guild does not confer any

123. *Growing and Growing Up*, UBER NEWSROOM (Apr. 21, 2016), https://newsroom.uber.com/growing-and-growing-up [https://perma.cc/ECZ4-ESEX]; Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, But Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), https://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html?_r=0.

124. Lien, *supra* note 122.

125. *Id.*

126. Mike Isaac, *Judge Overturns Uber's Settlement with Drivers*, N.Y. TIMES (Aug. 18, 2016), https://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html; Douglas MacMillan, *Uber Agrees to Work with a Guild for Its Drivers in New York City*, WALL ST. J. (May 10, 2016), http://www.wsj.com/articles/uber-agrees-to-work-with-a-guild-for-its-drivers-in-new-york-city-1462913669.

127. AFL-CIO organized so called "black car drivers" at Elite Limousine in the mid-1990s, resulting in a landmark NLRB decision granting independent drivers the right to organize and form unions for purposes of collective bargaining. *See* Steven Greenhouse, *Government Ruling Paves Way for Limousine Drivers' Union*, N.Y. TIMES (Nov. 26, 1997), http://www.nytimes.com/1997/11/26/nyregion/government-ruling-paves-way-for-limousine-drivers-union.html [https://perma.cc/Z853-LJQQ].

128. Advocates for drivers in New York City are not unanimously in support of the guild approach. On June 2, 2016, the Taxi Workers Alliance, a long-time advocacy group for independent cab drivers in New York City, claimed misclassification and a violation of wage and overtime law. Bharavi Desai, the Alliance's executive director, expressed frustration with the IAM approach—which conceded for the moment that Uber drivers should be considered independent contractors—and stated a desire for the Alliance to someday win a union representation election for Uber drivers in New York. Steven Greenhouse, *On Demand, and Demanding Their Rights: Gig Workers in the Uber Economy Are Organizing to Win More Say Over Their Jobs—And Writing A New Chapter in American Labor*

enforceable collective bargaining rights, Uber has stated a commitment to conduct regular public forums where drivers may communicate workplace issues directly to its management.[129] The IAM also promises to provide deactivation protection through representation before independent panels of highly rated drivers.[130] Membership will also make drivers eligible for certain automobile insurance discounts and roadside assistance programs, which are currently available to IAM black car drivers.[131] A similar guild is being considered by Uber drivers in Philadelphia,[132] though the fact that company-sanctioned organizations are also partially company-funded raises concerns that the guild is more like a nineteenth century company union than a modern-day vehicle for worker power.[133]

Uber remains a "moving target" for independent contractor class action litigation.[134] In response, state legislation has tried to head off litigation by constructing regulatory frameworks in favor of independent contractor status. For example, West Virginia's 2016 law provides that drivers are independent contractors and not employees of the transportation network company so long as (1) the company does not proscribe the driver's hours; (2) the company does not restrict a driver's right to work for a competitor rideshare company; (3) the company does not assign a driver a particular geographic area; (4) the company does not restrict a driver's ability to work in any other occupation or business; and (5) the company and driver agree in writing that the driver is an independent contractor of the company.[135] States with default independent

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History, AM. PROSPECT (June 28, 2016), http://prospect.org/article/demand-and-demanding-their-rights [https://perma.cc/99WE-RYMR].

129. *Id.*

130. *See* Travis M. Andrews, *Uber Settles Groundbreaking Labor Dispute for up to $100 Million Drivers to Remain Independent Contractors*, WASH. POST (Apr. 22, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/22/uber-settles-groundbreaking-labor-dispute-for-up-to-100-million-drivers-to-remain-independent-contractors/?utm_term=.50ba073d72b8 [https://perma.cc/AY2K-X9N2].

131. *Id.*

132. Jason Laughlin, *Uber Drivers Consider Guild Representation*, PHILA. INQUIRER (Aug. 5, 2016), http://www.philly.com/philly/business/transportation/20160805_Uber_drivers_consider_guild_ representation.html [https://perma.cc/5Z5N-97PU].

133. Greenhouse, *supra* note 128.

134. *See, e.g.*, Complaint, Scroggins v. Uber Techs., Inc., No. 16-cv-1419 (S.D. Ind. June 9, 2016).

135. W. VA. CODE ANN. § 17-29-11 (West 2016) (limitation on transportation network companies).

contractor classification provisions include Arkansas,[136] Indiana,[137] and North Carolina.[138]

B. The Seattle Experiment

Rather than waiting for the courts to remedy the disparity in bargaining power experienced by workers in the on-demand economy, the Seattle City Council took a more direct approach. In its first attempt at regulation, the city tried to limit the number of licensed drivers for TNCs like Uber and Lyft, but the measure was defeated largely by Uber consumer backlash.[139] At that point, public sentiment toward TNCs was that they provided a much-needed service outside of the "rigid regulations imposed on the taxi industry."[140] However, that sentiment began to shift as Uber slashed driver reimbursement rates from $2 per mile to about $1.20 per mile, and as workers began organizing and drawing attention to "limited pay, long hours, and arbitrary deactivation."[141]

Instead of "tinkering around the edges with new regulations," city council member Mike O'Brien drafted legislation that would allow the drivers to unionize and negotiate the terms and conditions of their labor directly with the TNCs, with the City of Seattle acting as an intermediary.[142] Finding that driving for companies like Uber and Lyft "can be a viable path to steady, reliable and regular work for historically disadvantaged communities, including new immigrants to the United States" and that collective bargaining with those companies will directly "better ensure that they can perform their services in a safe, reliable, stable, cost-effective and economically viable manner," the council passed the groundbreaking ordinance in December 2015.[143] With support from the Teamsters local 117 union, drivers for Uber and Lyft organized the App-

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136. S.B. 800, 90th Gen. Assemb., Reg. Sess. (Ark. 2015), http://www.arkleg.state.ar.us/assembly/2015/2015R/Bills/SB800.pdf [https://perma.cc/UW6A-F4RY].

137. HB 1278, 119th Gen. Assemb., First Reg. Sess. (Ind. 2015), https://iga.in.gov/legislative/2015/bills/house/1278 [https://perma.cc/7T2T-B8G2].

138. SB 541, 2015 Gen. Assemb., Reg. Session (N.C. 2015), http://www.ncleg.net/Sessions/2015/Bills/Senate/PDF/S541v5.pdf [https://perma.cc/CFC5-GX9E].

139. Davey Alba, *Inside Seattle's Bold Plan to Let Its Uber Drivers Organize*, WIRED (Dec. 14, 2015), http://www.wired.com/2015/12/inside-seattles-bold-plan-to-let-its-uber-drivers-organize/ [https://perma.cc/9UCP-U3JF].

140. Mike O'Brien, *A New Law Is Letting Uber Drivers Unionize*, NATION (July 1, 2016), https://www.thenation.com/article/a-new-law-is-letting-uber-drivers-unionize/ [https://perma.cc/2ZEC-FCZG].

141. *Id.*

142. *Id.*

143. SEATTLE, WASH., ORDINANCE 124968 (Dec. 23, 2015) (relating to taxicab, transportation network company, and for-hire vehicle drivers; amending Section 6.310.110 of the Seattle Municipal Code; adding Section 6.310.735 to the Seattle Municipal Code; and authorizing the election of driver representatives).

Based Drivers Association using traditional organizing techniques in a nontraditional economy.[144] Eleven months after the ordinance became law, the City of Seattle's Finance and Administrative Services Department (FAS) proposed rules clarifying, among other things, which drivers will be eligible to vote on unionization.[145]

Seattle's power to regulate working conditions in the on-demand economy stems not from any delegation of federal authority to the states but rather from the state's own reserved police powers in the Tenth Amendment of the United States Constitution.[146] Seattle saw itself as uniquely positioned to address the impacts that independent contractor classification has on its local workforce and consumer base. In addition to their interest in lost payroll tax revenues, local governments often serve as social safety nets when traditional employment benefits—such as healthcare, insurance, and retirement savings—are withheld by companies classifying their workers as independent contractors. However, consumer support for ride-hailing companies like Uber does not mean that Seattle taxpayers are not sympathetic to the idea that the workers providing those rides should be treated and compensated fairly. Rather than wait for the rideshare industry to raise standards voluntarily or for the federal government to mandate standards, Seattle looked to its existing regulatory tools and then innovated.

Under Chapter 6.310 of the Seattle Municipal Code (SMC), Seattle has the "power to license for-hire vehicles, taxicabs, for-hire drivers, taxicab associations, and transportation network companies, and issue TNC vehicle endorsements, for regulations and revenue."[147] The underlying regulatory purpose of this chapter of the SMC is to "increase the safety, reliability, cost-effectiveness, and the economic viability and stability of privately-operated-for-hire vehicle and taxicab services within The City of Seattle."[148] The ordinance's text criticizes on-demand business

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144. *App-Based Drivers Association*, TEAMSTERSTNC, http://www.teamstertnc.org/ [https://perma.cc/E96F-XY27].

145. Daniel Beekman, *Seattle Unveils Rules for Unionizing Uber, Lyft Drivers*, SEATTLE TIMES (Nov. 23, 2016), http://www.seattletimes.com/seattle-news/politics/city-unveils-rules-for-unionizing-uber-lyft-drivers/ [https://perma.cc/FW6F-6ADX]. As of this writing, four rules have been published by the Director of the FAS. These are FHDR-1 (Qualifying Driver and Lists of Qualifying Drivers); FHDR-2 (Application Process for Designating a Qualified Driver Representative); FHDR-3 (Certification of an Exclusive Driver Representative); and FHDR-4 (Subjects of Bargaining between a Driver Coordinator and an Exclusive Driver Representative). *See For-Hire Driver Collective Bargainaing*, SEATTLE.GOV, https://www.seattle.gov/business-regulations/taxis-for-hires-and-tncs/for-hire-driver-collective-bargaining [https://perma.cc/6NB3-D383].

146. U.S. CONST. amend. X.

147. SEATTLE, WASH., CODE, Ch. 6.310.735 (2015)

148. *Id.* The ordinance further states that its purpose is

> to ensure safe and reliable for hire and taxicab transportation service pursuant to RCW 46.72.160 and RCW 81.72.210, respectively, and to meet the state's authorization to

models that classify drivers as independent contractors, which the Council argues "render for-hire drivers exempt from minimum labor requirements that the City of Seattle has deemed in the interest of public health and welfare, and undermine Seattle's efforts to create opportunities for all workers in Seattle to earn a living wage."[149]

Implementation of the Seattle ordinance was initially delayed. After a reportedly "rowdy public comment period," the Seattle City Council's Education, Equity and Governance Committee announced that it would take another six months to work out the details of the election and representation process.[150] The first set of rules were published and made effective in December of 2016, with the remainder of rules to be released in the first quarter of 2017.

Pursuant to the first of these finalized rules promulgated in connection with the Seattle ordinance, drivers who contracted with a Driver Coordinator[151] (e.g., Uber, Lyft) at least ninety days prior to January 17, 2017, and who made at least fifty-two trips within the Seattle city limits for that particular Driver Coordinator will be eligible for collective representation.[152] This definition was deemed too narrow by rideshare companies like Uber and Lyft, who lobbied to allow every driver—including those who drove intermittently or infrequently—to be eligible to vote.[153] Uber sued the FAS on the grounds that the rulemaking

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> regulate for hire transportation pursuant to RCW 46.76.001, which states: 'The legislature finds and declares that privately operated for hire transportation service is a vital part of the transportation system within the state. Consequently, the safety, reliability, and stability of privately operated for hire transportation services are matters of statewide importance. The regulation of privately operated for hire transportation services is thus an essential governmental function. Therefore, it is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws.' RCW 81.72.200 governing taxicab transportation has a similar statement of legislative intent.

Id.

149. *Id. See also* Press Release, Seattle City Council, Council Unanimously Adopts First-of-its-Kind Legislation to Give Drivers a Voice on the Job (Dec. 14, 2015), https://www.seattle.gov/council/current-issues/giving-drivers-a-voice [https://perma.cc/3RT8-9FPL].

150. Daniel DeMay, *Uber Drivers' Union Could be Delayed 6 Months or More*, SEATTLE POST-INTELLIGENCER (Aug. 3, 2016), http://www.seattlepi.com/business/article/Uber-drivers-union-could-be-delayed-six-months-or-9112527.php [https://perma.cc/3S4E-234E].

151. "'Driver coordinator' means 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. For the purposes of this definition, 'driver coordinator' includes but is not limited to taxicab associations, for-hire vehicle companies, and transportation network companies." SEATTLE, WASH., ORDINANCE 124968 (2015).

152. *Rule FHDR-1 Qualifying Driver and Lists of Qualifying Drivers (SMC 6.310.110 and .735)*, SEATTLE.GOV (Dec. 29, 2016), http://www.seattle.gov/Documents/Departments/FAS/RegulatoryServices/collective-bargaining/FHDR-1-qualifying-driver-final.pdf [https://perma.cc/T5YL-NFNF].

153. Beekman, *supra* note 145.

process was arbitrary and capricious and that the rules themselves violate well settled principles of labor law.[154]

For their part, Mike O'Brien nor the labor unions were satisfied with the finalized rules, which represented a significant departure from the originally proposed eligibility standard of 150 trips within a thirty-day period.[155] The requirements for a labor union, or another advocacy organization, to be considered a qualified driver representative (QDR) remained unchanged; it must be a democratically organized not-for-profit organization with "experience in . . . assisting stakeholders in reaching consensus agreements with, or related to, employers and contractors."[156] Pursuant to the finalized rules, Seattle will certify a QDR as the exclusive bargaining representative if it can demonstrate that a majority of eligible drivers expressed interest in being represented by that organization.[157]

III. VIABILITY OF SEATTLE ORDINANCE

A little over two months after Seattle enacted its landmark collective bargaining ordinance, the U.S. Chamber of Commerce, on behalf of the industry, filed a lawsuit in federal court challenging the law.[158] The lawsuit made two predictable claims. First, it claimed that the NLRA restricts collective bargaining rights to employees and therefore preempts local and state governments like Seattle from enacting parallel or conflicting laws.[159] Second, it claimed that the ordinance violates the federal Sherman Antitrust Act, which prohibits anticompetitive behavior.[160] While the Sherman Act exempts from liability employees who negotiate as a union for higher wages, a court may view the same negotiations, when conducted by independent contractors, as "price-fixing."[161]

Because the purpose of laws like the Seattle ordinance is to alleviate workers' economic inequality through freedom of association and to protect consumers against abuses by large-scale monopolies, it is unlikely

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154. Rasier v. City of Seattle, No. 17-2-00964-4 (Wash. Super. Ct. filed Jan. 17, 2016).

155. Beekman, *supra* note 145.

156. *Id. See also Rule FHDR-2 Application Process for Designating a Qualified Driver Representative (SMC 6.310.110 and .735)*, SEATTLE.GOV (Dec. 29, 2016), http://www.seattle.gov/Documents/Departments/FAS/RegulatoryServices/collective-bargaining/FHDR-2-QDR-application-final.pdf [https://perma.cc/SE9V-LQSX].

157. *Rule FHDR-3 Certification of an Exclusive Driver Representative (SMC 6.310.110 and .735)*, SEATTLE.GOV (Dec. 29, 2016), https://www.seattle.gov/Documents/Departments/FAS/RegulatoryServices/collective-bargaining/FHDR-3-EDR-certification-final.pdf [https://perma.cc/39LF-UDWZ].

158. U.S. Chamber of Commerce v. City of Seattle, No. C16-0322RSL, 2016 WL 4595981 (W.D. Wash. Aug. 9, 2016).

159. *Id.*

160. *Id.*

161. Kennedy, *supra* note 7.

that Congress intended to bar initiatives like Seattle's (which seeks to reduce such inequality). On August 9, 2016, U.S. District Judge Robert Lasnik ruled that the Chamber of Commerce's members lacked standing to pursue the lawsuit because they didn't show that they were or would be harmed by the ordinance.[162] Judge Lasnik granted Seattle's motion to dismiss without prejudice, leaving the door open for the Chamber, or one of the rideshare companies themselves, to bring suit in the future.[163]

The Chamber stated that Seattle merely "delayed coming to grips with the legal flaws at the heart of this ordinance" and asserted that Judge Lasnik "made clear at oral argument that he stands ready to hear a challenge to Seattle's unprecedented ordinance in the future."[164]Though the first attempt to legally block the ordinance's implementation was unsuccessful, an in-depth analysis of federal preemption and antitrust law is necessary to determine whether this type of state regulation can survive future legal challenge.

A. Federal Preemption Claims

Any regulation of work in an on-demand economy is going to raise the red flag of federal labor preemption. Councilman O'Brien believes that cities have a "powerful role" in ensuring that the benefits to consumers created by the on-demand economy do not come at the expense of worker dignity.[165] Given the current lack of leadership on this issue at the federal level, may local governments regulate labor relations between on-demand workers and firms without running afoul of federal preemption challenges? A thorough analysis of the preemption arguments and available defenses strongly suggests that such a role is possible.

Article VI, Clause 2 of the U.S. Constitution (referred to as the "Supremacy Clause") states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

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162. Daniel Beekman, *Judge Tosses U.S. Chamber's Suit Against Seattle Over Uber Union Law, Calling it Premature*, SEATTLE TIMES (Aug. 9, 2016), http://www.seattletimes.com/seattle-news/politics/judge-tosses-chambers-suit-against-seattle-over-uber-law/ [https://perma.cc/27YP-3Y6G]; *see also* Order Granting Defendants' Motion to Dismiss, U.S. Chamber of Comm. v. City of Seattle, No. C16-0322RL (W.D. Wash. 2016), https://www.documentcloud.org/documents/3009511-19717037450.html [https://perma.cc/K95A-UUCM].

163. Order Granting Defendants' Motion to Dismiss, *supra* note 162.

164. Eric M. Johnson, *U.S. Judge Dismisses Challenge to Seattle's Uber, Lyft Union Law*, REUTERS (Aug. 10, 2016), http://www.reuters.com/article/us-uber-labor-seattle-idUSKCN10L0D3 [https://perma.cc/HV92-QSGJ].

165. *See* O'Brien, *supra* note 140.

> thereby, any Thing [sic] in the Constitution or Laws of any State to the Contrary notwithstanding.[166]

State and local laws are preempted when there is a clear manifestation of congressional intent to occupy the field and supersede local attempts to regulate that field.[167] Highways and railroads are good examples of areas in which the federal government exercises almost exclusive authority. Labor law preemption, however, is limited by deference to state regulation.[168] While the NLRB's broad powers to interpret and enforce federal labor laws often prohibit or promote conflicting rules of law, courts have recognized situations where state regulation is not preempted.[169] These are situations involving local regulations that touch and concern the complex employment relationship.[170]

The critical rights extended to workers under Sections 7 and 8 of the NLRA apply only to those classified as "employees" under the statute.[171] For example, individuals employed "in the domestic service of any family or person at his home" are excluded from the definition of "employee" under 29 U.S.C. § 152(3).[172] The Supreme Court reaffirmed the exclusion of such workers in *Harris v. Quinn*, referring to Illinois' homecare providers as "personal assistants" and holding that they are not covered by the NLRA.[173]

However, the NLRA itself contains no specific statutory preemption provision. Thus, "[t]he purpose of Congress is the ultimate touchstone."[174] In cases where federal law does not explicitly bar state and local attempts to regulate in a particular area, courts will uphold the local regulation "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."[175]

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166. U.S. CONST. art. VI, § 2.

167. *See, e.g.*, Bldg. & Constr. Trades Council v. Associated Builders & Contrs., 507 U.S. 218, 224 (1993).

168. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967); *see also* Willmar Poultry Co., Inc., v. Jones, 430 F. Supp. 573 (D. Minn. 1977).

169. *Vaca*, 386 U.S. at 178–79; *Willmar Poultry Co.*, 430 F. Supp. at 576.

170. *Willmar Poultry Co.*, 430 F. Supp. at 576.

171. Memo. of Law & Order, Greene v. Minn. Governor Mark Dayton, D. Minn., 81 F. Supp. 3d 747,750 (No. 14-3195), (D. Minn. Jan. 26, 2015) (citing 29 U.S.C. §§ 157, 158(a)(1), (b)(1) (2017)).

172. 29 U.S.C. § 152(3) (2017).

173. *See generally* Harris v. Quinn, 134 S. Ct. 2618 (2014).

174. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (citing Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

175. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985) (citing *Malone*, 435 U.S. at 504).

The Supreme Court, in one of the earliest (and only) cases to extend NLRA protection to independent contractors, did so in recognition of the economic forces at play between the employer and putative employees.[176] In that case, the Court relied on the NLRA's legislative history, which demonstrated a congressional commitment to broadening the narrow "master and servant" legal definition.[177] In response to the decision, Senator Taft scolded the Supreme Court for relying on an evaluation of "social interests," rather than the legal definition, to extend NLRA protection to newsboys.[178] In support of what would become the Taft–Hartley amendments to the NLRA, Taft explained,

> An 'employee' . . . means someone who works for another for hire. . . . In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.[179]

Even if states determined that on-demand workers are not traditional "employees," states still arguably have an interest in regulating the contractual relationship created between on-demand companies and their workers for reasons outside the scope of the NLRA. A closer examination of the economic and social goals of worker equality underpinning the NLRA, as well as the nature of the federal preemption doctrine, is required to support the proposition that the Seattle ordinance should not be preempted.

In determining whether a state law is preempted by the NLRA, an analytical distinction must be made between preemption based on federal protection of the conduct in question and preemption based on the NLRB's exclusive jurisdiction.[180] The Supreme Court has identified three scenarios in which state action is preempted by the NLRA, and the cases that arise under each scenario are understood to implicate the preemption

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176. N.L.R.B. v. Hearst Publs., Inc., 322 U.S. 111, 128 n.28 (1944) (citing S. REP. NO. 74-573, at 7 (1935)).

177. *Id.* at 124 (conceding that the legislative history mandated a narrower definition than merely "rendering service to others").

178. H.R. REP. NO. 80–245, at 18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 309 (1948).

179. *Id.*

180. *See generally* San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959); Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Rels. Comm'n, 427 U.S. 132 (1976).

doctrine as established under *Garmon*, *Machinists*, or Section 301.[181] The first category consists of cases in which the activity involved is arguably protected as an employee right under NLRA Section 7 or is prohibited as an unfair labor practice under NLRA Section 8. In the landmark case establishing the framework for analyzing cases that trigger this type of preemption, the San Diego Building Trades Council was engaged in "peaceful picketing" for the purpose of seeking employer recognition of (and collective bargaining with) the union.[182] The employer sought relief under state law, and the union argued that picketing was a protected NLRA Section 7 activity.[183] The Supreme Court ruled that whether the conduct was protected or prohibited was ultimately an issue for the federal National Labor Relations Board, not a state court.[184] The Court explained that were it to allow state laws or state remedies to prevail in instances where the activity in question was "arguably subject" to Sections 7 or 8 of the NLRA, it would risk interfering with a uniform national labor policy.[185] The contemporary justification for *Garmon* preemption is the concern that the existence of parallel state regulation could result in states prohibiting conduct that the NLRA protects.[186] In those cases, the NLRB and the courts have held that there is no room for parallel state regulation.[187]

The second category of cases in which the Court has found that the NLRA preempts state regulation is those in which the NLRB clearly has jurisdiction over an activity but chooses not to exercise it.[188] If, for example, the NLRB were to decline to issue a complaint against an employer because the labor relations involved were local in nature, it may nevertheless not cede jurisdiction to the state labor board. In that case,

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181. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

182. *See generally Garmon*, 359 U.S. 236.

183. *Id.* at 241.

184. *Id.* at 244–45.

185. *Id.* at 245.

186. In 1953, the Supreme Court held in *Garner v. Teamsters*, 346 U.S. 485, that states could not assume authority in areas that were within the authority of the NLRB. In that case, a Pennsylvania county court issued an injunction against picketers as a violation of the Pennsylvania Labor Relations Act. The Pennsylvania Supreme Court reversed, finding that the injunction was preempted by the NLRA. The Supreme Court affirmed, holding that the NLRA "leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner*, 346 U.S. at 488.

187. The *Garmon* court held that by allowing state laws or state remedies to prevail in instances where the activity in question was "arguably subject" to Sections 7 or 8 of the NLRA, it risks interfering with a uniform national labor policy. *See Garmon*, 359 U.S. at 245. The *Garmon* decision, which clearly provided states with little leeway, has become the dominant doctrine on federal preemption in the labor law field.

188. *See* Bethlehem Steel Co. v. N.Y. St. Lab. Rels. Bd., 330 U.S. 767, 776 (1947) (holding that attempts by the New York State Labor Relations Board to designate a bargaining unit of forepersons was preempted by an NLRB determination that forepersons were excluded from the NLRA).

a parallel claim filed in state court would be preempted by the NLRA, even though its own administrative forum denied review.[189]

In the third category of cases, the NLRA neither protects nor prohibits the activity in question, but national labor policy requires that the activity be left free from regulation, subject only to economic forces. In *Machinists v. Wisconsin Employment Relations Commission*, the Court held that a union's concerted refusal to work overtime was peaceful conduct and constituted an activity that must be kept free of state regulation if the comprehensive goals of the NLRA were not to be frustrated.[190]

Professor Gottesman has argued persuasively that the goals of the NLRA should prevail over strict doctrinal interpretation.[191] Given the clear intention of Congress in passing the Wagner Act to alleviate workers' economic inequality through collective bargaining, it is difficult to imagine that it would object to local laws that accomplish the goal of federal law.[192] As the Supreme Court noted in another context, "some preemption rulings insulating employers from state regulation would 'turn . . . the Wagner Act on its head.'"[193]

Courts have repeatedly addressed the issue of workers not covered under the NLRA but who are nevertheless seeking collective bargaining rights. In a case involving agricultural workers, the court found that, "there is no legislative history to indicate that the NLRA's exclusion of agricultural laborers from its coverage was intended to leave the area totally free from regulation."[194] In that case, the court held that the NLRA

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189. *See* Guss v. Utah Lab. Rels. Bd., 353 U.S. 1, 10–11 (1957) (holding that Utah Labor Relations Board had no power to deal with unfair labor charges falling within the jurisdiction of NLRB where NLRB declined to exercise its jurisdiction but had not ceded jurisdiction to Utah Board).

190. Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Rels. Comm'n, 427 U.S. 132, 155 (1976).

191. *See generally* Michael Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

192. *Id.* at 359.

193. *Id.* States have a legitimate interest in regulating demand-economy workers, an interest that is not preempted by either the Taft–Hartley Act or any other federal legislation. *See also* Met. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756–57 (1985) (finding that a Massachusetts statute setting forth mandatory minimum health care benefits for inclusion in general insurance policies is not preempted by the NLRA: "Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. . . . When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act"). "It is unlikely that Congress intended, by enacting the NLRA, to bind the hands of State Legislatures with respect to problems such as mental health." Att'y Gen. v. Travelers Ins. Co., 433 N.E.2d 1223, 1232 (Mass. 1982).

194. Willmar Poultry Co. Inc., v. Jones, 430 F. Supp. 573 (D. Minn. 1977).

would not (on *Machinist* preemption grounds) preempt the State of Minnesota's regulation of labor relations among agricultural workers.[195]

Similarly, in 2001, Washington State passed a state initiative establishing a public employer of record and creating certain collective bargaining rights for adult family home care providers, who would otherwise face total exclusion as domestic workers under the NLRA.[196] Following a successful series of similar laws establishing state governments as the public employer of privately contracted care providers in other states (including Illinois[197] and California), the Washington law extended to direct care workers the right to bargain collectively over "(i) [e]conomic compensation, such as manner and rate of subsidy and reimbursement, including tiered reimbursements; (ii) health and welfare benefits; (iii) professional development and training; (iv) labor-management committees; (v) grievance procedures; and (vi) other economic matters."[198]

The purpose of applying *Garmon* preemption to local laws are to protect the authority of the NLRB and to establish a uniform system of laws and remedies for all conduct by employers and employees that is arguably protected or prohibited by the NLRA. In other words, such preemption is applied to avoid the much maligned patchwork of legal protections that could develop if no such uniformity were enforced. On the other hand, the *Machinist* preemption operates more like a system of national parks—unregulated tracts of land, or in this case, certain conduct and speech, that is to be left unregulated by anything other than the interplay of economic forces.

Court precedent has established that Congress did not intend to leave the areas of domestic services and agricultural labor entirely free from

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195. *Id.*

196. WASH. STATE INITIATIVE 775 (2001), https://www.sos.wa.gov/elections/initiatives/text/i775.pdf [https://perma.cc/UY8Y-TXQP]; *see also* Judith Blake, *Bargaining Rights for State's Home Care Staffers Passing*, SEATTLE TIMES (Nov. 6, 2001), http://community.seattletimes.nwsource.com/archive/?date=20011106&slug=healthinit07m. The Service Employees International Union (SEIU) launched a successful organizing campaign on the heels of the initiative's passage, resulting in the formation of SEIU Local 775, a statewide union of 26,000 home care workers. SEIU, *A Timeline of Our Union's History*, http://seiu775.org/about-us-2/ [https://perma.cc/92KG-D8KU].

197. Note, however, that in *Harris v. Quinn*, the Supreme Court held that the exclusion of domestic workers was precisely because Congress did not see that their organization would further the interests of labor peace. However, by such exclusion, the Court concluded that *Garmon* preemption would not apply to a state law that extended labor rights to home care workers. Harris v. Quinn, 134 S. Ct. 2618, 2640–41 (2014).

198. WASH. REV. CODE § 41.56.029(2)(c)(i-vi) (2007). Adult family home providers do not have the right to strike. The statute concludes with a statement that, "In enacting this section, the legislature intends to provide state action immunity under federal and state antitrust laws for the joint activities of adult family home providers and their exclusive bargaining representative to the extent the activities are authorized by this chapter." WASH. REV. CODE § 41.56.029(2)(e)(10) (2007).

regulation.[199] As noted above, courts have held that the exclusion of agricultural workers under 29 U.S.C. § 152(3) did not preempt state regulation of such workers' labor relations.[200] Washington State Attorney General Rob McKenna, in considering whether the NLRA would preempt a Washington state bill to prohibit employers from requiring employees to attend "captive audience meetings," concluded that the bill would be preempted by the NLRA, for two independent reasons:[201]

> First, the bill proposes a state prohibition and sanction for employer actions that arguably are already prohibited by the NLRA in some circumstances. Second, the provisions of SSB 5446 could be applied to limit the type of employer speech regarding union organization that Congress intended to be controlled by the free play of economic forces and reserved for market freedom.[202]

The exclusion of on-demand workers from traditional employment laws is felt most at the state level in the form of lost payroll and other taxes.[203] States must nevertheless shoulder the burden of providing social services to marginalized groups of demand economy workers.[204] Furthermore, local industries such as taxi and limousine services involve consumer and public safety concerns, giving states an interest and arguable authority over those workers.

The City of San Jose invoked such an interest when it executed a labor peace agreement between owner–operator taxicab drivers and two

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199. *Willmar Poultry Co., Inc.*, 430 F. Supp. at 576.

200. *See Willmar Poultry Co., Inc.*, 430 F. Supp. at 578 (concluding that state regulation of agricultural laborers was likely not preempted because of the lack of legislative history or indication of intent to leave them unregulated); United Farm Workers of Am. v. Ariz. Agric. Emp't Rels. Bd., 669 F.2d 1249, 1257 (9th Cir. 1982) ("We find nothing in the [NLRA] to suggest that Congress intended to preempt such state action by legislating for the entire field. Indeed, we draw precisely the opposite inference from Congress' exclusion of agricultural employees from the Act.").

201. *See* Letter from Rob McKenna to the Hon. Mike Hewitt and the Hon. Janéa Holmquist, Washington State Senate, AGO 2009 No. 3 (July 22, 2009), http://www.atg.wa.gov/ago-opinions/whether-national-labor-relations-act-would-preempt-provision-proposed-bill-regarding [https://perma.cc/SKN5-BE2Q].

202. *Id.*

203. *See Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, *supra* note 72. *See also* Linda Donahue et al., *The Cost of Worker Misclassification in New York State* 11 (Cornell Univ., Sch. of Indus. and Lab. Rels., 2007), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=reports [https://perma.cc/TR4P-386Y] (detailing the "severe" implication for overall lost state revenues). "One recent estimate of the total tax loss due to misclassification in California is as high as $7 billion. A 2004 study in Massachusetts estimates losses of $12.6 to $35 million to that state's unemployment insurance system, a loss of $91 million in state income tax revenue, and $91 million in unpaid workers' compensation premiums." Donahue et al., *supra*.

204. *See Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, *supra* note 72.

taxicab corporations in connection with the operation of its airport.[205] The agreement included mechanisms for dispute resolution between drivers and taxi companies, such as the right of drivers to outside representation in disciplinary hearings; reporting requirements by the taxi companies; a prohibition on discrimination against drivers for union activity or other collective action; and a liquidated damages clause for breach of the agreement. Today, the San Jose airport is considering allowing Uber and Lyft to pick up passengers alongside taxi drivers subject to the agreement.[206]

The exclusion of on-demand workers from the National Labor Relations Act is inconsistent with the remedial purposes of the Act and is an omission best corrected at the federal level. Given the unlikelihood that such change will take place federally, employers should not be permitted to wield the Constitution in ways that preempt experimentation by state and local governments. Given the absence of any federal regulation, prohibition, or direction in the field, state legislative solutions to the on-demand dilemma should not be preempted by existing federal law.

B. Antitrust Claims

"[I]t's antitrust 101 that independent actors cannot conspire with each other to set prices."[207]

While measures by state and local governments to extend collective bargaining rights to independent contractors may survive preemption challenges, they must also overcome opponents' arguments that they violate antitrust law. Early American history is replete with cases of employers misusing antitrust law to defeat union organizing. Beginning in 1806, when a Philadelphia court ruled that the creation of a shoemaker guild would "disrupt market competition," courts relied on common law principles (and anti-union hostility) to find workers and unions guilty of "criminal conspiracy."[208] However, as described in more detail below, a careful examination of antitrust precedent and policy reveals ample bases

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205. CITY OF SAN JOSE, OFFICE OF THE CITY AUDITOR. REPORT TO THE CITY COUNCIL, CITY OF SAN JOSE. TAXI SERVICE AND REGULATION IN SAN JOSE: AN OPPORTUNITY TO REEVALUATE CITY PRIORITIES AND OVERSIGHT 6–7 (May 2013), https://www.sanjoseca.gov/DocumentCenter/View/17513 [https://perma.cc/G7PT-WS76].

206. Matt Keller, *Officials Consider Uber, Lyft Services at San Jose Airport*, ABC NEWS (June 23, 2015), http://abc7news.com/business/officials-consider-uber-lyft-services-at-san-jose-airport/800734/ [https://perma.cc/HF8S-27P4].

207. Lily Fu Clafee, Chief Legal Office of the U.S. Chamber of Commerce, in a statement "strongly oppos[ing] Seattle's Drivers' Union Ordinance."

208. William N. Cooke, *Evolution of the National Labor Relations Act*, *in* UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS 1, 3 (W.E. Upjohn Institute for Employment Research, 1985).

for exemptions from antitrust liability, such as in the case of the Seattle ordinance.

One of the principal applications of antitrust law is to preclude horizontal restraints that limit competition among economic entities. One example of a horizontal restraint is price fixing within an industry. The Seattle ordinance embodies the inherent tension between antitrust policy, which is designed to maximize individual competition, and national labor policy, which is designed to promote cooperation between workers in the face of employer economic power.[209] On-demand workers who are viewed as independent contractors lack the legal status to bargain collectively under labor law. Strikes and other concerted action in support of increased compensation—the "accoutrements of industrial strife"[210]—can arguably constitute unlawful horizontal restraints of trade. In addition, collectively negotiating over pay rates could arguably constitute illegal price fixing—a *per se* violation of antitrust law.[211] On-demand workers themselves could be held liable for violations of state and federal antitrust law. Yet, if viewed as individual businessmen, they are prisoners of the regime of competition and lack any means of attaining more equal bargaining power in negotiating the terms of their employment.

A careful consideration of the specific antitrust provisions, as well as exemptions from liability, is therefore necessary to determine whether or not collective bargaining among on-demand workers classified as independent contractors will trigger antitrust liability.

1. Federal Antitrust Law

Section 1 of the Sherman Antitrust Act makes unlawful "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states."[212] However, Section 6 of the Clayton Act affirms that human labor is not a commodity or article of commerce.[213] In addition, it immunizes labor organizations and their members that

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209. H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 713 (1981).

210. JEROLD S. AUERBACH, LABOR AND LIBERTY: THE LA FOLLETTE COMMISSION AND THE NEW DEAL 97 (1966).

211. Kennedy, *supra* note 7, at 169.

212. 15 U.S.C. §1 (2015). To establish a Section 1 violation, a plaintiff must show (1) concerted action by contract, combination, or conspiracy, and (2) an unreasonable restraint of trade. Benjamin J. Larson, *Antitrust for All: A Primer for the Non-Antitrust Practitioner*, COLO. LAW., Oct. 2014, at 19.

213. "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17 (2017).

lawfully carry out legitimate objectives of antitrust liability.[214] The Clayton Act makes clear that antitrust laws are not to be used to nullify the existence of labor, agricultural, or horticultural organizations created with the goal of mutual aid.[215] Thus, certain activities, such as strikes and boycotts, which if undertaken by independent businesses would violate antitrust law, are permitted by employees when undertaken in their own self-interest and in the course of disputes regarding the terms and conditions of work.

Independent contractors are typically excluded from this labor immunity under the Sherman Act, a general rule the Supreme Court has repeatedly affirmed. In 1962, the Court held in *United States v. L.A. Meat and Provision Drivers Union* that allowing independent contractors who collected and sold waste restaurant grease to be union members violated Section 1 of the Sherman Act.[216] Seeking to increase the margin between the prices, the grease peddlers paid restaurants for leftover grease and the prices at which they resold the grease to local processors, most of the Los Angeles area peddlers became members of the union Local 626.[217] With the help of the union's business agent, the peddlers fixed purchase and sale prices citywide.[218] The union enforced the new standards by threatening processors with strikes and boycotts if they chose to purchase grease from non-union peddlers.[219]

The California District Court held that the peddlers could not escape the reach of antitrust law simply by becoming members of a union.[220] The actions of the peddlers, as independent contractors, constituted an unlawful restraint on trade, and the district court ordered the peddlers to withdraw their union membership.[221] The judgment was affirmed on appeal to the U.S. Supreme Court.[222] In his concurring opinion, Justice Goldberg noted that it was not insignificant that the peddlers described themselves as "independent businessmen" rather than employees of the processors.[223] While the terminology that an employee (or employer) uses is not itself dispositive, in this case it was reflective of the actual

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214. *Id.*
215. *Id.*
216. L.A. Meat & Provision Drivers Union v. United States, 371 U.S. 94, 95 (1962).
217. *Id.* at 97.
218. *Id.*
219. *Id.*
220. United States v. L.A. Meat & Provision Drivers Union, 196 F. Supp. 12, 19 (S.D. Cal. 1961).
221. *Id.* at 21.
222. L.A. Meat & Provision Drivers Union v. United States, 371 U.S. 94, 103 (1962).
223. *Id.* at 107.

independence experienced by the peddlers. The tactics employed by the peddlers were more akin to business strategy than genuine labor dispute.[224]

Concerted action in a commercial context recalls the unbridled power of large trusts and monopolies, ruthlessly wielded against individuals and small businesses. In the Uber driver context, however, that unchecked power lies more realistically with the online platform itself. While it may indeed be elementary antitrust law that independent contractors cannot engage in price fixing, a more advanced set of legal principles and judicial decisions makes clear that the Court is willing to exempt independent contractors from antitrust liability when doing so advances the goals of antitrust and labor law.[225]

2. Labor Unions' Antitrust Liability

The Clayton Act exempts labor unions' collective demands for improved wages and working conditions from antitrust liability.[226] Moreover, the Supreme Court has held that unions can organize or regulate the activities of independent contractors if there is: (1) *wage or job competition* between independent contractors and employees represented by a union (e.g., competition between employee milk wagon drivers and self-employed milk vendors);[227] or (2) *some other economic interrelationship* between independent contractors and union-represented employees that has an impact on employee wages, etc. (e.g., musicians and orchestra leaders, actors and theatrical agents).[228] If the members of a union are independent contractors rather than a group of employees, then what was negotiated as a closed shop labor agreement becomes a union conspiracy to restrain competition. Such conduct "falls back into being the type of conspiracy which it would be without its labor agreement mantle."[229] In order for a union to shield itself from antitrust

224. *Id.* at 107 n.2.

225. *See, e.g.*, Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940); H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704 (1981).

226. Samuel Gompers, then president of the American Federation of Labor, declared the Clayton Act as the "Industrial Magna Charta upon which the working people will rear their structure of industrial freedom." PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 254 (U. of Cal. Press, 2008). For an examination of American labor cases prior to the Clayton Act, see Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926).

227. *See, e.g.*, *Milk Wagon Drivers' Union*, 311 U.S. at 94–96 (noting that picketing by independent contractor milk vendors constituted a "labor dispute" not in violation of antitrust law).

228. *See, e.g.*, *H.A. Artists & Assocs.*, 451 U.S. at 719–22 (stating that the union's system for franchising agents was exempt from the Sherman Act).

229. Int'l. Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d 384, 390 (3d Cir. 1973).

liability for organizing dependent contractors, it must pay strict attention to the rules laid down by the Supreme Court.[230]

In the grease peddlers' case, the district court concluded that while the peddlers had violated antitrust law, their membership in the union would not violate the Sherman Act so long as two conditions were met.[231] First, the peddlers had to be engaged in the same kind of work as existing union members, and second, they had to compete with those members.[232] The court reasoned that competition with employees could lower the working standards and wages of the union members if the grease peddlers were excluded from collective bargaining.[233] The district court relied on *Bakery and Pastry Drivers and Helpers Local v. Wohl*,[234] in which the Supreme Court sanctioned the joining of independent contractors with employees, so long as the independent contractors competed with union members by doing the same or similar work.[235] Using this two-pronged test, the district court concluded that the grease peddlers satisfied neither requirement.[236]

Independent contractors may be members of a union only when the purpose of their membership is to eliminate unfair competition between themselves and regular employees in order to obtain better wages and working conditions for all union members.[237] In New York

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230. For an interesting case involving a labor union wielding antitrust law to enjoin other labor unions, see generally Int'l Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, Inc., 483 F.2d 384 (holding that a construction association representing independent contractors and employees would not be immune from antitrust laws if it conspired to restrain trade by preventing plaintiff unions from representing associations' employees).

231. United States v. L.A. Meat & Provision Drivers Union, 196 F. Supp. 12, 15 (S.D. Cal. 1961).

232. *Id.*

233. *Id.*

234. 315 U.S. 769 (1941).

235. *L.A. Meat & Provision Drivers Union*, 196 F. Supp. at 15.

236. *Id.*

237. *Id.* at 16. *See also* Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 94–99 (1940). In that case, the Supreme Court held that the Teamsters union had engaged in a genuine labor dispute when it attempted to organize independent contractors who purchased and sold milk on consignment to retail stores. The Teamsters union believed that this industry-wide vendor system was designed by the dairies in order to avoid paying union-negotiated wages. At the time, the local Chicago Milk Wagon Drivers union had more than five thousand members, and the non-union independent contractors were, during this period of "acute distress" during the Great Depression, growing in number and threatening the ability of the union to negotiate wages and working conditions. *Id.* at 94. After an unsuccessful attempt to organize the vendors directly, the union began a period of intensive retail store picketing, prompting the dairies to seek an injunction in federal court. The dairies argued that the Norris–LaGuardia Act should not protect the union because the purpose of the action was not to unionize the vendors but to obtain what they described as a "Chicago milk monopoly" in violation of the Sherman Act. *Id.* at 96. The Court held that "whether rightly or wrongly," the Teamsters believed that the vendor system was a scheme to escape payment of union wages, rendering the picketing a "labor dispute" on its face. *Id.* at 98. "To say . . . that the conflict here is not a good faith labor issue . . . is to shut one's eyes to the everyday elements of industrial strife."

City, black car drivers compete directly with Uber, providing a basis for black car (employee) unions to organize workers into their locals, as the International Association of Machinists (IAM) has done.[238] Likewise, the Teamsters union in Seattle is affiliated with the Western Washington Taxicab Operators Association, which "promotes fairness, justice, and transparency in Seattle's heavily regulated taxi industry."[239]

Other cases in which antitrust law is triggered in dealings between labor unions and independent contractors are in the context of licensing systems. For example, the Actors Equity Association requires as a condition of union membership that Equity members contract only with licensed Equity theater agents.[240] This requirement was initially challenged during the Great Depression on grounds of common law tortious interference with business relationships.[241] The challenge failed but was reincarnated as an antitrust claim fifty years later, charging that the regulation violated Sections 1 and 2 of the Sherman Act.[242] The district court held that Equity's licensing system was fully protected by the statutory labor exemptions under antitrust laws and thus dismissed the agents' complaint.[243] Both the Second Circuit and the Supreme Court affirmed the decision on appeal.[244]

If "job or wage competition or some other economic interrelationship affecting legitimate union interests exists between union members and independent contractors," then independent contractors are a "labor group" and party to a "labor dispute" immune from antitrust laws under the Norris–LaGuardia Act.[245] The Court in *Carroll* confirmed that the "allowable area of union activity was not to be restricted to an immediate employer–employee relation."[246] Therefore, groups of on-demand workers that either compete with, or are economically related to a *bona fide* union of employees, may organize with those employees and still merit an exemption from federal antitrust law.

We can imagine a scenario in which on-demand workers organize themselves to agree to only work with licensed online platforms. However,

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Id. at 99. The Court found it immaterial that the Teamsters tried to condition vendors' union membership with an agreement to abandon the vendor title.

238. *Black Car Drivers Organize in New York City!*, AFL-CIO BLOG (May 4, 2012), http://www.aflcio.org/Blog/Organizing-Bargaining/Black-Car-Drivers-Unionize-in-NYC [https://perma.cc/EQW5-RCTP] (May 4, 2012).

239. TEAMSTER TAXI CAB, www.teamstertaxi.org [https://perma.cc/PG2P-TZ75].

240. H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 707 (1981).

241. *Id.* at 707 n.4.

242. *Id.* at 710.

243. *Id.* at 711.

244. *Id.* at 706, 723.

245. 29 U.S.C. § 113 (c) (2016); Am. Fed'n of Musicians v. Carroll, 391 U.S. 99, 106 (1968).

246. *Carroll*, 391 U.S. at 106.

the Supreme Court noted in the *Equity* case that a party seeking refuge in the statutory exemption must be a *bona fide* labor organization and not an independent contractor or entrepreneur.[247] In other words, the entity developing and enforcing the licensing system must be doing so for the purposes of advancing labor policy, not for the purposes of price fixing or collusion. In that case, Equity was uncontested as a legitimate labor group,[248] just as in the New York example the International Association of Machinists would likely be ruled a legitimate group. But great caution is necessary if on-demand workers proceed in a similar direction without the partnership of an established labor group.

3. On-Demand Workers and Antitrust Law: Liabilities and Exemptions

a) Noerr–Pennington *Doctrine*

Hypothetically, the very act of lobbying or engaging in concerted action in support of laws like Seattle's law could trigger antitrust liability for on-demand workers and the labor unions that support them. However, as is well established within the labor and antitrust canon, any effort to influence the exercise of government power, even for the purpose of gaining an anticompetitive advantage, does not create liability under antitrust law.[249]

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court held immune from antitrust liability a combination of rail freight interests that was formed in order to pass legislation that would grant members of the combination a competitive advantage over truckers.[250] In *United Mine Workers v. Pennington*, the Court interpreted its decision in *Noerr* broadly, holding that "concerted effort[s] to influence public officials" are shielded from the Sherman Act "regardless of intent or purpose."[251] The Court held, "[A] legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to

247. *Actors' Equity Ass'n*, 451 U.S. at 717.

248. *Id.* In upholding the combination of Equity and the licensed agents, the Court relied on its decision in *Carroll*, 391 U.S. 99 (1968), which held that independent contractor orchestra leaders constituted a labor group within the meaning of the Norris–LaGuardia Act. The orchestra leaders' participation in a union regulated booking system was held not to be an unlawful combination between labor and non-labor groups. The trial court assessed whether there was job or wage competition or some other economic interrelationship between the union members and the independent contractors.

249. *See, e.g.*, E. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 666 (1965).

250. *Noerr Motor Freight, Inc.*, 365 U.S. at 145.

251. *Pennington*, 381 U.S. at 670.

eliminate competition based on differences in such standards."[252] The Court held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[253]

The *Noerr–Pennington* doctrine thus protects the use of political, legislative, and judicial processes to seek collective bargaining rights for on-demand workers, even if the end result of such efforts is reduced competition.[254] However, laws like Seattle's still trigger antitrust liability on the part of the sponsoring state or local government itself, which cannot claim *Noerr–Pennington* immunity and instead relies on the State Action doctrine, as discussed below.

b) State Action Immunity Defense

Seattle, like other states and cities looking to regulate in this space, may invoke the State Action Immunity defense in response to the antitrust claims of on-demand companies and the Chamber of Commerce. In many respects, the innovative legislation passed by the Seattle City Council embodies the purpose of the defense, which is to ensure that the proper balance of power between the federal government and the state and local governments under our federalist system is preserved. Again, a careful analysis of the historical purposes and contemporary judicial interpretation of this critical defense is necessary to ensure that state and local governments may proceed to intervene in the labor relations among on-demand workers and firms without fear of antitrust liability.

"[N]othing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state . . . from activities directed by its legislature."[255] Consistent with our federalist[256] system of government, state and local governments are given wide latitude to regulate local issues related to the environment, health, or public safety.

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252. *Id.* at 666.

253. *Id.* at 670. The Supreme Court has also applied the *Noerr–Pennington* doctrine to courts and administrative agencies. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972).

254. There is an important exception, however. The *Noerr–Pennington* doctrine does not protect litigation from liability under the antitrust laws if the litigation is a "sham." The Supreme Court in *Noerr* recognized that if an action "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor [then] the application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144. *See also Cal. Motor Transport*, 404 U.S. at 511–16 (remanding for determination of whether the sham exception to the general immunity from the antitrust laws applied).

255. Parker v. Brown, 317 U.S. 341, 349–50 (1943).

256. Jorge E. Galva, Christopher Atchison & Samuel Levey, *Public Health Strategy and the Police Powers of the State*, PUB. HEALTH REPS. 20–21 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2569983/pdf/phr120s10020.pdf [https://perma.cc/XM2L-VXPP].

In the pursuit of those interests, however, certain regulatory measures may reduce competition. Zoning laws, for example, that seek to create sustainable communities by limiting emissions, may force the reduction of the number of industrial competitors within a given region. In order to preserve the delicate balance of federalism, the Supreme Court has articulated a "state action doctrine," an exemption from antitrust liability available to states that decide to have competition yield to some form of regulation or control.[257] States may have decided that competition is unnecessary or inappropriate for a particular industry or market, or they simply may have decided that under the circumstances, preserving public health is more important than preserving free markets.[258] When a state "acts as a sovereign and adopts a program in its governmental capacity, the federal antitrust laws are not intended to invalidate such a program."[259]

The Supreme Court first articulated the policies and practicalities underlying the state action doctrine in *Parker v. Brown*, another Depression-era case that favored state experimentation over rigid doctrinal interpretation.[260] The Supreme Court has consistently reiterated the proposition that *Parker* is rooted in federalist principles.[261] An understanding of the case's historical background is necessary for an accurate understanding of the case's legal significance.

In order to alleviate the extreme overproduction in agriculture during the Depression, the California legislature passed the California Agricultural Prorate Act (CPA) in 1933.[262] The CPA authorized the

257. N.C. State Bd. of Dental Exmn'rs v. FTC, 135 S. Ct. 1101, 1109–10 (2015).

258. *See, e.g.*, Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTITRUST L.J. 29, 36–37 (2000) ("State governmental action is considered immune from federal antitrust liability, even if the state action is anticompetitive, economically inefficient, and flatly inconsistent with the federal laws."). *See also* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 634 (1992) (stating that the purpose of the state action doctrine is "not to determine whether the State has set some normative standard, such as efficiency, in its regulatory practices").

259. In cases where a state acts as a "sovereign" and adopts a program in its governmental capacity, federal antitrust laws are not intended to invalidate such programs. *See generally* Parker v. Brown, 317 U.S. 341 (1943).

260. *See generally id.*

261. *See, e.g.*, City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 421 (1978) ("The Parker decision was thus firmly grounded on principles of federalism . . . ."); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 343 (1987) ("*Parker v. Brown* rests on principles of federalism and state sovereignty."); City of Columbia v. Omni Outdoor Advert., Inc. 499 U.S. 365, 370 (1991) ("Relying on principles of federalism and state sovereignty, we held [in *Parker*] that the Sherman Act did not apply to anticompetitive restraints imposed by the States . . . .").

262. The Prorate Act was part of a larger group of "fair trade" laws passed in response to small retailers' vulnerability to the price-cutting and loss leader practices of chain stores. Contemporary use of the term "fair trade" has taken on a social-movement meaning. It remains, as Circuit Judge Holmes noted in his dissent in *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F.2d 788, 796 (5th Cir. 1953), an "attractive misnomer."

creation of a state agency to administer and enforce limitations on competition among agricultural growers.[263] The agency was empowered to approve programs designed to "prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers."[264] Proposals were subject to economic analysis, a public hearing, and a finding that the program was "reasonably calculated to carry out the objectives of the Act."[265]

One such proposal adopted by an Advisory Commission in 1940 was a seasonal prorated marketing program that placed limits on growers in the marketing and production of raisins.[266] Parker, a dissident California farmer wanting to grow more raisins than the Commission permitted, sought an injunction against the California state officials implementing the state law.[267] The district court held that the marketing program was an illegal interference with interstate commerce and granted Parker injunctive relief.[268] On appeal, the Supreme Court found that the prorate program "was never intended to operate by force of individual agreement or combination."[269] The Court was unwilling to restrain such action because the prorated system, and indeed the Commission itself, derived its authority from the California legislature.[270] Writing for a unanimous Court, Justice Stone explained that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[271]

In *Southern Moor Carriers Rate Conference, Inc. v. United States*, the Supreme Court articulated a two-prong test for determining whether a

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263. The Prorate Act authorized the creation of an Advisory Commission of nine members, of which a state official, the Director of Agriculture, was exofficio a member. The other eight members were appointed for terms of four years by the Governor and confirmed by the state Senate, and were required to take an oath of office. *Parker*, 317 U.S. at 346.

264. *Id.*

265. *Id.* at 347.

266. *Id.* In the 1930s and 1940s, almost all of the raisins consumed in the United States, and nearly one-half of raisins consumed worldwide, were produced in California. *Id.* at 345.

267. *Id.* at 344.

268. *Id.*

269. *Id.* at 350.

270. The adoption of legislative measures to prevent the demoralization of the agricultural industry by stabilizing the raisin crop was a matter of state as well as national concern and, in the absence of inconsistent Congressional action, was a problem whose solution was peculiarly within the province of the state. In the exercise of its power, the state adopted a measure appropriate to the end sought. The program was not aimed at (nor did it) discriminate against interstate commerce, although it undoubtedly affected interstate commerce by increasing the price and decreasing the volume of raisins to some undetermined extent. *Id.* at 367.

271. *Id.* at 350–51.

state is entitled to immunity for its anticompetitive activity.[272] A challenged state policy that expressly permits but does not compel anticompetitive conduct must be "clearly articulated and affirmatively expressed as state policy."[273] Second, the policy must be "'actively supervised' by the State itself."[274] The Court ruled that "[a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct."[275] Rather, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."[276] Under the second prong of the test, a defendant must show that the anticompetitive policy was actively supervised by the state.[277] "[T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is . . . whether the anticompetitive scheme is the State's own."[278]

Seattle's ordinance establishing a regulatory structure for collective bargaining between rideshare drivers and rideshare platforms could satisfy both prongs of the test. On-demand workers would not be compelled to bargain the terms and conditions of their contracted labor, but rather such activity would be permitted by a clearly articulated intention of the state. By creating a regulatory structure such as the Seattle ordinance, the state would fulfill the second prong by taking an active role in executing its stated policy.

The ability to subtract from states' sovereign powers is not, as Justice Stone indicated, a power to be lightly attributed to Congress. As more recently affirmed by the Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,

> Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown* . . . this Court interpreted the antitrust laws to confer immunity

272. S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 61 (1985) (stating that *Midcal*'s two-part test applied to private parties' claims of state action immunity).

273. *See, e.g.*, Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

274. *Id.*

275. *S. Motor Carriers Rate Conference, Inc.*, 471 U.S at 64.

276. *Id.*

277. *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 105.

278. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992).

on the anticompetitive conduct of States acting in their sovereign capacity.[279]

The critical question for Seattle (and cities like New York and Cincinnati, which are currently considering similar measures),[280] however, is whether *cities* may also claim immunity using the state action doctrine when regulating the on-demand economy in ways that potentially reduce competition. Just as a state does not immunize individuals who violate the Sherman Act by authorizing them to violate it or by merely declaring their actions lawful, neither does the state immunize municipalities by fiat. Such immunity, at the city level, is not automatic; the particular facts matter. If a state government delegates its authority to a local government that acts to restrain trade, then the local government must show its actions were taken pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition."[281]

In *Federal Trade Commission v. Phoebe Putney Health Systems, Inc.*, the Supreme Court held that a Georgia law establishing special purpose public entities called hospital authorities did not permit those hospital authorities to engage in corporate acquisitions that substantially reduced competition in the market area.[282] Simply being endowed with general corporate powers, including the power to acquire hospitals, does not in and of itself entitle the sub-state agency to a blanket antitrust immunity.[283] Because the state's general grant of powers to the hospital authority did not include permission to use those powers anticompetitively, the Court held that the clear articulation test was not satisfied and state-action immunity did not apply.[284]

Similarly, in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, deeming the practice of dentistry a matter of public concern compelling regulation, the State of North Carolina passed

279. N.C. State Bd. of Dental Exmn'rs v. FTC, 135 S. Ct. 1101, 1104 (2015).

280. O'Brien, *supra* note 140.

281. Town of Hallie v. City of Eau Clair, 971 U.S. 34, 42–44 (1985). If a state government delegates its authority to a private person who acts to restrain trade, then the private person must show (1) his or her actions were taken pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition," and (2) the policy is "actively supervised" by the state government. The Supreme Court has hinted at a "commercial" or "market participant" exception to state action immunity, where the state "acts not in a regulatory capacity but as a commercial participant in a given market." The circuits that have addressed the issue are split, with the Tenth Circuit yet to weigh in on the matter. Larson, *supra* note 212, at 23 (internal citations omitted).

282. FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1007 (2013).

283. *Id.*

284. *Id. Cf.* City of Columbia v. Omni Outdoor Advert., 499 U.S. 365 (1991) (upholding the ability of the City of Columbia, South Carolina, to maintain an effective monopoly over billboards since the state's zoning regulation allowed the city to regulate the size, location and spacing of billboards).

the Dental Practices Act.[285] The Act established a board of dental examiners, which was empowered to create, administer, and enforce a licensing system for dentists.[286] Six of the eight board members must be licensed dentists engaged in the active practice of dentistry and elected by other licensed dentists in North Carolina.[287] While the Act itself does not explicitly designate "teeth whitening services" as a matter of dental practice, members of the board—concerned with the cheaper prices that non-dentists had begun charging for the service—voted to restrict the practice to licensed dentists.[288] The FTC brought suit, alleging that the decision was anticompetitive and a violation of antitrust law.[289] While the board argued that its decision was consistent with the public health directives of the Dental Practices Act, the FTC rejected this argument, noting that teeth whitening performed by non-dentists is a safe, cosmetic procedure.[290]

Following the Fourth Circuit's affirmation of the decision in favor of the FTC, the Supreme Court considered whether North Carolina was entitled to *Parker* immunity.[291] Given the structure of the board of dental examiners, which was overwhelmingly dominated by active market participants, the Court concluded that the second prong of the *Midcal* test—active supervision by the state—was factually impossible to meet in this case.[292] Dentists monitoring dentists (who had a clear interest in restricting the ability of non-dentists to provide teeth whitening services) did not constitute active state supervision.[293] And since the state was not actively monitoring the decisions of the board, in this case with respect to teeth whitening, the Court held that the board could not claim state action immunity.[294]

In her remarks following the *North Carolina* decision, FTC Commissioner Maureen K. Ohlhausen restated that *municipalities* do not need to follow the active monitoring prong.[295] Municipalities, she

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285. N.C. State Bd. of Dental Exmn'rs v. FTC, 135 S. Ct. 1101, 1107 (2015).

286. *Id.* at 1104.

287. The seventh member must be a licensed and practicing dental hygienist, elected by other licensed hygienists. The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Id.* at 1108.

288. *Id.* at 1106.

289. *Id.* at 1104.

290. *Id.* at 1109.

291. *Id.* at 1110.

292. *Id.* at 1114.

293. *Id.* at 1120.

294. *Id.* at 1104.

295. Maureen K. Ohlhausen, Comm'r U.S. Fed. Trade Comm'n, *Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity*, HERITAGE FOUND. (Mar. 31, 2015), https://www.ftc.gov/system/files/documents/public_statements/634091/150403hertiagedental.pdf [https://perma.cc/4CHF-6EQK].

explained, are electorally accountable and lack the private profit-making incentives characteristic of active market participants.[296] State agencies controlled by market participants, however, are more like private trade associations with considerable self-interest.[297] Cities engaged in traditional functions, however, do not pose a similar risk. To require a state to actively monitor such activities, simply to avoid antitrust liability, would be unnecessarily burdensome.

Likewise, in *City of Lafayette v. Louisiana Power and Light*, the court reaffirmed that cities are a "far cry from the private accumulations of wealth that the Sherman Act was intended to regulate."[298] For that reason, cities are not required to point to a specific statute that authorizes the anticompetitive activity, so long as that activity could be reasonably contemplated when it authorized the agency generally. The only limitation that the *North Carolina* case seems to have clarified is that market participant dominance can transform what would otherwise be permissible anticompetitive conduct by a state into prohibited antitrust violation.

In the case of the Seattle ordinance, the state has authorized the city's Finance and Administrative Services Agency to regulate for-hire transportation, such as rideshare and traditional taxicab services. The agency describes itself as having the most diverse set of responsibilities of any city government, including consumer protection, business regulation, and taxi licensing.[299] This authority stands in stark contrast to the Metropolitan Transportation Commission (MTC) in St. Louis, which, acting more like the conflicted dentists in *North Carolina* than an independent oversight charged with public safety, took a hard stance against Uber and Lyft.[300] The MTC is more like a traditional taxi commission made up of people with personal ties to the taxi and limousine industry and is arguably closer to the North Carolina Board of Dental Examiners than the Finance and Administrative Services Agency.

It is also more difficult to pinpoint the anticompetitive activity. Unlike the grease peddlers case, where independent contractors banded together in a sham union in order to fix prices, in this case, the city would

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296. *Id.*

297. N.C. State Bd. of Dental Exmn'rs v. FTC, 135 S. Ct. 1101, 1114 (2015).

298. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 430 (1978); *see also* Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) (stating that a city can refuse to provide sewage treatment services, and that cities acting pursuant to clearly articulated and affirmatively expressed state policy get automatic state action immunity).

299. Fred Podesta, Dir. Fin. & Admin. Serv. Agency, *About Finance and Administrative Services*, SEATTLE.GOV, https://www.seattle.gov/finance-and-administrative-services/about-fas [https://perma.cc/8N6G-2CJ8].

300. Rachel Lippmann, Stephanie Lecci, Wayne Pratt & Nashim Benchaabane, *Uber Expects Long Legal Fight in St. Louis*, ST. LOUIS PUB. RADIO (Sept. 21, 2015), http://news.stlpublicradio.org/post/uber-expects-long-legal-fight-st-louis#stream/0 [https://perma.cc/H633-29CD].

serve as a neutral broker of contract between a company and a contractor. This is a role that the city likely already plays—whether in real estate, construction, municipal finance, or education. And as with all labor contracts, there is no requirement that any increase in profit margin potentially available to drivers, as a result of negotiations, would require any additional cost to consumers. Helping establish minimum standards in an industry with direct contact with consumers is a critical role that local governments frequently play.

Antitrust policy is theoretically designed to benefit the consumer by restricting or prohibiting anticompetitive practices that tend to inflate prices and reduce consumer choice. In 1890, ostensibly to curb the unbridled power of monopolies such as Standard Oil, Congress passed the Sherman Antitrust Act.[301] Though designed to increase competition and help consumers, it did not take long for employers to co-opt the law to suppress worker organizing. In case after case—from boycotting hat makers in Connecticut,[302] to striking coal miners in Pennsylvania,[303] to picketing furniture haulers in Washington—courts issued injunctions against workers and unions based on a distorted interpretation of antitrust law. This winning streak for employers came to a halt in 1935, when passage of the National Labor Relations Act gave workers the right to form a union and halted the perverse application of a law designed to check the unrestrained power of corporations to working men and women struggling to obtain a living wage.[304]

CONCLUSION

On-demand employers persistently classify their workers as independent contractors in a thinly veiled attempt to lower overhead costs and maximize profit. Yet, if Uber drivers are truly independent contractors, then they should have the right to negotiate the terms of their contract with the company. Cities like Seattle should be able to regulate the process of negotiating those contracts in the same way it might facilitate negotiations around school construction contracts or industry licensing agreements. If, however, the drivers are actually employees, a conclusion that at least two federal courts have suggested there is factual basis to support, then those workers should enjoy the same right under the National Labor Relations Act.

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301. Larson, *supra* note 212.

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

303. Witte, *supra* note 226, at 832–34 n.42.

304. Special to the N.Y. Times, *Roosevelt Signs Wagner Bill as 'Just to Labor'*, N.Y. TIMES, Jul. 6, 1935, at 1.

In the absence of judicial clarity or federal regulatory leadership on this critical issue of employment status, state and local governments should be free to experiment in this space in order to remedy the growing disparity created by the structure of work within the on-demand economy. Because Seattle's innovative approach treats drivers as independent contractors, not as employees operating within the scope of the NLRA, the city should be able to clear its preemption hurdle. Seattle and the State of Washington should likewise be able to enjoy immunity from antitrust liability under the state action doctrine, which recognizes that federal antitrust policy is in no way intended to interfere with the kind of innovative regulation and protection of workers and consumers in the on-demand economy that Seattle has crafted.

Federal labor and antitrust laws were designed to alleviate economic inequality and protect consumers. The Seattle ordinance advances both goals. Until federal laws defining employee status reflect the economic realities of the on-demand economy, state and local measures like Seattle's are necessary to ensure that as technology transports us into the future, those who make that technology possible and profitable are not deported to the past.

APPENDIX A.

State	Enacted	Legislation	Notable Features
Alabama	None		
Alaska	None		
Arizona	2015	HB 2135[305]	Establishes minimum liability insurance requirements; requires background checks; mandates a zero-tolerance policy for drug and alcohol use while driving.
Arkansas	2013 2015	HB 1773[306] SB 800[307]	Limits municipal jurisdiction (and therefore limits power of cities to regulate TNCs beyond their city limits). Establishes minimum liability insurance requirements; requires TNCs to perform criminal background checks and enforce a zero-tolerance policy for drug and alcohol use while driving; prohibits street hails and cash rides; establishes rebuttable presumption that drivers are independent contractors and therefore ineligible to receive workers' compensation.

305. H.B. 2135, 52nd Leg., 1st Reg. Sess. (Ariz. 2015), https://legiscan.com/AZ/text/HB2135/id/1201440 [https://perma.cc/3WFG-UMTD].

306. H.B. 1773, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act1053.pdf [https://perma.cc/D3BL-RZ4X].

307. S.B. 800, 90th Gen. Assemb., Reg. Sess. (Ark. 2015), http://www.arkleg.state.ar.us/assembly/2015/2015R/Bills/SB800.pdf [https://perma.cc/UW6A-F4RY].

State	Enacted	Legislation	Notable Features
California	2014	AB 2293[308]	Establishes minimum liability insurance requirements for TNCs and participating drivers.
Colorado	2014	SB14-125[309]	TNCs must pay an annual permit fee of $110,250; establishes minimum liability insurance requirements; requires background checks and vehicle safety inspections; mandates a zero-tolerance policy for drug and alcohol use while driving; exempts TNCs from regulations applicable to common carriers.
Connecticut	None[310]		
D.C.	2014	Act A20-0489[311]	Creates registration procedures, authorizes inspections, requires background checks, mandates a zero-tolerance policy for drug and alcohol use; deregulates fares for digital dispatch; exempts private for-hire vehicles from licensing requirements.

308. A.B. 2293, 2014 Leg., Reg. Sess. (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2293 [https://perma.cc/H4T8-YBEY].

309. S.B. 14-125, 69th Gen. Assemb., 2nd Reg. Sess. (Colo. 2014), http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2014a/sl_323.htm [https://perma.cc/K7MC-GJQL].

310. In 2014, the Connecticut Department of Transportation commissioned a report that recommended how the state should approach regulating rideshare companies like Uber and Lyft. To date, none of those recommendations have been enacted. Christine Stuart, *State Legislators to Resume Uber-Lyft Debate on Regulation*, NEW HAVEN REG. (Jan. 2, 2017), http://www.nhregister.com/business/20170102/state-legislators-to-resume-uber-lyft-debate-on-regulation [https://perma.cc/5FW7-8CNN].

311. Act A20-0489, 2013 Council, 20th Council (D.C. 2013), https://legiscan.com/DC/text/B20-0753/2013 [https://perma.cc/NY3L-AGMT].

State	Enacted	Legislation	Notable Features
Delaware	2016	SB 262[312]	
Florida	None[313]		
Georgia	2015	HB 190[314]	Establishes minimum liability insurance requirements for TNCs and participating drivers.
Hawaii	None[315]		
Idaho	2015	HB 316[316]	Establishes minimum liability insurance requirements for TNCs and participating drivers.
Illinois	2015	SB 2774[317]	Establishes minimum liability insurance requirements for TNCs and participating drivers; mandates background checks; requires a zero-tolerance policy for drug and alcohol conviction; and requires compliance with non-discrimination provisions;

312. S.B. 262, 148th Gen. Assemb., Reg. Sess. (Del. 2016), https://legiscan.com/DE/text/SB262/2015 [https://perma.cc/8C3R-SHKG].

313. Attempts to pass statewide regulation reached an impasse during the last legislative session. Michael Auslen, *Plan to Regulate Uber, Lyft all but Dead in the Florida Legislature*, MIAMI HERALD (Mar. 10, 2016), http://www.miamiherald.com/news/politics-government/state-politics/article65208997.html [https://perma.cc/3QQV-NFQ7].

314. H.B. 190, 2015 Gen. Assemb., Reg. Sess. (Ga. 2016), https://www.documentcloud.org/documents/2692509-HB-190.html [https://perma.cc/7Z4Y-8FQH].

315. While statewide regulation has not yet been enacted, Honolulu's city council has passed a bill that regulates TNCs and their associated drivers, which includes background check requirements, license fees, and other provisions. HONOLULU, HAW., Bill 55, Amending Ordinance 16-25, Relating to Private Transportation Services and Drivers (Sept. 1, 2016), http://www4.honolulu.gov/docushare/dsweb/Get/Document-189170/DOC007%20(23).PDF [https://perma.cc/3M7H-SACA].

316. H.B. 316, 63rd Leg., Reg. Sess. (Idaho 2015), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2015/legislation/H0316.pdf [https://perma.cc/XW3A-HDZV].

317. S.B. 2774, 98th Gen. Assemb., Reg. Sess. (Ill. 2015), http://ilga.gov/legislation/fulltext.asp?DocName=09800SB2774enr&GA=98&SessionId=85&DocTypeId=SB&LegID=78615&DocNum=2774&GAID=12&Session= [https://perma.cc/37PX-5PVX].

State	Enacted	Legislation	Notable Features
Indiana	2015	HB 1278[318]	Requires TNC to have a permit issued by the Indiana department of state revenue and establishes requirements regarding criminal and driving history, drug and alcohol use, vehicle equipment, insurance, fares, privacy, nondiscrimination and accessibility, and TNC and TNC driver conduct.
Iowa	None		
Kansas	2015	SB 117[319]	Establishes minimum liability insurance requirements; mandates background checks; requires compliance with non-discrimination provisions; and requires zero-tolerance for drug and alcohol use convictions (Governor's veto overridden).
Kentucky	2015	SB 153[320]	Establishes minimum liability insurance requirements; extends licensing and bonding requirements to TNC operators and participating drivers; and includes "independent contractors" among the entities required to undergo background checks.

318. HB 1278, 119th Gen. Assemb., First Reg. Sess. (Ind. 2015)., https://iga.in.gov/legislative/2015/bills/house/1278 [https://perma.cc/7T2T-B8G2].

319. SB 117, 2015 Leg., (Kan. 2015), http://www.kslegislature.org/li_2016/b2015_16/measures/documents/sb117_enrolled.pdf [https://perma.cc/DK6C-678E].

320. SB 153, 2015 Leg., Reg. Sess. (Ky. 2015), http://www.lrc.ky.gov/record/15RS/sb153.htm [https://perma.cc/J8A2-QTQK].

State	Enacted	Legislation	Notable Features
Louisiana	2015	SB 172[321]	Establishes minimum liability insurance requirements.
Maine	2015	H.P. 934 - L.D. 1379[322]	Establishes minimum liability insurance requirements; requires permit ($10,000) for TNCs; entails a driver requirement; mandates compliances with non-discrimination provisions; and prohibits street hails by TNC drivers (Governor's veto overridden).
Maryland	2015	SB 868[323]	Requires TNCs to receive a permit from the Public Service Commission to operate within the state; authorizes municipalities to impose an assessment on any TNC within its jurisdiction; and establishes minimum liability insurance requirements.
Massachusetts	Pending		
Michigan	2016[324]		

321. SB 172, 2015 Leg., Reg. Sess. (La. 215), https://www.legis.la.gov/legis/ViewDocument.aspx?d=935305 [https://perma.cc/AC79-KNGK].

322. H.P. 934 - L.D. 1379, 127th Leg. Reg. Sess. (Me. 2015), http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0934&item=3&snum=127) [https://perma.cc/W5RX-NJLJ].

323. SB 868, 2015 Leg., Reg. Sess. (Md. 2015), http://mgaleg.maryland.gov/2015RS/bills/sb/sb0868t.pdf [https://perma.cc/5UZH-PNCL].

324. On December 22, 2016, Governor Rick Snyder signed a package of bills bringing rideshare companies into regulatory line with traditional taxis. The bills, which are effective immediately, increase regulatory requirements for Uber and other TNCs, while correspondingly decreasing regulations for traditional taxicab operators. Emily Lawyer, *Snyder Signs Bills Upping Uber Regulations, Decreasing Them for Taxis*, MLIVE.COM (Dec. 21, 2016), http://www.mlive.com/news/index.ssf/2016/12/snyder_signs_bills_upping_uber.html [https://perma.cc/S94A-EK8P].

State	Enacted	Legislation	Notable Features
Minnesota	2015	S.F.1679[325]	Establishes minimum liability insurance requirements and indemnification provisions.
Mississippi	None		
Missouri	Pending		
Montana	2015	SB 396[326]	Establishes minimum liability insurance requirements; creates a new class of motor carriers for TNCs ("Class E") and exempts Class E carriers from having to obtain a Certificate of Public Convenience and Necessity from the State Public Service Commission.
Nebraska	2015		
Nevada	2015	AB 175[327]	Authorizes the Public Utilities Commission to issue a permit to any TNC compliant with minimum requirements, including minimum liability insurance requirement, and mandates TNC payment (3% of the total fare) to the State Treasurer.
New Hampshire	None		
New Jersey	Pending[328]		

325. S.F. 1679, 89th Leg., Reg. Sess. (Minn. 2015), https://www.revisor.mn.gov/laws/?year=2015&type=0&doctype=Chapter&id=48 [https://perma.cc/VR8V-9W9T].

326. SB 396, 2015 Leg., Reg. Sess. (Mont. 2015), https://legiscan.com/MT/text/SB396/id/1164665 [https://perma.cc/4PAU-99N7].

327. AB 175, 78th Leg., Reg. Sess. (Nev. 2015), http://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB175_EN.pdf [https://perma.cc/STG2-CRFQ].

328. State legislature approved bills requiring minimum liability insurance, background checks, and related requirements were approved by the state legislature. They await Governor Chris Christie's signature. Claire Lowe, *Ride-Hailing Rules Head to Governor's Desk*, PRESS OF ATLANTIC CITY (Dec. 26, 2016), http://www.pressofatlanticcity.com/business/ride-hailing-rules-head-to-governor-s-desk/article_a0089f95-aeb9-5f98-9823-d7d84c977c2c.html [https://perma.cc/8A3Y-HFB9].

State	Enacted	Legislation	Notable Features
New Mexico	2016	HB 0168[329]	Requires TNCs to apply annually for a permit from the public regulation commission; establishes minimum liability insurance requirements; mandates a zero-tolerance policy for drug and alcohol use while driving or using the network; mandates background checks; and establishes a fund within the state treasury to ensure the safety and financial responsibility of TNC operators.
New York	Pending		
North Carolina	2015	SB 541[330]	TNCs must apply for a permit ($5,000) to operate inside the state; establishes minimum liability insurance requirements; mandates background checks and other driver standards; creates a rebuttable presumption that drivers for TNCs are independent contractors; and restricts the right of cities and municipalities from enacting more stringent requirements or imposing any fees on TNCs or their drivers.

329. HB 0168, 2016 Leg., Reg. Sess. (N.M. 2016), https://www.nmlegis.gov/Sessions/16%20Regular/final/HB0168.pdf [https://perma.cc/2282-TYCD].

330. SB 541, 2015 Gen. Assemb., Reg. Session (N.C. 2015), http://www.ncleg.net/Sessions/2015/Bills/Senate/PDF/S541v5.pdf [https://perma.cc/CFC5-GX9E].

State	Enacted	Legislation	Notable Features
North Dakota	2015	HB 1144[331]	Establishes minimum liability insurance requirements.
Ohio	2015	HB 237[332]	Establishes minimum liability insurance requirements and allows for an electronic form of “proof of insurance” to be carried by a TNC driver.
Oklahoma	2015	Bill No. 1664[333]	Establishes minimum liability insurance requirements; exempts TNCs and participating drivers from the definition of “motor carrier” and “taxi services”; requires background checks, zero-tolerance drug and alcohol use policies, and compliance with non-discrimination provisions; restricts release of passenger information to third parties without consent; and requires TNCs to obtain an annual operating permit ($5,000).
Oregon	None		
Pennsylvania	Pending	SB 984[334]	Establishes minimum liability insurance requirements.

331. H.B. 1144, 64th Leg., Reg. Sess. (N.D. 2015), http://www.legis.nd.gov/assembly/64-2015/documents/15-0434-06000.pdf?20160403153437 [https://perma.cc/4FA2-XZDC].

332. H.B. 237, 131st Gen. Assemb., Reg. Sess. (Ohio 2016), https://www.legislature.ohio.gov/legislation/legislation-status?id=GA131-HB-237 [https://perma.cc/RX9E-YVQT].

333. H.B. 1614, 2015 Leg., Reg. Sess. (Okla. 2015), http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20ENR/hB/HB1614%20ENR.PDF [https://perma.cc/4NDD-WJ7V].

334. S.B. 984, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015), http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2015&sessInd=0&billBody=S&billTyp=B&billNbr=0984&pn=2167 [https://perma.cc/BP2U-HWWC].

State	Enacted	Legislation	Notable Features
Rhode Island	2016[335]		Establishes minimum liability insurance requirements; requires drivers to be regulated by the Public Utilities Commission; requires background checks; and requires an annual permit for TNCs ($30,000).
South Carolina	2015	Bill 3525[336]	Establishes minimum liability insurance requirements; requires TNC drivers to affix a visible sign on their vehicle ("trade dress") at all times while operating on the digital network; requires TNC drivers to obtain a vehicle inspection within 30 days of working for the TNC, and specifies the elements of such inspection; requires TNCs to perform criminal background checks with zero tolerance for drug and alcohol violations; prohibits street hails; and assesses TNCs 1% of all fares annually to be used to enforce these standards.

335. Matt O'Brien, *Rhode Island Passes Ride-Hailing Bill to Regulate Uber, Lyft*, TURNTO10 (June 21, 2016), http://turnto10.com/politics/rhode-island-passes-ride-hailing-bill-to-regulate-uber-lyft [https://perma.cc/QM7C-528R].

336. H.B. 3225, Gen. Assemb., 121st Sess. (S.C. 2016), http://www.scstatehouse.gov/sess121_2015-2016/prever/3525_20150618.htm [https://perma.cc/E8ZU-J2YK].

State	Enacted	Legislation	Notable Features
South Dakota	2016	HB 1091[337]	Establishes minimum liability insurance requirements; requires TNCs to establish and enforce zero-tolerance policies for drug and alcohol use by drivers, including investigation; requires criminal background and driving history checks; exempts specific farm machinery and equipment from the definition of motor carrier; and restricts their ability to modify the minimum insurance requirements established by the bill although they do not prohibit municipalities from regulating TNCs.
Tennessee	2015	HB 0992[338]	Establishes minimum liability insurance requirements; mandates third party criminal background checks and zero-tolerance policies for drug and alcohol use by drivers; distinguishes TNCs from taxicab companies; and restricts sharing of passenger information to third parties without consent.

337. H.B. 1091, 2016 Leg., Reg. Sess. (S.D. 2016), http://sdlegislature.gov/legislative_session/bills/Bill.aspx?File=HB1091ENR.htm&Session=2016 [https://perma.cc/V92C-QM5E].

338. H.B. 0992, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015), http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB0992&ga=109 [https://perma.cc/3QVB-23SD].

State	Enacted	Legislation	Notable Features
Texas	2015	HB 1733[339]	Establishes minimum liability insurance requirements and establishes that TNCs do not "control" automobiles or drivers except as agreed by contract.
Utah	2014	HB 24[340]	
Vermont	None		
Virginia	2015	HB 1662[341]	Carves out TNCs and their drivers from many of the regulations governing taxicabs and common carriers; requires TNC drivers to pay an annual $33 fee (applicable to non-commercial drivers but not to taxicabs); establishes minimum liability insurance standards ($1M); requires TNCs to purchase a license ($100,000); and requires drivers to be 21 years of age and to undergo a background check.
Washington	2015	SB 5550[342]	Establishes minimum liability insurance requirements.

339. H.B. 1733, 84th Leg., Reg. Sess. (Tex. 2015), http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB01733F.pdf#navpanes=0 [https://perma.cc/F4Y6-YMRB].

340. H.B. 24, 60th Leg, 2014 Gen. Sess. (Utah 2014), http://le.utah.gov/~2014/bills/static/HB0024.html [https://perma.cc/W2CP-77SB].

341. H.B. 1662, 2015 Gen. Assemb., Reg. Sess. (Va. 2015), https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+CHAP0002 [https://perma.cc/UM7L-89YS].

342. SB 5550, 64th Leg. Reg. Sess. (Wash. 2015), http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Session%20Laws/Senate/5550-S.SL.pdf [https://perma.cc/JTJ9-9EZQ].

State	Enacted	Legislation	Notable Features
West Virginia	2016	HB 4228[343]	Establishes minimum liability insurance requirements; requires that TNCs obtain a permit and pay annual permit fee; establishes requirements for criminal background checks and zero-tolerance policies for drugs and alcohol while driving; prohibits street hails and cash rides; and establishes a framework for classifying drivers as independent contractors
Wisconsin	2015	AB 143[344]	Establishes minimum liability insurance requirements; prohibits municipalities from regulating TNCs; requires that TNCs obtain a license and pay an annual license fee ($5,000); prohibits street hails and cash rides; mandates background checks and a zero tolerance policy for alcohol and drug use while driving; and exempts TNCs from certain requirements applicable to common motor carriers.
Wyoming	None		

343. HB 4228, 2016 Leg., Reg. Sess. (W. Va. 2016), http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=HB4228%20SUB%20ENR.htm&yr=2016&sesstype=RS&billtype=B&houseorig=H&i=4228 [https://perma.cc/QS4U-46YT].

344. AB 143, 2015 Leg. (Wis. 2016), https://docs.legis.wisconsin.gov/2015/related/proposals/ab143 [https://perma.cc/9V7T-VBJH].