ANTITRUST IMPLICATIONS OF LABOR PLATFORMS

BY MARSHALL STEINBAUM[1]

1 Marshall Steinbaum is Research Director and a Fellow at the Roosevelt Institute. Some material in this piece was adapted with permission from a Roosevelt Institute post, "The Feds Side Against Alt Labor," November 16, 2017. http://rooseveltinstitute.org/feds-side-against-alt-labor/.

I. INTRODUCTION

Contra Robert Bork, the antitrust paradox that characterizes the history of competition policy in the United States is contained in the contrasting first two sections of the Sherman Act. On the one hand, since *Addyston Pipe*, *any* restraint of trade between two or more parties is illegal and potentially subject to criminal sanction under Section 1. On the other, since *Standard Oil*, monopolization — the control of trade by a single party — has been subject to the Rule of Reason — legal recognition that one party's power over commerce might be pro-competitive and hence requires some sort of balancing test. If you want to escape liability under the Sherman Act, just make sure you amass enough power in one place. Only little people violate the antitrust laws.

Of course, it's not so simple: the treatment of various vertical restraints of trade as *per-se* illegal versus subject to the Rule of Reason has varied over time, as has the jurisprudence of the Rule of Reason itself. But right now, almost 20 years post-*Microsoft*, we are in probably the most permissive regime *vis à vis* unilateral conduct that we have had since the government lost its case against U.S. Steel in 1920. This embraces both the size and market share of dominant firms, as well as their freedom to impose price- and non-price restraints on trading counterparties. Meanwhile, if antitrust law retains anything, it is a hostile stance toward horizontal agreements among like-situated parties. It is in this context that the modern labor platform, typified by Uber, has been allowed to grow up and prosper.

The antitrust treatment of labor platforms has remained an under-the-radar issue, sitting as it does on the border of labor and antitrust law and thus not an obvious subject of scholarship or policy interest by those engaged more fully in either area. On the one hand, the foremost policy issue raised by labor platforms is, not surprisingly, labor: who counts as an employee, how much control can a platform exercise over its workers and continue to evade its statutory obligations as employers? On the other hand, the antitrust treatment of the labor platforms themselves has been near-nonexistent, with the sole exception of several private actions, one of which, *Spencer v. Kalanick*, is discussed below. Where the antitrust authorities have been more active is in restricting the ability of workers to bargain collectively, which they consider to be a horizontal restraint and hence a *per-se* violation of Section 1 of the Sherman Act.

This contrasting treatment: light touch for the platforms themselves, heavy hand for the workers organizing against it, must be understood not only in light of the evolution of diverging jurisprudence under each section of the Sherman Act, but also in light of broader economic trends that are themselves the result of a weakening antitrust enforcement regime. The labor market is increasingly characterized by employer power to unilaterally dictate wages and working conditions, very much including non-price contract terms such as mandatory arbitration clauses and whether a worker will be classified as an employee or an independent contractor.[2] The phenomenon of the "Fissured Workplace" has been documented by David Weil, and the rising prevalence of the similar concept of "alternative work arrangements" was tracked in a paper by Lawrence Katz and Alan Krueger.[3] In specific instances we know that workers re-classified as independent contractors suffer sizeable wage penalties,[4] that low-wage workers increasingly do not benefit from the historic firm-size wage premium thanks to the threat of outsourcing,[5] that workers who work (as employees) for companies with concentrated buyers are paid lower wages,[6] and that overall, inter-firm earnings inequality has been a major component of the overall increase in income inequality — and that inter-firm inequality is *not* caused by rising dispersion in firm-size fixed effects, but rather in increasing segregation of low-wage workers into low-paying firms.[7] All of these phenomena are irreconcilable with a model of a competitive labor market in which a sufficient number of job offers equates workers' wages with their marginal productivity — instead, the balance of power has steadily shifted to the employer's side.

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2 Benmelech, Bergman & Kim, "Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?," *NBER Working Papers*, no. 24307 (2018); Azar, Marinescu & Steinbaum, "Labor Market Concentration," *NBER Working Papers*, no. 24147 (2017).

3 Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014); Katz & Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015," *NBER Working Papers* 22667 (2016).

4 Dube & Kaplan, "Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards," *ILR Review* 63, no. 2 (2010): 287–306.

5 Bloom et al., "Inequality and the Disappearing Large Firm Wage Premium," *American Economic Review Papers & Proceedings*, (2018); Cosic, "Wage Distribution in Large and Small Firms," *International Labour Review*, (2017); Cobb & Lin, "Growing Apart: The Changing Firm-Size Wage Premium and Its Inequality Consequences," *Organization Science* 28, no. 3 (2017): 429–46.

6 Wilmers, "Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014," *American Sociological Review* 83, no. 2 (2018): 213–42.

7 Song et al., "Firming Up Inequality," *Working Paper*, (2016).

The divergence between antitrust jurisprudence and the facts on the ground is not a mere coincidence, unfortunate or otherwise. The premise of labor law is that with the control inherent in the employment relationship comes certain responsibilities on the part of the employer: to pay a minimum wage, to demand no more than maximum hours of work, to provide health, workers' compensation, and unemployment insurance, for example. In the era of the Fissured Workplace, what employers have increasingly realized, and availed themselves of, is their ability to exercise control without fulfilling their responsibilities, by formally erecting the boundary of a firm between employer and worker. This weakening of the labor law regime has been widely recognized by scholars and policy-makers; what has not been widely-recognized is the equivalent and commensurate weakening of antitrust law that enables employers to continue to exercise control despite the boundary they've erected. Relationships between firms, or between employers and non-statutorily-employed workers, is the realm of antitrust, and what our current antitrust regime has allowed is for firms to control the behavior of less-powerful counterparties, while it has heightened the scrutiny on those less-powerful counterparties who seek to resist that control.

Two antitrust cases concerning Uber represent this contrasting antitrust treatment for labor platforms and the workers who work for them. *Meyer v. Kalanick* asserts that in operating an app that coordinates price-setting among hundreds of thousands of ride-sharing drivers, Uber's business model violates both Sections 1 and 2 of the Sherman Act. *Chamber of Commerce v. Seattle* challenges the city's grant of collective bargaining rights to Uber drivers despite their continued status as independent contractors, in purported violation of Section 2. The former case was recently all but ended when the District Court sent it to arbitration, pursuant to the Second Circuit's reading of the expansive jurisprudence of the Federal Arbitration Act, while the Chamber of Commerce's case is currently before the Ninth Circuit, appealing a lower court's ruling in favor of the defense on a motion to dismiss on the grounds that the state action exemption shields Seattle's conduct. But even these seeming barriers to resolving the issues on the merits implicate larger policy questions about how antitrust will operate in the gig economy. And since the United Kingdom ruled that Uber drivers are in fact statutory employees, the questions have international policy significance as well.

II. *MEYER V. KALANICK*

In early 2016, an Uber customer, Spencer Meyer, sued the CEO on the grounds that he'd been victimized by a price-fixing conspiracy among the CEO and its drivers.[8] The company itself was later joined to the case by a motion of the defense, and since the substance of the case concerns Uber's business model, it's reasonable to refer to it as the defendant.

The employment classification of rideshare drivers has been a matter of controversy since Uber started entering major metropolitan markets around the country.[9] Its business model relies on the independent contractor classification for its drivers so that it does not have to pay for or insure their cars or provide minimum wage or overtime. In many jurisdictions, drivers and state authorities sued to force Uber to reclassify drivers as employees, based on longstanding statutory tests for whether a business's control over workers creates an employment relationship. Those classification suits have largely settled in Uber's favor — the company has been able to retain the independent contractor classification for its drivers, in exchange for small concessions and settlements.

The substance of Meyer's complaint is that since Uber does not employ its drivers, its price-setting, and specifically its price coordination through surge pricing, amounts to a violation of the Sherman Act, whether through a multilateral conspiracy or through unilateral action. The whole premise of the case is that if Uber is not an employer of its drivers under labor law, then it should not be able to set and coordinate prices among those independent contractors and evade liability under antitrust.

The focus on surge pricing in Meyer's complaint draws attention to conduct that would seem to be in violation of the consumer welfare standard, since on its face it reduces consumer surplus. In its defense, Uber has now commissioned two papers, one showing that it increases consumer surplus under conditions of high demand elasticity by its efficient matching algorithm that ensures more demand is met, the other one showing that long run driver supply elasticity is high enough that raising prices eventually equalizes driver wages and thus, by implication,

8 For more on this case, see Steinbaum, "Uber's Antitrust Problem," *The American Prospect*, (2016), available at: http://prospect.org/article/uber%E2%80%99s-antitrust-problem.

9 For an overview of the classification issue, see Greenhouse, 2015. "Uber: on the Road to Nowhere," *The American Prospect*, (2015), available at: http://prospect.org/article/road-nowhere-3.

benefits consumers.[10] Both findings are designed to indicate that Uber's pricing strategy increases consumer surplus, which would be a core element of its defense if it were to be forced to defend itself in a Rule of Reason context.

In making the case that Uber is violating the Sherman Act, Meyer had a favorable precedent to work with from the *Apple ebooks* case prosecuted by the Justice Department in 2013. The DOJ alleged that an agreement between Apple and a consortium of publishers to erect an ebook platform to compete with Amazon was a hub-and-spoke conspiracy, and thus *per se* illegal. Had it instead been treated as a series of vertical agreements along a supply chain, it would have been subjected to the Rule of Reason following *Leegin Creative Leather Products v. PSKS.* Similarly, if the conspiracy of Uber and its drivers is hub-and-spoke, then it doesn't matter whether surge pricing increases or reduces consumer welfare — it violates the Sherman Act under the *per se* rule.

In this sense, the plaintiff in that case is turning the "antitrust paradox" referred to in the first paragraph of this article against Uber, since it cannot avail itself of the more favorable jurisprudence of Section 2 without risk that it might trigger labor law liability if it permits itself to be seen as a powerful monopoly, whether that monopoly is pro- or anti-competitive under antitrust. This points to a legal weakness unique to the labor platforms, as against other powerful tech sector platforms like Google, Facebook, or Amazon — at least the way the law currently stands, those firms can cop to their dominant market shares in the markets where they compete and claim to be benefiting consumers. Uber has thus far tried to do that as well, and thus far it has gotten away with it. Indeed, it has waged a campaign in state legislatures to immunize its business model from risk under labor law,[11] and it may eventually want to do that with one stroke at the federal level.[12] With those safe harbors from labor law liability in hand, Uber will be free to avail itself of the Rule of Reason in any defense to a theoretical monopolization or monopsonization case, making it unlikely such a case would ever be brought.

Spencer v. Kalanick survived a motion to dismiss in district court and the district court also voided Uber's mandatory arbitration clause. But that issue was appealed to the Second Circuit, and in August 2017 that court overturned the lower court's ruling. Thus, this past March, the district court was forced to send the case to arbitration. Of course, there could be a public antitrust case along similar lines against Uber, but there appears to be no indication that such a case would be forthcoming. Because it markets itself as displacing traditional taxi companies that have enjoyed local monopolies, it appears that the agencies consider Uber's business model to be pro-competitive and hence are loath to challenge it, on the theory that that would be "interfering" in the technological displacement of one business model with another.

III. *CHAMBER OF COMMERCE V. SEATTLE*

In 2015, the city of Seattle granted collective bargaining rights to drivers for ridesharing and taxi companies classified as independent contractors. The context is that in the aftermath of the resolution of most employment misclassification claims in favor of Uber, drivers have sought some of the rights and benefits historically associated with employment even in their current situation as contractors — including the right to negotiate collectively with their employer outside the process of formal unionization enshrined in federal law in the National Labor Relations Act. That federally unprotected status, so-called "alt labor," is what the Seattle ordinance aims to carve out for rideshare drivers.

Alongside the legal right to collective bargaining and a voice on the job comes an exemption from federal antitrust laws, which outlaw collusion in the interest of promoting competition throughout the economy. In the first 10 years after the Sherman Act was passed in 1890, it was deployed against workers organizing against their bosses, rather than against the monopolies for whom it was intended. In response, the Clayton Act bestowed an exemption from antitrust law on labor organizing in 1914. When federal labor policy was regularized in the 1930s and early 1940s, collective bargaining rights became one of the many emoluments of statutory employment. That means that both collective bargaining and the antitrust exemption for it are among the labor rights workers no longer have access to in the era of the "Fissured Workplace."[13]

10 Cohen et al., "Using Big Data to Estimate Consumer Surplus: the Case of Uber," NBER Working Papers # 22627, (2016); Hall et al., "Labor Market Equilibration: Evidence from Uber" (2017), available at: http://john-joseph-horton.com/papers/uber_price.pdf.

11 Borkholder et al., "Uber State Interference: How Transportation Network Companies Buy, Bully, and Bamboozle Their Way to Deregulation" (National Employment Law Project, 2018).

12 Harris & Krueger, "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker," *Hamilton Project Discussion Paper*, (2015).

13 Weil, 2015. *The Fissured Workplace: How Work Became So Bad for So Many and What Can be Done to Improve It.* Cambridge, MA: Harvard University Press, 2014. Katz & Krueger. 2016. "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015."

In November 2017, the Federal Trade Commission voted 2-0 to join the Justice Department's Antitrust Division in an amicus brief to the 9th Circuit Court of Appeals, siding with the Chamber of Commerce against the City of Seattle's grant of collective bargaining rights to independent contractors working as drivers for Uber, Lyft, taxis, and other ride-sharing companies.[14]

In their brief, the FTC and DOJ claim that "we take no position on whether or not the drivers covered by the challenged statutes are employees or independent contractors or how federal labor law may apply to this matter." The agencies contend that collective bargaining by independent contractors (as opposed to workers classified as employees) is not immune from antitrust challenge, which would relegate it to a *per se* violation of the Sherman Act. By claiming that collective bargaining by non-employees is illegal on its face and by writing this amicus brief in this case, the agencies implicitly contend that each and every Uber driver is an independent business rather than an employee in economic terms — siding with Uber in its labor law claims, despite the agencies' declarations to the contrary.

The stated aim of the brief is to restrict the application of the "state action" antitrust exemption. A recent paper by the American Antitrust Institute explains in detail how the state action exemption has been overused to protect anti-competitive conduct by quasi-official bodies, a subject about which the FTC recently won a Supreme Court case, *North Carolina State Board of Dental Examiners v. FTC*.[15] With this brief, the federal agencies are saying that the grant of regulatory authority made to the Seattle municipal government extends only to the consumer-facing side of the taxi and ridesharing business, not to the relationship between those companies and their drivers. As such, the drivers are exposed to full antitrust liability for bargaining collectively.

But as *Meyer v. Kalanick* illustrates, Uber itself fixes prices for its consumers. And since they aren't bound by any mandatory arbitration clause, the federal agencies could have sued Uber on those grounds — exactly the same ones they use to argue that collective bargaining by drivers is *per se* illegal. Following *Leegin v. PSKS*, the agencies might claim that Uber's price-fixing is subject to the Rule of Reason because it is vertical, and therefore the sort of Rule-of-Reason-motivated evidence brought forward in the two Uber-commissioned studies is convincing on the merits of whether Uber's price-fixing is pro- or anti-competitive. But if they did want to challenge Uber, they would have the favorable ruling in the *Apple ebooks* case.

The choice on the part of FTC and DOJ to use the Sherman Act against the drivers, and not against Uber, thus seems to reflect a policy choice that the greater threat to competition comes from drivers negotiating collectively with powerful companies and not from those powerful companies exercising their power, either in the market for their drivers or with respect to consumers, among whom they price-discriminate. In that sense, they are coming to the opposite conclusion to the Seattle city council in passing their ordinance to allow collective bargaining by drivers, in the hope of regulating the employer-worker relationship to the benefit of employees because Uber enjoys the greater bargaining power. The federal agencies' attempt to overturn the Seattle municipal authorities' policy judgement in this matter thus implicates the crucial element at the heart of the state action exemption: federal policy preempts state policy, but in matters of competition, there's a jurisprudence that exempts state decisions to restrict competition to serve other ends. In this case, a restriction of competition in the form of driver collective bargaining could be seen as pro-competitive since the market is monopsonized. In fact, Seattle definitely does see it that way, and if the federal agencies disagree, they could challenge the ordinance on the merits (as may happen in the district court if their amicus brief carries the day in the Chamber of Commerce's appeal of the defense's previously-granted motion to dismiss).

Another irony of the agencies' brief is that in its defense against allegations of employment misclassification, Uber claims not to be an employer in the market for drivers — directly at odds with the competition authorities' intervention on its behalf in this case. The FTC-DOJ brief says,

> The State of Washington's for-hire transportation laws do not clearly show that the State intended to displace competition in the *driver services market* [italics in original]. State law permits municipalities to regulate transportation services provided to consumers… Although it authorized displacement of competition in the provision of transportation service, the State has not acted 'in [the] particular field' at issue here… The State did not 'affirmatively contemplate anticompetitive conduct' in the market for driver services, which is distinct from the consumer service market.

14 Amicus brief of the FTC and DOJ in "Chamber of Commerce of the United States of America and Rasier, LLC, v. City of Seattle, et al.," available at: https://www.ftc.gov/policy/advocacy/amicus-briefs/2017/11/chamber-commerce-united-states-america-rasier-llc-v-city.

15 Stutz, "State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of a post-*Dental Examiners* Landscape," (2017), available at: http://www.antitrustinstitute.org/sites/default/files/Occupational%20Licensing%20White%20Paper.11.6.17.pdf.

This language makes it clear that the DOJ and FTC believe that Washington state law acts to displace competition in the consumer-facing side of ridesharing and taxi services, but not on the driver-facing side. Unfortunately for that argument, in its defense against employment misclassification, Uber itself contends that it does not operate at all on the consumer-facing side of the ride-sharing market. Instead, Uber's presentation of its business model is that it is a software company that licenses an app to drivers that enables them to provide ridesharing services to customers. If that is the case, then according to Uber, the state's grant of regulatory authority over ridesharing to the City of Seattle shields driver collective bargaining from antitrust scrutiny, since everything drivers do in the ridesharing market is consumer-facing. At the very least, it is incoherent to argue that Uber drivers are independent contractors (as the DOJ and FTC do, by claiming that their collective bargaining violates the Sherman Act) and that their collective bargaining is not protected by the state action exemption, given Washington's statute.

The market structure the DOJ and FTC contemplate is that Uber is a platform: It provides ridesharing services to customers, and it purchases labor from drivers. Given that, the brief does not make sense unless Uber drivers are employees — in which case the entire ordinance is unnecessary, and collective bargaining by those employees is shielded by the labor exemption.

What this illustrates is simply that Uber, and many other powerful tech companies, have a chameleon-like quality that they use to avoid all types of regulation: labor and antitrust, in this case. Their real business model is the regulatory arbitrage that those alternative configurations represent. Figuring out how not to be bound by regulations that your competitors must abide by isn't innovation, and yet, it appears to be the core contribution of the tech sector to the U.S. economy.

IV. CONCLUSION

Finally, to return to the economic question at the core of these two cases: Antitrust jurisprudence, as currently constituted, mostly assumes that labor markets are inherently competitive, so restrictions on competition like collective bargaining would "distort" them to the benefit of workers. It also assumes that anything that benefits consumers in the form of lower prices is pro-competitive, and hence that price- and wage-setting by Uber represents economic innovation being passed along to the market and should thus be shielded from antitrust scrutiny.

In fact, increasing economic evidence shows that labor markets are monopsonized — by powerful companies like Uber.[16] When employers have discretion over wage-setting, they restrict their labor demand to be below the competitive level to lower the market wage and increase their profits. And under those circumstances, empowering workers on the other side of the market likely raises wages and increases employment. Thus, underlying the questionable legal reasoning in the DOJ-FTC brief is a questionable economic theory. And in a world in which firms have wage-setting power in the labor market, it isn't true that maximizing consumer welfare on its own makes the economy competitive. In fact, it is quite possible that welfare on each side of the market might be in tension, and the existing antitrust bias in favor of protecting consumers lets powerful platforms engage in predatory pricing and erect vertical restraints that lower prices while maximizing buyer power to extract surplus from their supply chains, including workers.[17]

Labor market monopsony thus presents antitrust enforcers with a policy problem their existing tools and approaches are ill-suited to solve. And to return to the point of the introduction, that is no coincidence: employer power and discretion over wages and terms of employment is the outcome of an overall legal regime, and specifically an antitrust regime, that excuses market power on the part of dominant employers, empowering them to exercise control without responsibility, while scrutinizing any form of countervailing power on the part of workers. And this, in turn, arises out of an ideology that assumes market power either doesn't exist or is equally distributed on both sides of the labor market. Neither assumption is borne out by the empirical evidence.

16 For a longer discussion of labor market monopsony and review of the evidence, see Steinbaum, "Antitrust in the Labor Market: Protectionist, or Pro-Competitive?" *ProMarket*, (2017), available at: https://promarket.org/antitrust-labor-market-protectionist-pro-competitive/.

17 Khan, *Amazon's Antitrust Paradox*, Yale Law Journal 126 (3), (2017).