

THE FUTURE OF THE GIG ECONOMY, LABOR LAW, AND THE ROLE OF UNIONS: HOW
WILL THEY LOOK GOING FORWARD?*

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Much of late twentieth century and twenty first century labor law focuses upon the question of employee status, i.e., who can properly be identified as an employee. Resolution of questions relating to who is part of the labor law framework are both critical and fundamental.¹ The issue has been dramatized by virtue of the many alternate arrangements beyond those that were traditional in the immediate post-World War II era which have emerged in recent years, as well as the enhanced distance between capital technological innovations which invite investments and the worker who performs services for the employer. Many or most of these developments have placed new tension upon employee status, producing disputes about how society defines employees for labor law purposes and the protection that labor law provides.² The trends appear to walk in lockstep toward greater inequality between the haves and have nots and the consequent social ills associated with the ever-widening income gap.

The focus of this article is upon the gig economy³, particularly those who work with the highly sought-after ride sharing or ride hailing services associated with firms like Uber⁴, Lyft, and others,⁵ though it extends to skilled tradespeople, cleaners, cooks, and various kinds of personal assistants and delivery people that are part of new and more efficient means to deliver inexpensive products to the public.⁶ States Professor Orly Lobel: “Advances in digital technologies, the widespread availability of

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¹ See Marc Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 UNIV. OF DET. L.R. 555 (1988-1989).

² See generally Eli Lehrer, *The Future Work*, NATIONAL AFFAIRS 35 (Summer 2016) at 35; Andrew Stern and Eli Lehrer, *How to Modernize Labor Law*, NATIONAL AFFAIRS 30 (Winter 2017) at 52; ARUN SUNDARARAJAN, *THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM* (2016).

³ The Cambridge English Dictionary defines “gig economy” as follows: “A way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer.” CAMBRIDGE ENGLISH DICTIONARY, CAMBRIDGE UNIV. PRESS.

⁴ The departure of Travis Kalanick brought new challenges for Uber’s new leadership. See Katie Benner, *For Uber, a Sudden Thorn*, N.Y. TIMES, Aug. 18, 2017 at B1; Farhad Manjoo, *Crossroad for Uber: A Question of Vision as a Leader is Picked*, N.Y. TIMES, Aug. 29, 2017 at B1; Leslie Hook, *Lyft wins \$1bn Alphabet funding and raises heat on arch-rival Uber*, FINANCIAL TIMES, Oct. 20, 2017 at 1; *Profit, not culture, will be Uber’s biggest hurdle*, FINANCIAL TIMES, Sept. 5, 2017 at 8; Katie Benner and Mike Isaac, *Uber Board Approves Power Shift Amid Strife*, N.Y. TIMES, Oct. 4, 2017 at B1; Carolyn Said, *Ex-CEO’s power roils Uber*, S.F. CHRONICLE, Oct. 3, 2017 at D1. See also Frank Field and Andrew Forsey, *Sweated Labour: Uber and the ‘gig economy,’* (Dec. 2016) (Describing some of the labor practices of Uber in Great Britain).

⁵ Many of the problems addressed here antedate the advent of the gig economy by a number of years. In a landmark article, professor Harry Arthurs appears to be the first to address this issue more than a half-century ago. H.W. Arthurs, *The Dependent Contractor: A Study of Legal Problems of Countervailing Power*, 16 UNIV. OF TORONTO L. J. 89 (1965).

⁶ Indeed perhaps the first NLRB General Counsel complaint in this arena has taken place outside of the industry which occupies most of the discussion in this article. See Handy Technologies, Inc., Case Nos. 01-CA-158125 & 01-CA-158144 (Aug. 28, 2017). The above case involves the NLRA but disputes of this kind have recently arisen in connection with the delivery of food orders. See, for instance, *Lawson v. Grubhub, Inc.*, Docket No. 3:15-cv-05128 (N.D. Cal. Nov 9, 2015). Some of the focus inevitably involves workers who are, given their language and undocumented status, even more vulnerable than the above groups and subject to employer misconduct of a different nature. See, for instance, Justin Miller, *The Fight to Organize Port Drivers -- Modern – Day Indentured Servants*, THE AMERICAN PROSPECT, June 26, 2017; *Green Fleet Systems, LLC*, 2015 WL 1619964 (April 29, 2015), adopted by the Board in the absence of exceptions, 2015 WL 4932363 (August 18, 2015); Preliminary Injunction granted in

handheld devices, and ever-increasing high-speed connectivity have combined with the realities presented by several cycles of economic downturn, shifts in lifestyle, and generational preferences.”⁷

In the Introduction, Part I, this article addresses developments relating to the so-called gig economy and characterizes the problems as I see them. Part II reviews the cases arising under the National Labor Relations Act (NLRA) and the factors relied upon to resolve the independent contractor-employee conundrum under that statute, and provides some suggestions with regard to the way in which the ride sharing driver issue should be addressed and resolved. Part III deals with some of the early class actions that have emerged in connection with drivers at Uber and Lyft and discusses the barriers in the path of such. Part IV addresses the important Seattle ordinance in which Seattle has asserted jurisdiction over transportation in connection with its labor-management relations. It discusses the litigation that has arisen from it and provides assessments as to how the issues involved should be resolved. Part V deals with the emergence of union activity in the ride sharing and ride hailing industry, the issues that are being discussed between labor and management, and the discussion of changes in practice and legislative reform relating to so-called portable benefits. The portable benefits reform might provide health insurance, pensions and leave for illness and family-related matters to individuals who enter into relationships with more than one employer and have a particular need for the benefits to be portable.

I. Introduction

The use of an app and the GPS system has allowed new ridesharing employers to retain labor which is more flexible and autonomous than most traditional employment relationships. These individuals can and do work for a number of companies simultaneously and can devise flexible schedules, varying from a 50-hour work week or more to occasional work for two, three, or four hours on the weekend so as to obtain extra money in addition to another income derived from wages or fringe benefits.⁸ One area of conflict has taken the form of litigation before the National Labor Relations Board (NLRB) and the courts, and it has presented the issue of whether such individuals can be properly characterized as employees or as independent contractors. As has been made clear in Seattle in particular (discussed below),⁹ the companies are deeply hostile to trade union organization and have engaged in a variety of

Olivia Garcia, Green Fleet Systems, LLC, CV-14-06220-PSG-JEM (October 10, 2014); Cf. Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187 (1999). Some of the issues relate to relatively affluent professionals as well. See Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for Dependent Contractors*, 26 BERKELEY J. EMP. & LAB. L. 143, 155-160 (2005); AmeriHealth Inc., 326 NLRB 509 (1998); AmeriHealth Inc., 329 NLRB 870 (1999); Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563 (D.C. Cir. 2016). Cf. James Watkins, *Are High-Skilled Workers the Future of the Gig Economy?*, THE DAILY DOSE, Oct. 4, 2017, <http://www.ozy.com/acumen/are-high-skilled-workers-the-future-of-the-gig-economy/80984>.

⁷ Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 UNIV. OF SAN FRANCISCO L.R. 51, 52 (2017).

⁸ See generally Aaron Smith, *Gig Work, Online Selling and Home Sharing*, PEW RESEARCH CENTER (2016); *Independent Work: Choice, Necessity and the Gig Economy*, MCKINSEY & CO.: MCKINSEY GLOBAL INSTITUTE, (2016); Ryan Calo and Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COL. L. REV. ___ (2017); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016); Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577 (2016); Miriam A. Cherry, *Invisible Labor and People Analytics*, 61 ST. LOUIS UNIV. L.J. 1(2017); Miriam A. Cherry and Antonio Aloisi, *‘Dependent Contractors’ in the Gig Economy: A Comparative Approach*, 66 AMERICAN UNIV. L. REV. 635 (2017). A thorough discussion of the problems of discrimination in this new economy is contained in Nancy Leong & Arron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L. J. 1271 (2017).

⁹ See generally Dmitri Iglitzin & Jennifer L. Robbins, *The City of Seattle’s Ordinance Providing Collective Bargaining Rights to Independent Contractor for-hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49 (2017).

anti-union tactics and messaging aimed at both drivers as well as the public--the fight over both employment status and labor union representation takes place in connection with an on demand economy which provides services that are attractive to the public¹⁰ and yet undercuts the standards of many of those who provide services.¹¹ As one scholar has noted when speaking about non-professionals who work in the so-called sharing economy: "... 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."¹² This is not the first time that unions and employees have had to push back against a new business model which subordinates labor.¹³

About the "gig economy" and its "false promise," the New York Times has had this to say:

The promises Silicon Valley makes about the gig economy can sound appealing. Its digital technology lets workers become entrepreneurs, we are told, freed from the drudgery of 9-to-5 jobs. Students, parents and others can make extra cash in their free time while pursuing their passions, maybe starting a thriving small business.

In reality, there is no utopia at companies like Uber, Lyft, Instacart, and Handy, whose workers are often manipulated into working long hours for low wages while continually chasing the next ride or task. These companies have discovered they can harness advances in software and behavioral sciences to old-fashioned worker exploitation, according to a growing body of evidence, because employees lack the basic protections of American law.¹⁴

¹⁰ Leslie Hook, *The view from the driving seat*, FINANCIAL TIMES, Oct. 5, 2017 at 11 ("Ever since it was founded in 2009, Uber has had a single-minded focus on one thing: the passenger. As the company grew to more than 70 countries, and earned a valuation close to \$70bn, passengers' rides got better, faster, and cheaper, with usage soaring as a result. But during Uber's years of breakneck growth, the drivers were left behind. Lawsuit piled upon lawsuit, alleging that drivers were misclassified, or that their pay was not calculated correctly. Meanwhile, lots of drivers voted with their feet: nearly half of Uber drivers in the US quit in less than a year, according to company statistics collected in 2013-2015. More and more have started driving for rival Lyft, which has been gaining market were sharing in the US, partly thanks to its pro-driver reputation").

¹¹ Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* 107 (INST. FOR RES. IN LAB. & AMP., Working Paper No. 100-14-2014), <http://irl.berkeley.edu/files/2014/Labor-Standards-and-the-Reorganization-of-Word.pdf>). The taxi industry and its labor standards have been diminished by virtue of not only its own inefficiencies but also cheaper labor costs and technological innovation in ride sharing. See Winnie Hu, *As Uber Ascends, Debt Demolishes Taxi Drivers*, N.Y. TIMES, Sept. 11, 2017 at A1. But the outcome is by no means certain. See *Profit, not culture, will be Uber's biggest hurdle*, FINANCIAL TIMES (LONDON), Sept. 5, 2017 at 8; Adam Vaccaro, *At Logan, Uber and Lyft squeezing the taxis*, BOSTON GLOBE, Aug. 15, 2017 at C1.

¹² Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Rights in the On-Demand Economy*, 40 SEATTLE U. L. REV. 987, 993 (2017).

¹³ W. Harry Fortuna, *The gig economy is a disaster for workers. Hollywood's unions can help them learn to fight back*, QUARTZ (Sept. 1, 2017); Catherine Fisk, *Hollywood's Writers and the Gig Economy*, U. CHI. LEGAL F. (forthcoming 2017).

¹⁴ *The Gig Economy's False Promise*, N.Y. TIMES, April 10, 2017, at A20. See generally *All Eyes on the Gig Economy*, THE ECONOMIST (March 9, 2013), <https://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items>; *Can the Sharing Economy Provide Good Jobs?*, WALL ST. J. (January 28, 2017), <https://www.wsj.com/articles/can-the-sharing-economy-provide-good-jobs-1431288393>; William B. Gould IV, *Growing "Gig Economy" also Grows Wealth Gap*, SAN JOSE MERCURY-NEWS May 7, 2017, at A14; William B. Gould IV, keynote speech at Global Chamber San Francisco's event, "Gig Economy: Emerging Trends & Keys to Retaining Top Talent," in Palo Alto, CA (Nov. 14, 2017), <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/11/WBGouldIV-Gig-EconomyKeynote-Speech-11-14-2017.pdf>.

In the 1980s and '90s, the concept of contingent worker status--originally so named by Audrey Freedman of the Conference Board¹⁵--began to unfold in the form of worker referrals to a particular company by a third party. Manpower was the most important of them (with Kelly Girl its predecessor in the 50s and 60s), and the NLRB, interpreting the NLRA, went on a seesaw decision-making process in attempting to determine whether these employees could participate in the union electoral process and collective bargaining provided by federal labor laws. The Obama Board sanctioned some participation in the electoral process by putting referred employees alongside of so-called regular or "permanent" employees employed directly by the enterprise itself.¹⁶ In a sense, this mirrored casual and sometimes seasonal workers who had often been more frequently referred by union hiring halls at a time when the unions were stronger in the 1950's and '60s.¹⁷ Subsequently, part time workers became more important, particularly because they could not enjoy the same range of fringe benefits, such as medical insurance and pensions, as did the regular employees.

There is some dispute about the extent to which the status of the independent contractor has increased in recent years, though "...supplementary self-employment work appears to be increasing...[and]... misclassification appears to be more common in particular industries, such as home care, janitorial services, construction, trucking, hospitality, and restaurant."¹⁸ In California, more of the independent contractors as compared to employees are "...likely to be older men and white (though about half are workers of color), and they are somewhat more likely to be foreign-born, reflecting growing rates of self-employment among immigrants over the past three decades."¹⁹ As might be anticipated, the demographics "...differ markedly across the occupational spectrum...[with] women, immigrants, and Latinos are disproportionately employed in what are typically low wage occupations, while white independent contractors are disproportionately employed in what are typically higher-wage occupations."²⁰ In any event, more of these categories of work have seemed to expand over the past few decades²¹ and, in so doing, have posed problems for the unions, collective bargaining, the safety net, and indeed, growing inequality in society generally. This has spread the risk²² in the worker-employer

¹⁵ See "Contingent" Work Force Expands Rapidly as Firms Seek Buffers in Economic Downturn, DAILY LABOR REPORT No. 138, at A-3 (July 18, 1985).

¹⁶ See *In re M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), reversed by *In re H.S. Care L.L.C.*, 343 NLRB 659 (2004), reversed by *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (The Obama Board reaffirming the *Sturgis* board's sanctioning of units of the employees employed by a supplier employer); *Tree of Life, Inc.*, 336 NLRB No. 77 (2001); Glenn Burkins, *Labor Board May Allow More Temps to Join Unions*, WALL ST. J. (Dec. 2, 1996) at A3 (where I said: Current rules that make it 'virtually impossible' for temps to join unions alongside an employer's permanent staff are based on a 'flimsy premise'); See also Barnaby Feder, *Bigger Roles for Suppliers of Temporary Workers*, N.Y. TIMES, April 1, 1995. Cf. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996) (Temporary Workers deemed entitled to the same benefits as their permanent counterparts); *Ninth Circuit Finds That Misclassified Employees Are Eligible for Federally Regulated Employee Benefits*, 111 HARV. L. REV. 609 (1997).

¹⁷ See *Local 357, Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB*, 365 U.S. 667 (1961). In a recent and wide ranging article discussing, in part, *Meyer v. Kalanick*, 174 F. Supp.3d 817 (S.D. N.Y. 2016), vacated by *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017), which articulated antitrust liability for Uber vis-à-vis passengers and the driver-company arrangement, the author finds a link between *Local 357* and practices of ridesharing companies under discussion in this article. See Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017).

¹⁸ Annette Bernhardt and Sarah Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, UC BERKELEY LABOR CENTER (June 14, 2017).

¹⁹ *Id.* at 2.

²⁰ *Id.* at 12.

²¹ See, e.g., GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011).

²² See JACOB S. HACKER, *THE GREAT RISK SHIFT* (2006).

relationship to the former and expanded the labor market of contractor employees who are the recipients of inferior compensation and benefits.²³

Notwithstanding the passage of the Patient Protection and Affordable Care Act of 2010--it been under considerable assault by its opponents in 2017²⁴--a decline in the welfare state in the United States has placed an extraordinary amount of weight and pressure upon the employment relationship as the employment relationship withers away. A "job with benefits" has entered into the American parlance, and that job is frequently those few which are unionized or with the diminishing number of companies which fear unionization,²⁵ containing negotiated fringe benefits like health care, pensions, and leave benefits along with so-called supplemental compensation in connection with layoffs.²⁶ As has been discussed in great detail elsewhere, the trade union sector of the economy has declined precipitously, initially beginning in the 1960s and '70s and then in a kind of freefall during the past couple of decades. While there has been considerable debate about the role of the law in this phenomenon, the fact is that law appears to mirror developments in other areas like technology and trade and thus is a subordinate factor more often than not.²⁷ For instance, in recent years the Obama Board has vigorously pursued appropriately expansive interpretations of the NLRA,²⁸ while the trade union movement has continued to decline.²⁹

²³ See Neil Irwin, *The Great American Janitor Test*, N.Y. TIMES (Sept. 3, 2017); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY BAD AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

²⁴ See, for instance, Margot Sanger-Katz, *Fewer Perks in Health Bill Tilting Right*, N.Y. TIMES, July 14, 2017, at A1; Kate Zernike, Reed Abelson, and Abby Goodnough, *New Effort to Kill Health Law Is G.O.P.'s Most Far-Reaching*, N.Y. TIMES, Sept. 22, 2017, at A1.

²⁵ This corporate practice is described in detail in RICK WARTZMAN, *THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA* (2017). The lawfulness of these practices has been addressed in an opinion authored by myself and another Board Member in *Dayton Hudson Dept. Store Co.*, 324 NLRB 33 (1997):

“...the Board's decision today does not condemn employment practices, developed in the absence of union activity or the perceived imminent resurrection of same, which are designed to instill a high morale among employees and thus deter employees from seeking unionization. Such practices are not designed to influence a specific choice presented to employees by a union seeking to represent them. There is nothing unlawful about improved employment conditions which may make it less likely that employees will opt for unionization. Different considerations come into play when, as here, the employees are presented with such a choice. Thus, the Board has long held that during a union campaign, an employer must make certain employment decisions as it would if the union were not on the scene. With respect to benefits, for example, if an employer's course of action is prompted by the union's presence, then the employer violates the Act whether he confers benefits or withholds them because of the union. *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 fn. 1 (1967). See also *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), where the Supreme Court held that the conferral of benefits to employees while a representation election was pending, for the purpose of inducing employees to vote against the union, interferes with, restrains, or coerces employees in the exercise of their Sec. 7 rights.” *Dayton Hudson Dept. Store Co.*, 324 NLRB 33, 36 n. 17 (1997).

²⁶ *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (holding that the order of the Board requiring the company to bargain with respect to retirement and pension matters is valid and consistent with the NLRA).

²⁷ See generally WILLIAM B GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993).

²⁸ See, e.g., *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015); *The Trustees of Columbia University in the City of New York*, 364 NLRB No. 90 (2016); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), *enf'd sub nom Kindred Nursing Centers East LLC v. NLRB* 727 F.3d 552 (6th Cir. 2013); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016); *Purple Communications, Inc.*, 361 NLRB No. 126 (2014). The Obama Board engaged in important rulemaking initiatives. See *Representation-Case Procedures*, 79 Fed. Reg. 74308-10 (December 15, 2014), *aff'd Associated Builders and Contractors of Texas, Inc. v. NLRB* 826 F.3d 215 (5th Cir. 2016) (approving the rule which was designed to decrease the time preceding union elections and providing for employees to take a vote on union representation as soon as eleven days subsequent to the filing of a

But throughout all of this, one thing has remained clear for the workers. In order to have access to many of the benefits and statutory machinery which were enacted between the Great Depression and the 1970s, one must be characterized as an employee. Employee status is a prerequisite to obtaining unemployment compensation benefits and worker compensation for injuries incurred in the course of employment. Generally, only employees may invoke anti-discrimination legislation.³⁰ The same holds true for Social Security benefits as well. Independent contractors are excluded from both the laws facilitating the collective bargaining process as well as the above noted areas. Finally, though the article takes note of Krueger-Harris³¹ advocacy of a so-called third classification for workers who do not clearly fall on one side of the employee-independent contractor line, I have tended to view these proposals with considerable skepticism given the analysis undertaken below both representing my views at the NLRB and those subsequently obtained in the two decades since my departure from Washington, D.C.³² I am aware that some employers are willing to provide benefits not currently available to any contractors, dependent or independent, so long as they can preserve or diminish their labor law liability for such. From my perspective, the proposals for a so-called third classification are rather self-serving, though I recognize that the prospects for success for gig workers at both the federal and state level may be somewhat distant and that a special third classification which carries with it portable benefits legislation could well be the best that can be obtained in an extremely imperfect world where right wing conservatism dominates all branches of government.³³

II. The National Labor Relations Act cases; the conflict between employee and independent contractor status

Discussion of the gig economy has dramatized the above-noted divide under the NLRA in this century to a greater extent than the one just passed, particularly where the pursuit of workers' right to associate with one another is for the purpose of some form of collective activity. As noted, only

representation petition). However, the Board sometimes takes a cautious position in response to Congressional hostility. *See, for instance*, Northwestern University, 362 NLRB No. 167 (2015); *Contra*, William B. Gould IV, Glenn M. Wong, and Eric Weitz, *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 Loy. L.A. Ent. L. Rev. 1 (2014).

²⁹According to the Bureau of Labor Statistics, union membership rates have decreased from 12.3% in 2009 to 10.7% in 2016. In the same period of time, the percentage of the workforce covered by union contracts also decreased from 13.6% to 12%. *See Union Members-2016*, BUREAU OF LABOR STATISTICS NEWS RELEASE (Jan. 27, 2017), <https://www.bls.gov/news.release/pdf/union2.pdf>; In the past several decades, union membership in the U.S. has steadily declined. The number of employed union members has declined by 2.9 million since 1983, from over 20% of the American workforce in 1983 to just over 10% in 2016. *See Union Membership in the United States, Bureau of Labor Statistics Spotlight on Statistics* (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/home.htm>. *See generally* SOLOMON BARKIN, *THE DECLINE OF THE LABOR MOVEMENT* (Center for the Study of Democratic Institutions, 1961); A.H. Raskin, *The Big Squeeze on Labor Unions*, ATLANTIC MONTHLY 41 (Oct. 1979); A.H. Raskin, *The Squeeze on Unions*, ATLANTIC MONTHLY 55 (June 1961). For a more contemporary perspective, *see* Rana Foroohar, *U.S. union revival is long overdue*, FINANCIAL TIMES, July 31, 2017 at 9; William Forbath and Brishen Rogers, *New Workers, New Labor Laws*, N.Y. TIMES, Sept. 4, 2017 at A21.

³⁰Some state courts have held that independent contractors as well as employees are protected by state anti-discrimination legislation. *See Currier v. Northland Services, Inc.*, 332 P.3d 1006 (Wash. Ct. App. 2014). But this is against the grain of most states. *See* National Employment Law Project, *The On-Demand Economy and Anti-Discrimination Protections* (2017), <http://www.nelp.org/content/uploads/On-Demand-Anti-Discrimination-Protections.pdf>. *See also* Hargrove v. Sleepy's LLC, 106 A.3d 449 (N.J. 2015) (The New Jersey Supreme Court applying a new test that opens the door for more misclassification challenges and expands the coverage of protections).

³¹Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker,"* THE HAMILTON PROJECT (Brookings, December 2015).

³²WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR* (2000).

³³These views are developed in more detail in pages 35-36.

employees can utilize the right to organize into unions, to engage in the collective bargaining process, and to protest employment conditions under the NLRA. The exclusion of independent contractors now constituting, by some measure,³⁴ 55 million individuals gig workers and more than one-third of the country's workforce places parameters around this right, necessitating an examination of both the concept of employer and employee rights which can be enjoyed beyond this relationship itself.³⁵

Supervisors, once included within the protection of the NLRA,³⁶ are excluded though issues relating to them may come into play if they affect employees.³⁷ But like confidential employees,³⁸ so-called managerial employees are also excluded, as interpreted by the Supreme Court,³⁹ and this exclusion has frequently included professors in private universities.⁴⁰

But the most immediately relevant gig economy line of authority is rooted in the Supreme Court's decision of *NLRB v. Hearst Newspapers*,⁴¹ interpreting the word "employee" under the Wagner Act as it was known then, prior to the amendments to the NLRA. Here the Court was confronted with a case involving so-called "news boys" for Los Angeles newspapers who were "generally mature men, dependent on the proceeds of their sales for their sustenance, and frequently supporters of families" who were worked as "news vendors on a regular basis" with little turnover.⁴² The question was whether the news boys were "employees" within the meaning of the NLRA and thus entitled to its protections. The Court, speaking through Justice Rutledge, noted that Congress had not "explicitly" defined the term and concluded that the word "employee" did not allow any "definite meaning," and that Congress was not "...thinking solely of the immediate technical relation of employer and employee."⁴³ Said the Court: "[Congress] had in mind at least some other persons than those standing in the proximate legal relationship of employee to the particular employer involved in the labor dispute."⁴⁴

³⁴ See, for instance, Bernhardt and Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, *supra* note 18 (55 million workers is the high-end estimate of the number of independent contractors excluded from the NLRA. Other studies have set the number between 20-25 million workers). A more detailed discussion of hours of work, income, and exposure to financial risks is contained in *Gig Workers in America: Profiles, Mindsets, and Financial Wellness*, Prudential Financial (2017), http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf.

³⁵ Additionally, there are numerous other exclusions beyond those discussed in this article for those employed by public sector employers and those engaged in railways and airlines, covered by the Railway Labor Act of 1926 (generally covered by state and local legislation); See also WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 327 (Cambridge University Press, 5th ed. 2013) (42 states have public employee collective bargaining legislation, including Indiana, which is limited to public teachers).

³⁶ *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (holding that supervisors were employees entitled to NLRA protections).

³⁷ The NLRA § 2(3), 29 U.S.C. § 152 (2012). The Taft-Hartley Amendments reversed *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (holding that supervisors were employees entitled to NLRA protections). Subsequent to the Taft-Hartley amendments employees may still be protected, though somewhat peripherally. See *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *aff'd. sub nom. Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 888 (D.C. Cir. 1998). See also *General Security Services Corp.*, 326 NLRB 312, 314 (1998) (Chairman Gould concurring).

³⁸ *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170 (1982). Similar problems arise with regard to close relatives—the children and the spouse of employer are not employees within the meaning of the Act. *NLRB v. Action Auto., Inc.*, 469 U.S. 490 (1985).

³⁹ See *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974).

⁴⁰ See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

⁴¹ *NLRB v. Hearst Newspapers*, 322 U.S. 111 (1944).

⁴² *Id.* at 116.

⁴³ *Id.* at 124.

⁴⁴ *Id.*

The High Court, proceeding in an approach roughly akin to that which had been applied to the Fair Labor Standards Act (FLSA) of 1938 to this very day (covering such matters as minimum wages and maximum hours of work),⁴⁵ rejected the proposition that it could "import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness."⁴⁶ Said Justice Rutledge: ". . . [T]he broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts, rather than technically and exclusively by previously established legal classifications."⁴⁷ The *Hearst Newspapers* holding became the so-called economic realities test for determining the demarcation line between independent contractor and employee.

The 1947 Taft-Hartley amendments soon reversed this aspect of *Hearst Newspapers* by creating a new independent contractor exclusion under the statute.⁴⁸ As the Court said subsequently: "Congressional reaction to [*Hearst*] was adverse, and Congress passed an amendment . . . [t]he obvious purpose of [which] was to have the . . . courts apply general agency principles in distinguishing between employees and independent contractors under the Act."⁴⁹ Accordingly, the objective was to revive the common-law principles, and Congress reversed the Court's *Hearst* holding to promote a view subsequently furthered quite recently by the Court of Appeals for the DC Circuit,⁵⁰ i.e., that the judiciary possessed expertise comparable to that of the NLRB, therefore negating the deference otherwise normally accorded to the latter.⁵¹

⁴⁵ See *United States v. Silk*, 331 U. S. 704, 713 (1947); *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945); *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961). Yet here too complexities abound, particularly in the contemporary context of ridesharing litigation. See, e.g., *Saleem v. Corp. Transp. Grp.*, 854 F.3d 131 (2d Cir. 2017).

⁴⁶ *Id.* at 125.

⁴⁷ *Id.* at 129.

⁴⁸ The NLRA § 2(3), 29 U.S.C. § 152(3) (2012). The General Counsel is of the view that employer misclassification of its employees as independent contractors interferes and restrains workers in the exercise of their Section 7 rights and is itself an unfair labor practice. *Pacific 9 Transportation Co., Inc.* Case 21- analysisCA-150875 (Division of Advice Memorandum, December 18, 2015). It may be difficult to prove that misclassification itself is a violation in ride sharing if the question of employee identity is a close one, as it is likely to be most of the time.

⁴⁹ *NLRB v. the United Ins. Co. Of America*, 390 U.S. 254, 260 (1968).

⁵⁰ *FedEx Home Delivery v. NLRB* (FedEx I), 563 F.3d 492 (D.C. Cir. 2009); *FedEx Home Delivery v. NLRB* (FedEx II), 849 F.3d 1123 (D.C. Cir. 2017). The Court of Appeals held that given the Supreme Court's finding that no special administrative expertise was involved in these cases "this particular question under the Act is not one to which we grant the Board Chevron deference." 849 F.3d 1123 at 1128. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Of course, Chevron invokes the standards which the Supreme Court established for the NLRA itself. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); *NLRB v. Local Union No. 103, Iron Workers (Higdon Construction)*, 434 U.S. 335, 341, 350 (1978); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978); *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 497 (1979); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-399 (1996); *Sure-Tan, Inc. and Surak Leather Co. v. NLRB*, 467 U.S. 883, 891 (1984); *NLRB v. Town & Country, Inc.*, 516 U.S. 85, 94 (1995). In truth, the Court devised an intermediate role for the Board in these kinds of cases, i.e., one which precluded *de novo* review enforcement where there were two "fairly conflicting views." See note 47 *infra*. This deference is akin to the kind established in *Universal Camera v. NLRB*, 340 U.S. 474 (1951). See WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW*, 102-105 (Cambridge University Press, 5th ed. 2013).

⁵¹ The Supreme Court said:

"...It should also be pointed out that such a determination of pure agency law involved no special administrative expertise that a court does not possess. On the other hand, the Board's determination was a judgement made after a hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way. . . . Here the least that can be said

In the 1968 Supreme Court ruling, the Court said that the “obvious purpose of this [independent contractor] amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.”⁵² It then proceeded to note that there would be “...innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor...” and that there was “... no shorthand formula or magic phrase that can be applied to find the answer [of independent contractor or employee status], but all of the incidents of the relationship must be assessed and weighted with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.”⁵³

Finally, in establishing the relevant criteria under the 1947 amendments, the Court said this about the issues in the case before it:

. . . the [insurance] agents do not operate their own independent businesses, but perform functions that are an essential part of the company’s normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company’s policies; . . . [the plan that] . . . contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under and elaborate a regular reporting procedure; the agents receive the benefits of the company’s vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.⁵⁴

But like so much else in the law, paradoxically the common law principle has been unduly convoluted in practice.⁵⁵ It is easy to articulate in the abstract and *therefore* difficult to apply on a case by case examination of specific facts. This has been particularly true in cases involving transportation, which arose first in both commercial trucking and taxis, and most recently in the ride sharing or ride hailing industry. Deregulation, particularly in commercial trucking, dramatized the independent contractor-employee tension and conflict, with the unions (mainly the International Brotherhood of Teamsters) fighting against a greater use of so-called independent contractors. Simultaneously, taxi drivers were

for the Board’s decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board’s order. It was error to refuse to do so.” NLRB v. United Ins. Co. of America, 390 U.S. 254, 260 (1968).

See generally Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992).

⁵² *Id.* at 256.

⁵³ *Id.* at 258.

⁵⁴ *Id.* at 558-259. It is from this decision that the Board has articulated relevant criteria. FedEx Home Delivery, 361 NLRB No. 55 (2014) (extent of control by employer; whether or not the individual is engaged in a distinct occupation or business; whether the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the occupation; whether the employer or individual supplies instrumentalities, tools and place of work; length of time for which the individual is employed; whether the evidence tends to show that the individual is, in fact, rendering services as an independent business; whether the principal is or is not in the business). *See also* Porter Drywall, Inc., 362 NLRB No. 6 (2015).

⁵⁵ Ana Deknatel and Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGES 53, 103 (2015) (many state jurisdictions have a place for common law test with more simplified standards which allow for less evasion than the common law test which was substituted for *Hearst*).

frequently characterized as independent contractors by the reviewing courts,⁵⁶ if not the NLRB itself. These rulings reflected a:

. . . nationwide shift to leasing [and] lead to the eventual dissolution of union representation for taxi workers and the unraveling of their working conditions. Through the practice of leasing, taxi companies passed the risk and uncertainty of business to workers while avoiding the liabilities associated with having 'employees.'⁵⁷

Lack of physical or face-to-face supervision over workers in transportation enhanced these independent contractor rulings, contrasting them with the more proximate supervisor – employee factory settings where the conduct of the workers could be directly and more easily observed by supervisors. These cases represent a disproportionate number of NLRB adjudications prior to the taxi decisions. The taxi cases⁵⁸ were to have substantial implications for other aspects of transportation like commercial trucking itself.

The Clinton Board addressed these kind of disputes with a series of rulings in the late 90's, but it was not until a wide variety of decisions involving the Federal Express company and its time-sensitive delivery of products in packages that the NLRB and the courts began to venture into a world more akin to ride sharing service companies like Uber and Lyft. The first round of litigation in this arena arose out of the above-noted deregulation of trucking which emerged in the 1970s,⁵⁹ bringing with it the entry of new non-union firms in this industry.⁶⁰ The Clinton Board addressed these cases in the 1990s when it held unanimously in *Roadway Package System, Inc.*⁶¹ that the drivers were employees, given the fact that they "bear few of the risks and enjoy little of the opportunities for gain associated with an entrepreneurial enterprise" and that the same employer had "substantial control over the manner and means" of performance by their drivers.⁶² Here the Board, alluding to the Supreme Court's *United Ins. Co.* decision which had considered, as the Board noted, the "meaning and ramifications of the 1947 amendments" on independent contractors, held that the so-called decisive factors were relevant, i.e. whether the functions performed were an essential part of the company's normal operations, whether the individuals were

⁵⁶ The leading cases here are *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862 (DC Cir. 1978); *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F. 2d 366 (DC Cir. 1983); *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (11th Cir. 1983). *But see* *NLRB v. Friendly Cab Co. Inc.*, 512 F.3d 109 (9th Cir. 2008); *City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980).

⁵⁷ Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIFORNIA L. REV. 65, 97 (2017); *See also* Veena Dubal, *The Drive to Precarity: A Political History of Work, Regulation & Labor Advocacy in San Francisco's Taxi & Uber Economies*, 38 BERKELEY J. OF EMPLOYMENT AND LABOR LAW 73 (2017).

⁵⁸ The industry was to be badly damaged by the advent of ridesharing. Winnie Hu, *As Uber Ascends, Debt Demolishes Taxi Drivers*, N.Y. TIMES, Sept. 11, 2017 at A1. Cf. Joshua D. Angrist, Sydnee Caldwell, and Jonathan V. Hall, *Uber vs. Taxi: A Driver's Eye View*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Oct. 2017). The tensions between ridesharing and taxies have been dramatized by the London experience which has produced racial and immigration conflicts. Katrin Bennhold, *Uber, London and a Time for Reflection*, N.Y. TIMES, Oct. 3, 2017 at A4.

⁵⁹ The deregulation of the trucking industry culminated in the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296 (1980). For an examination of practices and policies ante-dating the deregulation era, see, for instance, *American Trucking Ass'ns v. United States*, 344 U.S. 307 (1953); John B. Gillingham, *The Teamsters Union on the West Coast*, INSTITUTE OF INDUSTRIAL RELATIONS, U. OF CALIF. (1956), at 35-36.

⁶⁰ *See generally* STEVE VISCELLI, *THE BIG RIG* (2016); MICHAEL H. BELZER, *SWEATSHOP ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION* (2000). Cf. RALPH C. JAMES AND ESTELLE DINERTSTEIN, *HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER* (1965).

⁶¹ 326 NLRB 842, 854 (1998) (Chairman Gould concurring).

⁶² *Roadway Package Sys. (Roadway I)*, 288 N.L.R.B. 196 (1988); *Roadway Package Sys. (Roadway II)*, 292 N.L.R.B. 376 (1989); *Roadway Package Sys., Inc. v. NLRB, enfd.*, 902 F.2d 34 (6th Cir. 1990).

trained by company supervisory personnel; whether the individuals do business in the company's name "with considerable assistance and guidance from the company and its managerial personnel"; whether the individuals accounted to the company and received various fringe benefits; and whether the relationship continued so long as the performance of the individuals involved was satisfactory.⁶³ Harking back to the above-noted Supreme Court precedent, the Board applied what it characterized as a common-law agency test to the independent contractor issue.

In the instant case, the Board noted that the drivers in question devoted a substantial amount of their time, labor, and equipment to performing so-called "essential functions" that allowed the employer to compete in the small package delivery market. The Board stressed that the "form of truck ownership ... does not eliminate ... dependence on *Roadway* in acquiring their vehicles."⁶⁴

But the answer to the independent contractor-employee controversy was made more enigmatic in the companion *Dial-A-Mattress*⁶⁵ decision where a majority of the Board reversed a Regional Director decision and found that those operators were independent contractors within the meaning of the Act. The Board majority concluded that the employer had effectively outsourced its delivery functions and "structured its relationship with the owner-operators to allow them (with very little external controls) to make an entrepreneurial profit beyond a return on their labor and their capital investment."⁶⁶ The Board also stressed that the employer played no part in the selection, acquisition, ownership, or financing, or inspection, or any maintenance of the vehicles used by the so-called owner-operators. Owner-operators could use their vehicles for other purposes, and the Board found that two drivers had done so—each vehicle displayed the name and address of the Department of Transportation and the owner-operator's company, not Dial itself. Payment was for deliveries made, not by the hour. Dial did not know the identity of others who worked for the owner-operators, and they were not "directly" supervised by the employer.

I dissented from this opinion.⁶⁷ I noted that there were a number of areas where the employer had exercised "significant control" over the manner and means used by the owner-operators in delivering mattresses, and that this generally demonstrated employee status. The employer assigned "geographical areas" in which owner-operators could make deliveries, established a route sheet for each owner-operator which listed the order in which deliveries were to be made for the day, and it had suspended owner-operators who failed to deposit COD money in the bank and to return merchandise of the employer.

I further noted that the owner-operators had no input into the pricing of the merchandise, and did not cultivate customers for the employer at all. The record established that the drivers had no choice of customers. I wrote:

Dial's dispatch department exclusively controls the number and location of customers assigned to the owner-operators. Further, the owner-operators do not have a particular route they service, and cannot bid on any customer deliveries. Instead, they may be assigned to any route within Dial's entire New York metropolitan territory and service a different route from day to day.⁶⁸

⁶³ NLRB v. United Ins. Co. of America, 390 U.S. 254, 269 (1968).

⁶⁴ *Roadway*, 326 NLRB 842, 851 (1998).

⁶⁵ 326 NLRB 884 (1998).

⁶⁶ *Id.* at 891.

⁶⁷ *Id.* at 894 (Chairman Gould dissenting).

⁶⁸ *Id.* at 894-895.

I noted that while the owner-operators were not required to display any employer insignia, "virtually all of them use their trucks to service the Employer."⁶⁹ Even the two individuals who did not fall in this category nonetheless serviced the employer 90-95% of their time, and therefore there was little opportunity to increase profits by performing services for any of the employer's competitors or other businesses. Accordingly, I was of the view that the basic arguments supporting employee status in *Roadway* applied to *Dial* as well.

Finally, I noted that any focus upon the ability to increase profits argues more strongly for independent contractor status in *Roadway* than in *Dial*. As I said:

The *Roadway* drivers had some choice, albeit marginal, in their customers because they were assigned to a specific geographical service area and these areas couldn't, theoretically, be bought and sold by the drivers. In contrast, *Dial* owner-operators have no assigned routes and no choice of customers. Their compensation is controlled essentially by *Dial* which has total discretion over which route they drive and how many customers they service each day.⁷⁰

Roadway Express and *Dial-a-Mattress* constituted cases where the employer was transporting products of others. In this respect it differed somewhat from Uber and Lyft cases involving ride sharing arrangements where the employers contend that they act merely as a platform, i.e., as an intermediaries that bring together, through their app and GPS system, individuals who have their own cars and commercial insurance with the demand for driving that exists in the public. Again, in between commercial truckers and the Uber and Lyft situation is the delivery of product packages by employers such as Federal Express. Here the very same question of whether their drivers are independent contractors or employees has been critical.

Like the trucking cases, the major product package case involving the NLRA is *FedEx Home Delivery v. NLRB*.⁷¹ Here a majority of the Court of Appeals for the District of Columbia reversed the Board⁷² and held that such drivers were independent contractors inasmuch as they could operate multiple routes, hire additional drivers and helpers, and sell routes without permission. The court noted that judicial resolution of disputes involving the question of whether workers can be characterized as independent contractors or employees "involves no special administrative expertise that a court does not possess."⁷³

The majority said that examination of employer control had produced an unsatisfactory analysis. Said the court: "while all the considerations and common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism."⁷⁴ A key consideration for the court was the "characteristics of entrepreneurial potential," many of which were in the record in the FedEx case. The fact that contractors may contract to serve multiple routes or hire their own employees, that more than 25% of contractors had hired their own employees at some point, that they could take a day or week or month off at their own discretion so long as they hired someone else to take their place, reflected the entrepreneurialism which the court regarded as critical. The court acknowledged the Regional Director's findings that FedEx required contractors to wear a "recognizable

⁶⁹ *Id.* at 895.

⁷⁰ *Id.* at 896.

⁷¹ 563 F.3d 492 (D.C. Cir. 2009).

⁷² *FedEx Home Delivery & Int'l Bhd. Of Teamsters*, 351 NLRB No. 16 (2007).

⁷³ 563 F.3d at 496.

⁷⁴ *Id.* at 497.

uniform and conform to grooming standards,"⁷⁵ and to display the FedEx logo in a manner larger than that required by Department of Transportation regulation.

But these considerations, in the court's view, simply reflected differences in the type of service being performed rather than differences in the employment relationship, and reflected the fact that the employer was "an intermediary between a diffuse group of senders and a broadly diverse group of recipients," containing a model which was the result of customer demands regarding safety.⁷⁶ The court took the view that customer demands and government regulations of the kind required by the Department of Transportation could not determine the employment relationship, thus echoing the taxi cases where control through governmental regulations rather than that fashioned by employer itself (even if the regulation was sought by the employer) did not negate a conclusion that the worker was an independent contractor.⁷⁷

The fact that the drivers were performing an essential characteristic of the employer's business could not be viewed as "determinative," said the court.⁷⁸ Substitutes and helpers had been hired without FedEx's involvement, and contractors had negotiated for "higher rates."⁷⁹

Chief Judge Garland, dissenting in part, was of a different view--and it was indisputably the better view. The fundamental divide between his opinion and that of the majority was to be found in "their view that the common-law test has gradually evolved until one factor--'whether the position presents the opportunities and risks inherent in entrepreneurialism,'--has become the focus of the test In [the majority] view, this factor can be satisfied by showing a few examples, or even a single instance, of a driver seizing an entrepreneurial opportunity."⁸⁰ Opined Judge Garland using the language of the Supreme Court: "[A] court of appeals may not displace the Board's choice between two fairly conflicting views."⁸¹ Here, he cited and relied upon *United Insurance*⁸² and noted that even if the court would have made a different judgment had it reviewed the matter in the first instance, the Supreme Court had decreed that a tribunal should defer to the Board's judgement. Said Judge Garland: "While the NLRB may have authority to alter the focus of the common law test . . . , this court does not."⁸³ Here Judge Garland

⁷⁵ *Id.* at 500.

⁷⁶ *Id.* at 501.

⁷⁷ I have long been of the view that the control which is attributable to government regulation is irrelevant and should not be distinguished from employer control. As I said:

"I would reverse current Board precedent and find the controls mandated by Governmental regulation should be considered probative of an employer-employee relationship. . . . [C]ontrols placed by the employer on workers are indicative of an employment relationship, regardless of whether the employer imposes the controls because of Government regulation or for independent business reasons. . . .

It is true that the Government is the source of the regulations and that the carriers have no choice but to impose the regulations if they wish to do business. However, it is also true that the Government does not directly interact with the drivers or owner-operators. . . .

[T]hat, in my view, is the heart of the matter. To the extent that the Government sets regulations, it relies on the carriers to impose and enforce them. The only "face" that drivers see is that of the carrier, not the Government. The reality of such a situation is that of an employment relationship where the carrier has significant control over the drivers' job performance."

Roadway Package Sys., Inc., 326 NLRB No. 72, 854-855 (1998) (Chairman Gould concurring) (citations omitted).

⁷⁸ 563 F.3d at 502.

⁷⁹ *Id.* at 503.

⁸⁰ *Id.* at 502.

⁸¹ *Id.* at 504.

⁸² 390 U.S. 254, 260 (1968).

⁸³ *Fed Ex*, 563 F.3d 492, 504 (D.C. Cir. 2009).

invoked *Chevron*⁸⁴ and its deference to administrative agency expertise and specifically, he took issue with the majority view that the cases reflected a gradual evolution to a test that emphasizes entrepreneurial opportunity."⁸⁵

While conceding that this was a relevant factor (and noting that the Supreme Court had not explicitly referred to it), Judge Garland noted that this was only one of multiple factors to consider--and not the most important one.⁸⁶ His opinion noted that both control and entrepreneurial opportunity had been key considerations and that the "Board gave pride of place to neither one."⁸⁷ In this case, he focused upon the Regional Director's decision which had found employee status in light of: (1) the function performed was part of the regular and essential business performed by FedEx, i.e. the delivery of packages; (2) the vehicle was required to display FedEx specifications, i.e. name, logo and colors; (3) no prior training or experience was required, and the employer provided the training to those with no experience; (4) the vehicle furnished must be approved by the employer; (5) the driver had no discretion not to provide delivery service on any given day--the package must be delivered on the day of assignment, notwithstanding control by the employees or contractors over starting times and breaks.

Moreover, Judge Garland criticized the majority's refusal to take into account other relevant Regional Director findings such as the requirements that (1) drivers wear a "recognizable uniform"; (2) that the vehicles be of a particular color and size range; (3) that the drivers complete a driving course if they do not have prior training and that they submit to two "customer service rides" per year to audit their performance; (4) that the truck and driver be available for deliveries every Tuesday through Saturday.⁸⁸ Said Judge Garland:

The cases have repeatedly cited this particular factor [of whether the drivers perform a regular and essential part of the employer's normal operations] in concluding that workers are employees. In short, there is no basis for discounting the significance of the traditional factors upon which the Regional Director relied in concluding that the FedEx drivers are employees rather than independent contractors.⁸⁹

Notwithstanding the control demonstrated in *Federal Express*, as noted above, the majority had relied upon the fact of the opportunity of drivers to do other work for themselves or other companies. But said Judge Garland: "Do the drivers actually use their trucks for other purposes? Not so much."⁹⁰ All that was in the record was use of the trucks for personal purposes such as moving family members, not entrepreneurial concerns. Again, relying upon the Regional Director's findings that the workers would not be able to use much time for the purpose of other entrepreneurial work even if they wanted to, said Judge Garland: "It is not unreasonable for the NLRB to take the position that a material number of workers must

⁸⁴ See *supra* note 50. Here Judge Garland appears to be in error given the fact that the deference dictated by the 80th Congress and the Supreme Court interpreting the independent contractor exclusion precludes deference in the law, but retains deference in the *Universal Camera* context, where the facts can be interpreted in different ways. The Court says where this ability to interpret the facts in different ways is present, a deference is mandated – and mandated in a *Universal Camera* fashion.

⁸⁵ *Fed Ex*, 563 F.3d 492, 507 (D.C. Cir. 2009).

⁸⁶ *Id.* at 505.

⁸⁷ *Id.* at 509.

⁸⁸ *Id.* at 511.

⁸⁹ *Id.* at 512.

⁹⁰ *Id.* at 514.

actually take advantage of an opportunity before we'll conclude that the opportunity is significant and realistic rather than insubstantial and theoretical."⁹¹

Two themes emerge in the *Federal Express* litigation. The first is an emphasis upon entrepreneurialism or risk taking as a basis for concluding that individuals are independent contractors, notwithstanding the fact that both the Board and Judge Garland have noted that this is not found in the common law criteria articulated by the Court. Control has been the central focus. But, at the beginning of this century, it must be noted that the Court of Appeals for the District of Columbia purported to respond to the NLRB General Counsel's position before the courts in the Bush era⁹² in developing an approach which was something like the one put forward in *Federal Express*. It too focused upon entrepreneurial opportunity for gain or loss. Said the court, in developing in this concept:

For example, as the Board points out, 'the full-time cook is regarded as a servant [rather than as an independent contractor] although it is understood that the employer will exercise no control over the cooking ... Similarly, a corporate executive is an employee despite enjoying substantial control over the manner in which he does his job. Conversely, a lawn-care provider who periodically services each of several sites is an independent contractor regardless how closely his clients supervise and control his work. The full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur – that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.'⁹³

The court's holding in *FedEx*, over Chief Judge Garland's dissent, emerged from this principle, i.e., that entrepreneurialism was the "animating" factor and that the mere potential for entrepreneurial activity, as opposed to its actual exercise, would satisfy for the purpose of establishing independent contractor status.

On the other hand, the Court of Appeals for the Ninth Circuit, in an opinion authored by Judge William Fletcher in *Alexander v. FedEx Ground Package System*⁹⁴ under California common law criteria,⁹⁵ was of the same view as Judge Garland. Of course, even the Ninth Circuit⁹⁶ itself has

⁹¹ *Id.* at 517. However, the dissent viewed the Board's refusal to allow FedEx to prove on a system-wide basis that the number of route sales and the amount of profit on such sales by drivers as deficient. Accordingly, Judge Garland was of the view that this should be remanded for the purpose of garnering such evidence.

⁹² In fact, the Board's brief did not make the argument attributed to it by the Court of Appeals. *See* 2001 WL 36039100. The Board appears to have looked to a wide variety of factors without emphasizing any single one since *Roadway Package*.

⁹³ *Corp. Exp. Delivery Sys. V. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002). The point articulated here was that there are circumstances where control will not adequately answer the issue at hand.

⁹⁴ 765 F.3d 981 (9th Cir. 2014).

⁹⁵ *Id.* at 988.

⁹⁶ *See Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966, 974 (9th Cir. 1978) ("While a balancing of the various indicia of control is somewhat inconclusive, the entrepreneurial characteristics of the owner-operators tip decidedly in favor of independent contractor status"); *Accord, Collegiate Basketball Officials Ass'n, Inc. v. NLRB*, 836 F.2d 143, 145 (3d Cir. 1987) (to make determination under "right of control" test, court examines a number of factors, including the type of services rendered, the possibility of realizing additional profits through the exercise of entrepreneurial skill, and the ownership and maintenance of equipment); *The Painting Co. v. NLRB*, 298 F.3d 492, 500 (6th Cir. 2002) (company "controlled the employment" of the two individuals and neither individual "exhibited any meaningful entrepreneurial or proprietary characteristics that would lead one to believe that they controlled the terms of the work they completed."). *Accord, U.S. v. Silk*, 331 U.S. 704, 708-709, 716, 719 (1947). Then Judge (now Justice) Breyer explained in *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 64 (1st Cir. 1981), *Silk* is significant because it found certain owner operators to be independent contractors under a more expansive standard

recognized entrepreneurial opportunity as an important factor. But the point made by that court and others which have joined in interpreting the NLRA is the one made by judge Garland, i.e., that the test was real opportunities rather than theoretical ones of the kind accepted by the DC circuit in *Federal Express*.

In certain critical respects the facts were similar to those presented in the case before the Court of Appeals for the District of Columbia, with FedEx not dictating working hours but arranging workloads so as to ensure delivery in a given period of time every working day. The drivers could fashion a plan to survey the driver's service area, but the drivers' plan could be rejected and "reconfigured." Up to four "ride-along" evaluations could be conducted by a driver's manager to make sure that the driver was meeting customer service standards required by an agreement between the drivers and the company. The payment for maintenance and expenses of the vehicle could be borne by FedEx but deducted from a drivers' pay. In this case, Judge Fletcher relied upon the more convoluted multi-factored test principles which were adumbrated by the Supreme Court of California in *Borello*⁹⁷ to conclude that the drivers were employees.

As was true in the D.C. case, the Ninth Circuit saw control as partially related to on-the-job clothing, "from their hats down to their shoes and socks."⁹⁸ There were requirements relating to being clean-shaven with neat and trimmed hair and for one to be free of body odor.⁹⁹ Also, though there were no starting times established, there was "a great deal of control over drivers' hours."¹⁰⁰ "FedEx controls drivers' results and it contended this does not include "manner and means in which drivers achieve these results."¹⁰¹ Said the court:

We agree with FedEx that results, 'reasonably understood,' refers in this context to timely and professional delivery of packages. Some but not all of FedEx's requirements go to the 'results' of its drivers' work so understood. Most obviously, no reasonable jury could find that the 'results' sought by FedEx includes detailed specifications as to the delivery driver's fashion choices and grooming...No reasonable jury could find that the 'results' FedEx seeks include having all of its vehicles containing shelves built exactly to the same specifications. Other aspects of FedEx as control—such as limiting drivers to a specific service area with specific delivery locations—also are not merely control of results under California law.¹⁰²

The Ninth Circuit, relying upon extant California authority,¹⁰³ focused upon the requirement that drivers load and unload packages at FedEx terminals every working day to be consistent with "regular schedules" reflecting employee status and employer control notwithstanding the absence of regular hours reflecting a starting and quitting time. The court explicitly rejected the D.C. Circuit's shift away from control to entrepreneurial opportunities, rejecting the holding as having "no bearing on this case."¹⁰⁴ Said Judge Fletcher for the court: "There is no indication that California has replaced its longstanding right-to-control test with the new entrepreneurial-opportunities test developed by the D.C. Circuit."¹⁰⁵ And again,

that considered the remedial purpose of the legislation and "economic reality." Cf. *National Van Lines v. NLRB*, 273 F.2d 402, 407 (7th Cir. 1960).

⁹⁷ See *S.G. Borello and Sons, Inc. v. Dept. of Industrial Relations*, 769 P.2d 399 (Cal. Sup. Ct. 1989).

⁹⁸ *Alexander*, 765 F.3d 981, 988 (9th Cir. 2014) ("FedEx can and does control the appearance of its drivers and their vehicles.")

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 989-990.

¹⁰¹ *Id.* at 990.

¹⁰² *Id.*

¹⁰³ See *Air Couriers Intern. v. Employment Development Dept.*, 59 Cal. Rptr. 3d 37, 47 (3d Dist. 2007).

¹⁰⁴ *Alexander*, 765 F.3d 981, 993 (9th Cir. 2014).

¹⁰⁵ *Id.* Beyond the issue of whether control could be exercised through the means with which drivers perform their work, the court then considered other right-to-control issues: (1) the right to terminate at will--in the view of the

squaring off with the D.C. Circuit's views, the *Alexander* opinion concluded that the actual exercise of control factors reflected in written form is "irrelevant."¹⁰⁶ Said the court: "What matters is that the right exists."¹⁰⁷

Given the "broad" right to control which was reflected in the evidence and that the other factors do not "strongly favor" either employee or independent contractor status, the Ninth Circuit concluded that the drivers were employees within the meaning of the California test—presenting a sharp divide (albeit pursuant to slightly different standards) to the approach taken by the Court of Appeals for the District of Columbia. But finally, there is yet another consideration which makes the DC Circuit approach in *Federal Express* vulnerable and suspect. And this is the same court's decision in *Lancaster Symphony Orchestra*.¹⁰⁸ In that case, Judge Tatel, speaking for the court, considered entrepreneurial opportunity as simply one of a number of factors--just as the Board has done.¹⁰⁹ Significantly, the court noted that ordinarily musicians were not entitled to "fill multiple chairs" (hire someone else to serve in their place), although they were obliged to find last-minute replacements. Noting that musicians here were able to back out of a series of programs and to play for a higher-paying "gig" with another symphony--a term often used to describe the role of jazz musicians who take particular engagements, the court stated that this entrepreneurial opportunity was "limited," and provided "miniscule support" for a conclusion that they were independent contractors. Said the court:

Unlike FedEx drivers, the Orchestra's musicians--even with their ability to back out of a concert in order to take advantage of a more profitable gig--can increase their income only by accepting jobs with other employers. Were this quite minor entrepreneurial opportunity given much weight, it might lead to almost automatic classification of many part-time workers as contractors. Yet as the Board explained, "[p]art-time and casual employees covered by the Act often work for more than one employer."¹¹⁰

Lancaster Symphony is at odds with portions of the *Federal Express* reasoning. As noted, it allows for entrepreneurial opportunities which might exist through "gig" with another employer. As we see below, this is a theme which emerges anew in the ridesharing cases.

court this factor did not favor FedEx enough to indicate that the drivers were independent contractors; (2) the nature of the work--in this case that which was integrated into the FedEx operation, reflecting employee status notwithstanding the opportunity to take on additional routes and hire helpers subject to FedEx's business needs; (3) whether the work is performed under the principal's direction--a factor supporting employee status in light of close supervision; (4) the skill required for the work favoring employee status in light of the fact that no experience is needed, i.e., only the ability to drive itself; (5) provision of tools and equipment. This factor favoring FedEx given the fact that the drivers provide their own vehicles and relevant equipment--here the court concluding that employee status was present due to California judicial precedents holding that it results even where the individual provides his own vehicle or tools; (6) the length of the time for performance of services--independent contractors usually performing within a finite period of time, and indefinite employment and indefinite tenures favoring employee status; (7) method of payment--the fixed nature of hourly pay indicates employee status whereas per-job payment favors independent contractor status. But in fact in *Alexander*, the court noted that the payment was tied to packages, stops, and the ratio of driving time to deliveries, and even though independent contractors may be paid by time or piece as well as completion of a particular service, this still might constitute employee wages in an employment relationship. Also relevant is whether the work is part of the regular business. In this case the drivers performing the pickup and delivery of packages which constituted the heart of FedEx's "core" business as well as the parties' belief—a factor which like method of payment is subordinate to other considerations.

¹⁰⁶ *Id.* at 994.

¹⁰⁷ *Id.*

¹⁰⁸ 888 F.3d 563 (D.C. Cir. 2016).

¹⁰⁹ FedEx Home Delivery, 361 NLRB No. 55 (2014).

¹¹⁰ *Lancaster Symphony Orchestra v. NLRB*, 888 F.3d 563, 570 (D.C. Cir. 2016).

III. The Ride Sharing Cases, Class Actions and *O'Connor*

At this writing, no case has come before the NLRB involving the ride sharing independent contractor-employee controversy.¹¹¹ But the cases have begun to arise in class actions like *Alexander*¹¹² applying state law as well as other proceedings protesting misclassifications which deprive workers of employment benefits provided employees by statutes.¹¹³ A leading one involving approximately 160,000

¹¹¹ But the General Counsel of the NLRB has issued complaints indicating that such workers are employees. See *Bekele v. Lyft, Inc.*, No. 16-2109 (1st Cir. 2017); *Handy Technologies*, *supra* note 6. A British Employment Tribunal has already held that Uber drivers in that country--there are 30,000 in the London area and 40,000 in the United Kingdom as a whole--are employees within the meaning of British labor law. In line with Judge Chen's finding that Uber is a transportation company selling rides and not a provider of services as it has asserted. *Aslam v. Uber B.V.* reasons for the reserved judgment on preliminary hearings sent to the parties on October 28, 2016 (Employment Tribunals, Case Nos. 2202550/2015 & Others), appeal dismissed, *Uber B.V. et. al vs. Aslam et al*, Employment Appeal Tribunal, Before Her Honour Judge Eady QC, Appeal No. UKEAT/0056/17/DA (Nov. 10, 2017); Prashant S. Rao, *Ruling on Drivers in Britain Deals Uber Another Setback*, N.Y. TIMES, Nov. 11, 2017 at B1. See generally Prashant Rao and Mike Isaac, *Uber, Lamenting Cost of 'Bad Reputation,' Loses London License*, N.Y. TIMES, Sept. 23, 2017 at A1; *Uber pays the price for trampling on public trust*, FINANCIAL TIMES, Sept. 23, 2017 at 8; *Trade unions have a role to play in Brexit Britain*, FINANCIAL TIMES, Sept. 13, 2017 at 8 ("Unions can remain relevant if they use their power wisely. The success of the GMB union's employment tribunal against Uber (demanding basic rights for drivers) is an example of how unions can fight for better conditions with a more flexible workforce. Britain's unions have an opportunity: their role is likely to become more important after the UK leaves the EU. They should deploy their influence by advocating for worker protections that fit an open economy and by fighting for workers in the 21st-century industries that are driving economic growth."). Cf. Ben Judah, *I don't say anything. I just drive*, FINANCIAL TIMES, Sept. 30, 2017 at 16.

¹¹² See, e.g., *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014) (holding that the putative class of FedEx drivers are employees under California's right-to-control test); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014) (holding that plaintiff drivers in the class action are employees as a matter of law under Oregon's right-to-control and economic-realities tests); *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313 (11th Cir. 2015) (holding that the employment status of the class of Florida drivers is a genuine issue of material fact to be determined by the jury); *In re FedEx Ground Package Sys., Inc. Emp't Practices Litig.*, 792 F.3d 818 (7th Cir. 2015) (holding that class of drivers are employees under Kansas law); *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995 (8th Cir. 2015) (holding that genuine issues of material fact precluded summary judgment on issue of whether drivers were employees or independent contractors of company); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093 (9th Cir. 2014) (holding that drivers for trucking company were employees under California law).

¹¹³ Under the FLSA in the Obama administration, the Department of Labor issued two important guidance that broadened the definition of employees. In a guidance from January 2016, the Department clarified that joint employment under FLSA and the Migrant Act can be either "horizontal" or "vertical," which would include employees working for two or more employers that are "technically separate but related or overlapping employers," and employees of intermediary employers, such as staffing agencies, who are also employed by another employer. See U.S. Dept. of Labor, Wage & Hour Div., FLSA 2016-1, Joint Employment under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act (2016). In another guidance from July 2015, the Wage and Hour Division addressed the misclassification of employees as independent contractors by encouraging employers to use an economic realities test to apply FLSA's broad definition of employment as "to suffer or permit to work." See U.S. Dept. of Labor, Wage & Hour Div., FLSA 2015-1, The Application of the FLSA's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (2015). Both the joint employment and independent contractor guidance were withdrawn in June 2017 by the Trump Administration's Secretary of Labor, Alexander Acosta. See Press Release, Dept. of Labor, US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (Jun. 7, 2017); See generally WEIL, THE FISSURED WORKPLACE.

In California, individual claims of misclassification can be filed in the California Labor Commissioner's office at the California Division for Labor Standards Enforcement (DLSE) and are often adjudicated together. In April 2017, for example, the Labor Commissioner issued an order in the amount of \$855,285.62 to four port and rail drivers working for XPO logistics, based on claims of misclassification as independent contractors. They joined over 300

of Uber's 700,000 drivers has come before a federal district court in *O'Connor*.¹¹⁴ It has arisen in the context of both a motion for summary judgment as well as class certification.¹¹⁵

Uber maintained that it owned no vehicles and employed no drivers but simply was a "transportation provider"¹¹⁶ with "alleged" independent contractors. Said Judge Chen in *O'Connor*:

in this litigation, Uber bills itself as a 'technology company' not a 'transportation company' and describes the software it provides as a 'lead generation platform' that can be used to connect 'businesses that provide transportation' with passengers who desire rides. Uber notes that it owns no vehicles, and contends that it employs no drivers. Rather, Uber partners with alleged independent contractors that it frequently refers to as transportation providers.¹¹⁷

In examining the summary judgment issue, the court considered Uber's characterization of itself. Federal District Judge Chen said: "Uber's self-definition as a mere 'technology company' focuses exclusively on the mechanics of its platform (i.e., the use of Internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides). This is an unduly narrow frame."¹¹⁸ Noting that Uber sells rides and not software, the court concluded that "Uber is most certainly a transportation company, albeit a technologically sophisticated one."¹¹⁹ The court also noted the "obvious," i.e., that drivers perform a fundamental service for Uber without which it would be impossible for it to operate as a business entity.¹²⁰

port drivers that the Labor Commissioner's office have determined to be misclassified. *See* Order, Decision, or Award of the Labor Comm'r, Case Nos. 05-66467 KR; 05-66468 KR; 05-66595 KR; and 05-66694 KR (Cal. Labor Comm'r Apr. 14, 2017). The California Labor Commissioner's office has also directly adjudicated on the issue of a Uber driver's classification, determining that the plaintiff is an employee. *See* *Berwick v. Uber Techs., Inc.*, Case No. 11-46739 EK, Labor Commissioner of the State of California (June 3, 2015).

The California Public Utilities Commission (CPUC) has also wrestled directly with the issue of regulating and classifying drivers in promulgating permitting regulations for "Transportation Network Companies." The CPUC defines driver status as such: "Every driver of a vehicle shall be the permit/certificate holder or under the complete supervision, direction and control of the operating carrier and shall be: A. An employee of the permit/certificate holder; or, B. An employee of a sub-carrier; or, C. An independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier." CALIFORNIA PUBLIC UTILITIES COMMISSION, GENERAL ORDER 157-D, §5.03. After the landmark decision in *Hargrove v. Sleepy's LLC*, 106 A.3d 449 (N.J. 2013), New Jersey has in place a stringent test that must be met for workers to be classified as independent contractors. Claims of misclassification may be filed directly with the New Jersey Division of Wage and Hour Compliance, and the NJ Department of Labor and Workforce Development routinely conducts random audits for misclassification.

¹¹⁴ *O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

¹¹⁵ Some of this uncertainty has woven its way into the litigation about the ride sharing employers which have begun to emerge during these past three or four years. A major piece of litigation involving these issues is *O'Connor v. Uber Technologies*. The heart of the employee-independent contractor controversy here was presented in an early motion for summary judgment and for class certification. In San Francisco, a federal district judge noted that in this case, the facts were that Uber provides a service allowing for employees who need vehicular transportation to log into the Uber software application through a smartphone, request a ride and to be linked to an Uber application with an available driver. The driver picks up the individual passenger and takes him or her to a final destination. "Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger." Plaintiffs either leased cars from third parties or drove their own personal vehicle. In order to become a "partner" with Uber they had to complete an application process, and in so doing to upload their driver's license information as well as information about registration and insurance. They also had to pass a background test, a "city knowledge test" and to attend an interview with an Uber employee.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1137.

¹¹⁸ *Id.* at 1141.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1142.

This comports with what a federal district court said about Lyft in rejecting the company's contentions that it did not provide for hire transportation services but merely was a contact with drivers to provide "ride referrals."¹²¹ Said that court: "[the] argument that Lyft is merely a platform, and the drivers perform no service for Lyft, is not a serious one."¹²² It thus rejected the proposition that the company acted as a "broker of transportation services."¹²³ The court said in *O'Connor* itself, the argument that Uber is "merely a technological intermediary between potential riders and potential drivers ... is fatally flawed in numerous respects."¹²⁴ Judge Chen also noted that Uber's revenues did not depend on its distribution of software, but rather on the generation of rides by its drivers.

The court also found that Uber bills its drivers directly for the entire amount of the fare and charged a fare that is set unilaterally by Uber without any input by the drivers. A payment system, again unilaterally established, provides eighty percent of the fare that is charged the rider for the driver while the company retains twenty percent as a so called "service fee." The unilateral promulgation of both the fare and the service fee reflects characteristics generally associated with an employer-employee relationship.

Similarly, the court noted that drivers are prohibited from booking outside rides from under the app or otherwise soliciting rides from Uber riders. Uber stated that "the solicitation of such work has zero tolerance which can result in the immediate suspension from Uber network." Drivers are required to ask to request an Uber when the rider inquiries about future pickups. The court found that riders cannot request specific Uber drivers. This control is a factor which weighs in favor of employee status.

Another factor which weighs in favor of an employment relationship is the substantial control over qualifications in the selection process of Uber drivers--in order to qualify as a "partner," a background check and a "city knowledge" exam, as well as an inspection and personal interview are prerequisites. In contrast to the commercial trucking cases, there is no way that a ridesharing driver can contract with or bring in another driver as a substitute in the company involved or in the industry. This makes it difficult or impossible for a company to hire or employ any driver other than the one who is already employed by Uber or Lyft—a practice which we have seen in both commercial trucking and *Federal Express* weighed in favor of independent contractor status. The absence of such a practice in ride hailing weighs in favor of characterizing the drivers there as employees.

Examining the right-to-control issue under California law, the court emphasized that the key question was not whether the right is exercised but whether the party in question has the *right* to exercise it. Noting the so-called "secondary indicia" adhered to in California, the court reiterated the Supreme Court of California's view that none of the factors were "dispositive."¹²⁵ Right to control in California, and in federal labor law, depends upon the ability of the party to whom the service is rendered to control the "manner and means of accomplishing the objective." A key element of this is whether the company can fire its "transportation providers." The drivers in *O'Connor* claimed that they could be fired at any time for any reason, sharing this characteristic with the so-called at-will employees.¹²⁶

Another critical area of dispute related to the hours that employees work. Because they work as much or little as they like, claimed Uber, (except that they must accept one ride every 180 days, or if on

¹²¹ *Cotter v. Lyft, Inc.* 60 F. Supp.3d 1067, 1078 (N.D. Cal. 2015).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *O'Connor*, *supra* note 114 at 1141.

¹²⁵ *Id.* at 1140.

¹²⁶ The concept is discussed and explained in WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW*, 419-428 (Cambridge University Press, 5th ed. 2013).

the so called UberBlack platform every 30 days) they are not like the employees in FedEx who could manage their own time but had to perform their assignment within a given period of time. But drivers have noted that rejecting too many trips can constitute a so-called “performance issue” that can result in the possible termination from the platform. This will undoubtedly require a fact intensive examination. Uber also argued that its drivers frequently have other apps, resulting in the fact that many Uber drivers drive for its major competitor, Lyft, as well. This is a factor which might weigh in favor of its independent contractor status.

But the fact is that many casual or part-time employees are similarly situated and will work for a number of employers. This is the very point made by the DC Court of Appeals in *Lancaster Symphony*, where it noted with approval the Board’s conclusion that the exclusion of workers as employees on the ground that they are part-time or casual would be inconsistent with the Act’s coverage. Moreover, the idea of a “prohibition of moonlighting” is unknown today-- even the word itself is strange to most millennials. For instance, when employers unsuccessfully sought to exclude so-called “salt” employees from their workforce who were employed by a union, they did not contend that this policy against “serving two masters” applied to other employers besides unions.¹²⁷ This is because the practice of employment with more than one employer has become so widespread, moving beyond the original “moonlighting” practice, which employers sometimes attempted to prohibit, i.e., working on the moon nocturnally as well as during the day—prompting some employer concerns that employees were not well rested. The demise of such employer practices and thus the phenomenon of working for more than one employer cannot be viewed as dispositive on the employment on the employee-independent contractor issue. Flexibility in hours is something frequently associated with employees and employee status as well as that of independent contractors--again, a point made by both the Board and the Court of Appeals in *Lancaster Symphony*.

Moreover, it appears that some of the new bonus structures, described below, strongly encourage drivers to “prioritize one app over the other.”¹²⁸ Indeed, Uber’s arrangement providing for a bonus “for exceeding some threshold number of rides during a 3-4 day period or during specific times of day (i.e., rush hours) . . . all but forces me to stay true to Uber and not drive for Lyft,” states an Uber driver.¹²⁹ At the same time, the policy of no prohibitions against working for another company has been retained—but these developments suggest that the policy is more theoretical than real.

True, Uber and other platform companies do not require that drivers work for any particular number of hours, let alone under any particular schedule. But it is difficult for companies to find drivers, as illustrated by Uber’s continuous advertising to recruit¹³⁰ them on AM radio throughout the United States. And, as revealed in the *New York Times*, given a perennial shortage of labor with which such companies are confronted, Uber is using so-called “psychological tricks” to convince drivers that they should work a greater number of hours or, as noted above, that they should go to different locations where

¹²⁷ See *N.L.R.B. v. Town and Country Elec., Inc.*, 516 U.S. 85 (1995); *Tualatin Elec., Inc.*, 319 NLRB No. 147 (1995) (holding that employer’s no moonlighting policy violated NLRA because it was enacted to avoid hiring salts); *Architectural Glass & Metal Co., Inc. v. NLRB*, 107 F.3d 426 (6th Cir. 1997) (employer may lawfully adopt neutral policy against moonlighting if there is no discriminatory intent against the union). Arbitration decisions from the 1950s and 60s have established the principle that moonlighting itself is not just cause for discharge short of the moonlighting employee negatively affecting the business interests of the primary employer. See, e.g., *Janitorial Service, Inc.*, 33 BNA LA 902 (1959); *Firestone Retread Shop*, 38 BNA LA 600 (1962).

¹²⁸ Email from Lorrie Bradley to the author, October 3, 2017.

¹²⁹ Email from Uber Driver to author, November 17, 2017.

¹³⁰ *Id.* at A15.

the company knows there will be many riders who seek transportation.¹³¹ Uber provides a bonus for drivers to recruit others or to work a certain number of hours during a period.

All of these tactics are akin to methods designed for a jogger or walker who is encouraged to complete his or her task with signs that appear on the treadmill saying that one is “almost there” or “halfway towards the goal.” Similarly, Uber provides encouragement to drivers who may be near the achievement of a certain number of rides. States Noam Sheiber, “Psychologists and video game designers have long known that encouragement toward a concrete goal can motivate people to complete a task.”¹³² This is a sophisticated method of control through substantial encouragement which may nonetheless prove attractive to a Federal Express DC Circuit which seeks to make control unimportant in favor of so called entrepreneurialism.¹³³

In examining the above referenced factors, Judge Chen had this to say in *O'Connor*:

Uber’s application data can similarly be used to constantly monitor certain aspects of a driver’s previous behavior. This level of monitoring, where drivers are potentially observable at all times, argues that Uber has a tremendous amount of time and control over the “manner and means” of the driver’s performance A reasonable jury could conclude that Uber’s persistent performance monitoring. . . weighs in favor of finding that Uber drivers are Uber’s employees under California law.¹³⁴

Obviously, as the court noted in *O'Connor*, other factors, such as the extent to which Uber drivers are required to dress “professionally,” or encouraged to play “soft jazz” or NPR on the car radio and to have certain features such as a bottle of water and an umbrella, reflect control. Finally, on the other hand, there is the fact that drivers provide their own vehicles and sign an agreement saying there is no employment relationship. These are relatively unimportant factors (particularly the latter) which weigh in favor of concluding that the drivers are independent contractors.

Yet the driver acquisition and ownership of vehicles were not viewed as dispositive in commercial trucking cases like *Roadway Express*. True, a majority in *Dial a Mattress* relied upon the fact that the employer there was not involved in the selection of the vehicle itself or its acquisition or financing in concluding that the drivers were independent contractors (erroneously in my view), but both Uber and Lyft inspect the vehicles, a feature absent in *Dial a Mattress*.

Finally, both Uber and Lyft initially did not require the drivers to exhibit their insignia or labels on their vehicles (at least at all times). But the fact is that increasing number of drivers have placed the company insignia or label on the windshield of the car for the purpose of both passenger identification as

¹³¹ Noam Sheiber, *How Uber uses Psychological Tricks to Push its Drivers Buttons*, N.Y. TIMES, April 3, 2017.

¹³² *Id.*

¹³³ Some Lyft drivers have said “. . . that the app creates a ‘heat map’ or shaded area on the map that induces drivers to go there to receive higher fares (called ‘surge’ or ‘prime time’ depending on the company) in addition to the bonus structure that encourages being logged in for a certain length of time or completing a certain number of rides. Many drivers have told us that they go to the highlighted areas on the maps with the understanding that the rates will be higher there, only to discover that the rates have lowered when they actually get there. The companies’ position on this is that the fares only reflect supply and demand, so if more divers move to this area, the fares ‘naturally’ drop based on increased supply of drivers, but drivers tend to not credit this explanation based on their experience.” Email from Lorrie Bradley to the author, October 3, 2017.

¹³⁴ 82 F. Supp. 3d at 1151-1152.

well as advertising to the public. And both firms appear to require visible insignia or “trade dress” on the vehicle used.¹³⁵

But whatever the content of the law (albeit predicated upon the NLRA or state law), it seems unlikely that class actions like *O’ Connor* can resolve these issues promptly and effectively in the foreseeable future. Though such actions were supposed to be the principal vehicle through which the independent contractor issue could be resolved, the fact of the matter is that in a series of United States Supreme Court¹³⁶ rulings, that tribunal has not only diminished or eliminated the ability of workers to pursue class actions generally,¹³⁷ but also has enhanced the employer-promulgated individual arbitration procedures through which a worker waives his or her right to proceed through class actions.¹³⁸ The upshot of these rulings has left one remaining issue before the Supreme Court, i.e., the compatibility of such procedures with the Federal Arbitration Act of 1925 and the right to engage in concerted activity under the NLRA.¹³⁹ This is surely a last gasp or longshot designed to rescue workers from judicially devised

¹³⁵ “...both Uber and Lyft now require the display of the company’s logo or ‘trade dress.’ This is either a sticker or a lighted sign displayed on the dash. It is different from e.g. DOT carriers required to display their DOT number or a Fed Ex logo, and can be removed when the driver is off duty, but it is now a requirement.” Email from Lorrie Bradley to the author, October 3, 2017; Lyft, “Stay Compliant With Your Shiny New Trade Dress” (Dec. 7, 2016), <https://thehub.lyft.com/blog/new-lyft-emblem>; Uber, “Uber decal requirements,” <https://help.uber.com/h/421b14ed-0685-4188-9fa3-f2104e881c3f>.

¹³⁶ See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). Cf. *Oxford Health Plans, LLC v. Sutter*, 133 S.Ct. 2064 (2013) (upholding the arbitrator’s ruling authorizing class-wide arbitration and affirming the arbitrator’s ability to decide whether the contract authorized class action arbitration); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (holding that imposing class arbitration on parties who have not agreed to authorize class arbitration violates the FAA). See generally William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization and Class Actions: Justice Ginsburg’s Term*, 36 UNIV. OF HAW. L. REV. 371 (2014); Martin H. Malin, *The Three phases of the Supreme Court’s Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 59-60 (2017). Of course, the law relating to arbitration under collective bargaining agreements is another matter entirely, although the Supreme Court appears to have not recognized this. See generally, William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50: PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Mark I. Lurie, eds., 2011).

¹³⁷ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Of course, as I have made clear previously, the Supreme Court’s hostility to class actions generally has operated almost in tandem with its position on the Federal Arbitration Act. See William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization and Class Actions: Justice Ginsburg’s Term*, 36 UNIV. OF HAW. L. REV. 371, 391-96 (2014).

¹³⁸ See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); See generally Matthew W. Finkin, *Workers’ Contracts Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). This trend has been generally supported by a number of scholars. See, for instance, Samuel Estreicher, *Saturns for Rickshaws: The States in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001); Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REF. 783, 796 (2008). My own position is somewhat more conflicted and nuanced. See generally William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885 (1986); William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMP. REL. L.J. 404 (Winter 1987-88). This general approach is reflected in the California State Bar Committee majority opinion in *To Strike a New Balance: A Report of the Ad Hoc Committee on Termination at Will and Wrongful Discharge*, LABOR AND EMPLOYMENT LAW NEWS, STATE BAR OF CALIFORNIA (February 8, 1984).

¹³⁹ The circuit courts have been split on this issue and the Supreme Court has granted certiorari. Compare *Morris v. Ernst & Young*, No. 13-16599 (9th Cir. 2016), and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), with *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied 737 F.3d 344 (5th Cir. 2013), *NLRB v. Murphy Oil*

anti-class action scriptures. And in this connection, Uber has provided the ability to the driver to “opt-out” and thus has persuaded the judiciary that, in this connection, whatever the outcome of these waivers where arbitration is mandatory, the opt-out provision makes such arbitration lawful in the view of the judiciary because of the ability of the workers to extricate themselves from the arbitration procedure.¹⁴⁰

Another important issue which may yet reach the Supreme Court in the future is the question of whether such ridesharing drivers can avail themselves of the transportation worker exclusion from the Federal Arbitration Act’s coverage. The Act, after all, excluded transportation workers in substantial part because railway employees were well organized (the Railway Labor Act of 1926¹⁴¹ was to be enacted the following year).¹⁴² That is, reasoned the Supreme Court, the basis for concluding that contract employment in this industry would be disruptive.¹⁴³ But drivers for the ridesharing industry are also transportation workers and thus fit literally within the statutory exclusion, thus providing the potential for inapproachability of pro-arbitration and anti-class action Supreme Court jurisprudence. The Court of Appeals for the First Circuit has held that truck drivers and transit workers are part of the statutory exclusion whether they are employees or independent contractors¹⁴⁴ but only if they themselves are involved in conduct which is itself interstate commerce,¹⁴⁵ providing a sharp contrast to a broad legislative use of the Commerce Clause which allows for statutory coverage when the employer does any business across state lines,¹⁴⁶ given the fact that the Federal Arbitration Act reflects a pre-*Jones and Laughlin* understanding of interstate commerce.¹⁴⁷

USA, Inc., 808 F.3d 1013 (5th Cir. 2015), *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), and *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013).

¹⁴⁰ See *Mohamed v. Uber Techs. Inc.*, 848 F.3d 1201 (9th Cir. 2016). Even prior to *Mohamed* the same court had held that the option to opt out meant that Uber drivers were not required to accept a class action as a condition of employment and that therefore, their NLRA rights were not violated. See *Johnmohammadi v. Bloomingdales, Inc.*, 755 F.3d 1072, 1075 (9th Cir. 2014). The NLRB holds the contrary view that, i.e., these opt-out agreements are unlawful. *On Assignment Staffing Services, Inc.* 362 NLRB No. 189 (2015), enf. denied WL 3685206 (5th Cir. Jun. 6, 2016). However, the panel in *Mohamed* amended its opinion in light of *On Assignment*. In *Johnmohammadi and Morris v. Ernst & Young, LLP*, 834 F.3d 975, 982 n.4, it has suggested that this is an open question, given the fact that their decision preceded that of the Board. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

A very thorough and exhaustive article addressing the peculiarities of arbitration in the gig economy context is Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, forthcoming 2016 CHI. L. FORUM — (forthcoming 2017).

¹⁴¹ *The Int’l Brotherhood of Teamsters v. Kienstra Precast, LLC*, 702 F.3d 954 (7th Cir. 2012).

¹⁴² *Id.*

¹⁴³ See *Circuit City*, 532 U.S. 105 (2001).

¹⁴⁴ See *Oliveira v. New Prime, Inc.*, No. 15-2364, at 32 (1st Cir. May 12, 2017).

¹⁴⁵ See *Id.* at 21; *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (Delivery truck driver engages in interstate commerce and exempt from the FAA); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600 (6th Cir. 1995) (FAA exclusions only “apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are”); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that the excluded category of workers “includes only employees actually engaged in transportation of goods in commerce”); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) (Section 1 to cover only “those workers actually involved in the ‘flow’ of commerce, i.e., those workers responsible for the transportation and distribution of goods”).

¹⁴⁶ See, e.g., *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *Polish Nat. Alliance of U.S. v. NLRB*, 322 U.S. 643, 648 (1944).

¹⁴⁷ *Washington Coach Co. v. NLRB*, 301 U.S. 142 (1937).

This then is the position in federal or state court proceedings involving class actions, designed to give drivers employee status to obtain minimum wage, overtime, and other benefits. The obstacles involved in NLRB proceedings are almost equally formidable, whatever the outcome of the cases pending before the High Court involving the compatibility of Federal Arbitration Act of 1925 with the NLRA's protection of "concerted activity."¹⁴⁸ For whatever the position of the NLRB on the question of whether such drivers are employees or independent contractors (it must be said that a new Trump Board¹⁴⁹ majority is unlikely to accord them employee status), pursuit of the convoluted NLRB procedures promises delay¹⁵⁰ and thus a denial of effective remedies.

All of this has turned attention to state and local relief on two levels. The first avenue which has been pursued exists by virtue of the adoption of a legal framework promoting the right of independent contractors to join labor organizations and to engage in the collective bargaining process--a policy that has been adopted in 2015 by the city of Seattle when it enacted an ordinance.¹⁵¹ The second forum relates to the possible development of portable benefits, albeit in embryonic form, as a substitute for statutory protection from which independent contractors have been excluded by statute through state as well as federal legislation.

IV. The Seattle Ordinance

Seattle is the first city¹⁵² to enact legislation which provides through local law an opportunity for the collective bargaining process for drivers in for-hire vehicles and taxis, some of which are operating for employers utilizing platforms (no other state has done so). The ordinance covers any company that sells a ride, whether it be through an app, a dispatch, curbside calling, hailing on the street, or a flat rate. It was enacted on December 14, 2015 by the Seattle City Council.¹⁵³ Finding that the unilateral imposition of contracts upon drivers as well as unilateral changes could "adversely affect the ability of a for-hire driver to provide transportation services in a safe, reliable, stable, effective and economically viable manner,"¹⁵⁴ Seattle has provided these drivers with an opportunity for union representation and collective bargaining through a statutory mechanism administered by the City's Finance Administrative Services Department which has authority to engage in rulemaking.¹⁵⁵

¹⁴⁸ See *supra* pgs. 23-24.

¹⁴⁹ See William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Process*, 64 EMORY L.J. 1501 (2015); William B. Gould IV, Opinion, *Trump trolls 'the Swamp' for NLRB nominee*, S.F. CHRON., Jul. 15, 2017.

¹⁵⁰ These procedures can be circumvented, however, with the use of section 10(j) of the NLRA where appropriate, which authorizes the Board to seek a temporary injunction in federal district court to stop unfair labor practices. See WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW, 243-244 (Cambridge University Press, 5th ed. 2013).

¹⁵¹ SEATTLE, WASH., ORDINANCE 124968 & (IE) (December 23, 2015).

¹⁵² Somewhat similar legislative proposal has been introduced at the state level. California Assemblywoman Lorena Gonzalez Fletcher authored a bill allowing ridesharing drivers to organize in California in 2016, titled the 1099 Self-Organizing Act, but the bill was later pulled amid opposition. The bill would have created a members-only bargaining relationship where majority support for the union in a workplace is not necessary to create the bargaining relationship. The Supreme Court has recognized that a union may bargain on behalf of its members only to protect their section 7 rights. See *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938). See also Jennifer Van Grove, *California bill would let gig workers organize for collective bargaining*, L.A. TIMES (Mar. 11, 2016), <http://www.latimes.com/business/la-fi-gig-workers-bill-20160310-story.html>; Liam Dillon, *Bill to give 'gig economy' workers collective bargaining rights is done for the year*, L.A. TIMES (Apr. 29, 2016), <http://www.latimes.com/politics/la-pol-sac-essential-poli-the-gig-economy-collective-bargaining-bill-wont-p-1461262367-htlstory.html>.

¹⁵³ SEATTLE, WASH., ORDINANCE 124968 & (IE) (December 23, 2015). The Mayor of Seattle did not sign the bill.

¹⁵⁴ *Id.*

¹⁵⁵ See Rule FHDR-1 *Qualifying Driver and Lists of Qualifying Drivers* (SMC 6.310.110 and .735), SEATTLE.GOV (Dec. 29, 2016), http://clerk.seattle.gov/~CFs/CF_320270.pdf; Rule FDHR-2 *Application Process for Designating a*

The ordinance provides for machinery through which for-hire drivers can seek representation by a labor organization to bargain collectively on their behalf and to seek representation as the exclusive representative of the drivers for the purpose of collective bargaining, mirroring the NLRA itself. The ordinance also provides that, in the seeking of representation, the union is entitled to obtain from the so-called “driver coordinators” the names, contact information and license numbers of drivers so that the union can solicit their interest and obtain, if possible, majority support for the purpose of bargaining after an exclusive representative status has been obtained on the basis of support from the majority. In the event that parties are unsuccessful at negotiating a collective bargaining agreement, either side may initiate binding interest arbitration of their differences so long as local government approval of the award is obtained.

Two lines of attack challenging the constitutionality and lawfulness of the ordinance have emerged in both state and federal court in Seattle. The state court proceeding involves the rulemaking authority of Seattle’s FAS and those proceedings adjudicated an attack on the establishment of the collective bargaining process involving the negotiation of an agreement after a union has qualified as an exclusive bargaining representative. Additionally, one of the plaintiffs, Uber, maintained that the rules could not be established in a “piecemeal” through promulgation of procedures relating to union organizing and representation prior to rules regulating the collective bargaining process itself. This contention was rejected by the state court which concluded that such a process was not “arbitrary and capricious,” concluding that, in any event, the city was moving towards the establishment of rules regarding development of negotiation and arbitration.

The rules provide that a so-called “qualified driver” who can participate in the selection of a labor organization and the establishment of a collective bargaining process itself is one that has done more than 52 trips in the 3-month period immediately prior to invocation of the selection machinery.¹⁵⁶ On this issue the Superior Court for King County said that:

The issue that is the most difficult issue [is]... the substance of whether the line that was drawn by the City in defining a qualified driver is arbitrary and capricious...

The Court recognizes the argument that Raiser makes about there not being specific safety-related data as to whether there is a specific correlation to an accident rate verses the number of trips. I am not sure that that is what the Constitution requires in order to justify rule making...

[The City]... was looking to try to find a group of drivers that would correlate to what they were asking them to do in the implementing legislation, which is to provide safe, reliable, stable,

Qualified Driver Representatives (SMC 6.310.110 and .735), SEATTLE.GOV (Dec. 29, 2016), http://clerk.seattle.gov/~CFs/CF_320271.pdf; Rule FHDR-3 *Certification of an Exclusive Driver Representative* (SMC 6.310.110 and .735), SEATTLE.GOV (Dec. 29, 2016), http://clerk.seattle.gov/~CFs/CF_320272.pdf.

¹⁵⁶ Seattle’s rule defining eligible drivers is predicated upon a similar NLRB approach. The NLRB has often applied specific factors and formulas to determine if certain employees are eligible to vote for their collective bargaining representative. *See, e.g.,* Capitol Insulation Co., Inc., 233 NLRB 902, 903 (1977) (considering “factors of length, regularity, and currency of the [workers’] employment” in determining eligibility to vote); Cab Operating 12 Corp., 153 NLRB 878 (1965) (considering the likelihood that certain part-time drivers would work an entire year in determining eligibility to vote); Trump Taj Mahal Associates, 306 NLRB 294 (1992) (finding that on-call employees averaging at least four hours per week in quarter before eligibility date have sufficient regularity of employment to vote); Steiny & Co., Inc., 308 NLRB 1323 (1992) (applying formula to determine voting eligibility in the construction industry); *See also* Roy N. Lotspeich Publ’g Co., 204 NLRB 517 (1973) (reaffirming the rule that an employee must be employed and working on the established eligibility date to be eligible to vote); NLRB v. Tom Wood Datsun, 767 F.2d 350 (7th Cir. 1985) (affirming the Board’s finding that employees not performing actual bargaining unit work on the eligibility date are not eligible to vote).

cost-effective, and economic transportation services... I find that that gets over the Constitutional hurdle despite what the court might have done differently.¹⁵⁷

A. Unit Coverage and Voting

But this approach has spawned numerous issues. First, while full time drivers are estimated to do 10-15 trips per day, those who do 52 or more in a three-month period may have fares and distances which are miniscule, even though they qualify.¹⁵⁸ But second, while the number of drivers excluded is uncertain (some think that those driving only a few hours per week are the majority or close to it), the union which obtains a majority bargains for “all drivers” of the employer.¹⁵⁹ This means that the normal inseparability between the scope of the unit and voting to choose a union under the NLRA¹⁶⁰ is broken. While temporary or part time employees can be excluded from the unit,¹⁶¹ here all such drivers are included and if NLRA principles were followed (as they are for voting eligibility¹⁶²) should vote.¹⁶³ The unresolved issue in this aspect of the Seattle ordinance is whether this departure from NLRA practice is sufficient to establish a judicial conclusion that due process or other constitutional protections have been denied to those included within the unit who are ineligible to vote.¹⁶⁴

This controversy highlights a fundamental problem, i.e., the substantial diversity that exist amongst drivers and the lack of the normal community of interest, to use the federal labor law language. As noted above, the contrast is between retirees, undergraduate and graduate students who may be working only a few hours on the weekends, on the one hand, and full-time drivers who may be working in excess of 60 hours per week and who are disproportionately immigrant workers. That is why, for instance, Senator Gonzalez’s legislative proposals¹⁶⁵ in California provide for “members-only”

¹⁵⁷ Verbatim Record of Proceedings of *Rasier v. City of Seattle* (March 17, 2017), at 71,72.

¹⁵⁸ Email from Dawn Gearhart to the author, November 19, 2017. “If we conservatively estimate the number of trips a full time driver takes as 15 per day for 5 days a week, [the driver would take] 900 trips in twelve weeks. 52 trips [over three months (around 12 weeks)] is only 5.7% of what a full time driver works in the same window of time.” *Id.*

¹⁵⁹ SEATTLE, WASH., ORDINANCE 124968 & (IE) (December 23, 2015) (“‘Exclusive driver representative’ (EDR) means a qualified driver representative, certified by the Director to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator, and authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver-coordinator”).

¹⁶⁰ *Post Houses, Inc.*, 161 NLRB 1159, 1172-1173 (1966); *Sears, Roebuck & Co.*, 112 NLRB 559, 569 n.28 (1955); *Shoreline Enterprises of America, Inc. v. NLRB*, 262 F.2d 933, 944 (5th Cir. 1959).

¹⁶¹ Temporary, merely part-time, or casual employees are not included in the unit and may not get to vote. *Newburgh Mfg. Co.*, 151 NLRB 763, 766 (1965).

¹⁶² *See supra* note 156.

¹⁶³ *Muncie Newspapers, Inc.*, 246 NLRB 1088, 1089 (1979). “In short, the individual’s relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit.” *Pat’s Blue Ribbons*, 286 NLRB 918 (1987). In high-turnover industries, regular part time employees also include persons who are not currently employed but have a recent work history that satisfies Board-designed formulae that seek to identify persons with a reasonable likelihood of reemployment in the reasonable future and who therefore have a legitimate interest in participating in answering the question concerning representation. *See NLRB v. Hondo Drilling*, 428 F.2d 943 (5th Cir. 1970); *Fresno Auto Auction, Inc.*, 167 NLRB 878, 879 (1967); *Davidson-Paxon Co.*, 185 NLRB 21 (1970).

¹⁶⁴ The Supreme Court has made it clear that departure from statutory norms are not necessarily to be equated with Constitutional violations in the election machinery arena. *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979). The plot thickens with the presence of a union security clause. *See Janus v. Am. Fed’n*, No. 16-1466, 2017 WL 2483128 (U.S., Sept. 28, 2017); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v Quinn: Déjà Vu All Over Again?*, THE SUPREME COURT REVIEW 2014 (2014).

¹⁶⁵ *See supra* note 152.

representation and bargaining. The objective is to circumvent the tensions between contrasting groups who have different concerns and objectives. Seattle has attempted to address this issue by excluding some of those on the periphery from voting eligibility but including them within the unit and thus providing for some measure of representation without participation.

B. The Federal Court Proceedings

A second suit was filed in federal district court by the Chamber of Commerce against Seattle and it was initially dismissed on standing grounds.¹⁶⁶ It attacked the ordinance as both a violation of the Sherman Antitrust Act and as preempted by the NLRA. Subsequently, the same argument was made after the ordinance was implemented in January 2017 when the ordinance came into effect and Teamsters Local 117's notice to driver coordinators acting as a trigger. This second action raised the same considerations presented in the earlier complaint. This time around the federal district court addressed the issues presented directly in the context of a motion for preliminary injunction.

The court first examined the Sherman Antitrust Act prohibiting the contract for “[e]very contract, combination, . . . conspiracy, in restraint of trade or” the monopolization of commerce. Said Federal District Judge Lasnik:

One can reasonably infer that the Ordinance will reduce, if not extinguish, any variability in the terms and conditions for which drivers offer their services to the driver coordinators. The anticompetitive potential of all price-fixing agreements is likely to arise and may justify a facial invalidation.¹⁶⁷

The court did not address the broad antitrust issue that frequently arises in connection with unions where their actions seek to represent independent contractors or to regulate their conduct under the Clayton Antitrust Act of 1914, which states that “the labor of a human being is not a commodity or article of commerce” (It prohibits utilization of antitrust law against labor organizations which are “lawfully carrying out the legitimate objects thereof.”).¹⁶⁸ This carves out an exception to the application of antitrust principles established in the Sherman Antitrust Act of 1890¹⁶⁹ which has prohibited conspiracies and restraints of trade, and was supposed to protect competition between businesses. From 1908 onward,¹⁷⁰ unions have been ensnared within these prohibitions.¹⁷¹ The above-noted Clayton Antitrust Act amended the Sherman Antitrust Act, but the Supreme Court nonetheless held that the union economic pressure designed to improve employee working conditions through unionization, which could be viewed as secondary, was still unlawful under antitrust law.¹⁷² The fundamental conundrum has always been that antitrust law is designed to strike down practices which suppress competition, but public policy favoring collective action, freedom of association, and unionization is designed to take labor out of competition.

¹⁶⁶ See *Chamber of Commerce v. City of Seattle*, No. C16-0322RSL, at 1 (W.D. Wash. Aug. 9, 2016) (granting City of Seattle's motion to dismiss because the Chamber of Commerce lacks standing to challenge the Ordinance and its claims are not prudentially ripe).

¹⁶⁷ *Chamber of Commerce v. City of Seattle*, No. C17-0370RSL, at 4 (W.D. Wash. Apr. 4, 2017).

¹⁶⁸ 15 U.S.C. §17 (2012).

¹⁶⁹ 26 Stat. 209 (1890), as amended 15 U.S.C. §1-7 (2000).

¹⁷⁰ See *Loewe v. Lawlor*, 208 U.S. 274 (1908), or *Danbury Hatters*, as it has become more popularly known.

¹⁷¹ See WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW, 14-26 (Cambridge University Press, 5th ed. 2013) (Discussing the impact of *Danbury Hatters* and *United States v. Hutcheson* on the applicability of antitrust legislation to organized labor).

¹⁷² See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

The labor exemption predicated upon the above-noted Clayton Antitrust Act has been established by a framework for subsequent decisions by the Supreme Court since the New Deal era.¹⁷³ Where so-called self-employed independent contractors who are members of the union were involved, the Court,¹⁷⁴ over Justice Douglas' dissent,¹⁷⁵ not only refused to apply the exemption where there was no showing of "any actual potential wage or job competition, or any other economic interrelationship," but has also concluded that the "association" could be subject to dissolution when it was not immunized from antitrust law.¹⁷⁶ Similarly, a boycott by a group of lawyers in private practice who regularly acted as court-appointed counsel for individual defendants was held to be subject to Sherman Antitrust Act strictures, notwithstanding the understanding that "social justifications proffered for respondents' restraint of trade [were not a basis for concluding that it was] ... any less [unlawful]." The restraint of trade conclusion was reached on the grounds that the boycott had as its objectives "price fixing."¹⁷⁷ The one line of authority in which the Court has concluded that regulation of a contractor's conditions of employment is immune from antitrust law is where union action is designed to protect collectively-bargained wages and conditions of represented workers from the competition of independent contractors.¹⁷⁸ But in Seattle there were no collectively-bargained conditions elsewhere in taxis, for instance, to be protected. Presumably this point was not raised by the parties and was thus left unaddressed by Judge Lasnik because of the fact that transportation even within the taxi industry itself within the city of Seattle is non-union.

Thus Judge Lasnik's *Chamber of Commerce* analysis addressed only the so-called government exception from antitrust law, i.e., the conduct that would otherwise be violative of antitrust law is rendered immune from its prohibitions when the object of state and local legislation is enacted for appropriate purposes. The court's *Chamber of Commerce* opinion said that, while it was unclear whether the chamber would succeed on the merits of this antitrust claim, regulations which protect the interests of the citizens and are reasonable, enacted by their states or political subdivisions are appropriate even if the regulations have "anticompetitive effects."¹⁷⁹ But the court noted that the regulation which is relied upon must be clearly articulated and affirmatively expressed as state policy and supervised by the state itself.¹⁸⁰ Said Judge Lasnik:

¹⁷³ *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Hutcheson*, 312 U.S. 219 (1941).

¹⁷⁴ *Los Angeles Meat & Provisions Drivers Union v. United States*, 371 U.S. 94 (1962).

¹⁷⁵ *Id.* at 98.

¹⁷⁶ Here the Court relies in particular upon *Columbia River Packers Assn. v. Hinton*, 315 U.S. 143 (1942), in which it concluded that a controversy involving a sale of commodities was not a "labor dispute" within the meaning of the Norris-La Guardia Act. Said Justice Goldberg with whom Justice Brennan concurred: "to believe that labor union interests may not properly extend beyond mere job and wage competition is to ignore not only economic and social realities so obvious as to not need mention, but also the graphic lessons of American labor union history." *Id.* at 104. Said Justice Douglas: "the court said many years before this age of enlightenment the unions were rightfully concerned with the 'the standard of wages of their trade in the neighborhood.'" *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)." *Id.* at 111.

¹⁷⁷ *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 424 (1990); *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460 (1949). *Cf.* *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (distinguished from *FTC v. Superior Court Trial Lawyers Association* on the ground that a civil rights boycott was involved). *See also* *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

¹⁷⁸ *See* *American Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968); *H.A. Artists & Assoc., Inc. v. Actors' Equity Association*, 451 U.S. 704 (1981); William B. Gould IV, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 49-51 (1981). *See also* *Teamsters v. Oliver*, 358 U.S. 283 (1958); *Milk Wagon Drivers' Union, Local No. 753, Int'l Bhd. of Teamsters v. Lake Valley Form Prod.*, 311 U.S. 91 (1940); *Bakery and Pastry Drivers and Helpers Local v. Wohl*, 315 U.S. 769 (1941).

¹⁷⁹ *Chamber of Commerce*, *supra* note 167, at 4 (citing *Parker v. Brown*, 317 U.S. 341 (1943)).

¹⁸⁰ *Id.* at 5 (citing *Cal Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

the taxi industry in Washington [state] is heavily regulated at a local level under regulatory schemes that allow or require agreements, which in most other contexts, would be invalid as anticompetitive or monopolistic. The statutes have been used in a fairly consistent way, however, namely to allow municipalities to establish rates and other regulatory requirements in the taxi industry. They have never, as far as the Court is aware, been used to authorize collusion between individuals in the industry in order to establish a collective bargaining position in negotiations with other private party... whether existing state law covers, or was intended to cover, the sort of regulation the City attempts through the Ordinance is far from clear. Questions also remain regarding the level of state supervision contemplated by the Ordinance. The City does not establish the terms and conditions under which for-hire transportation is offered. Rather, those terms and conditions are negotiated between private parties, and there is no requirement that the City evaluate the competitive effects of the agreements reached. The City's sole role is to review and approve the negotiated terms. While approval may be sufficient to trigger state immunity under governing case law, it is troubling that disapproval again places the matter back into the hands of private parties, with no state oversight.¹⁸¹

Accordingly, the “potential absence” of any state oversight over the agreements, the lack of evaluation of competitive effect, and the potential impact upon an important transportation industry in Seattle raised “serious questions” in the court’s view about whether the immunity analysis was present (The court was at pains to note that this was not a final resolution of the issues but gave it sufficient pause to fashion the preliminary injunction ruling).

Subsequently, the court provided a final resolution of the issues in addressing Seattle’s motion to dismiss. Judge Lasnik issued two opinions on this matter--the first, after rejecting Seattle’s procedural positions on standing and ripeness, where the court considered both the antitrust and preemption issues. This time around in an August 1 opinion¹⁸² Judge Lasnik took on the antitrust issue first.

In his August 1 opinion, he noted that the city of Seattle relied properly upon a clearly delegated authority “for regulating the for-hire transportation industry to local government units” which were authorized properly to use “anticompetitive means in furtherance of the goals of safety, reliability and stability.”¹⁸³ The court noted that at the preliminary injunction stage it had balked at what it had viewed as a “novel” idea going beyond the establishment of rates and regulatory requirements. But on August 1 the court said:

After full consideration of this matter, the Court finds that a municipality’s creativity in its attempts to promote the goals specified in the statute does not abrogate state immunity. The municipality need not ‘be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit.’... The fact that [the state’s statute in question]... does not expressly authorize collective negotiation regarding the terms and conditions under which for-hire drivers provide their services does not alter the fact that the state clearly contemplated and authorized regulations with anticompetitive effects in the for-hire transportation sphere.¹⁸⁴

Alluding to the key United States Supreme Court *Southern Motor Carriers*¹⁸⁵ ruling the court noted that the state of Washington had intended to displace competition in industry through a regulatory structure satisfying the so-called first prong of the test to fashion a detailed policy implementation within

¹⁸¹ *Id.*

¹⁸² Chamber of Commerce of the United States of America v. City of Seattle, No. C17-0370RSL, 2017 WL 3267730 (W.D. Wash. Aug. 1, 2017), *stayed pending appeal*, No. 17-35640 (9th Cir. Aug. 29, 2017).

¹⁸³ *Id.* at 8.

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

the strictures of governmental immunity from federal antitrust law. The court noted that the Washington statute “expressly authorizes a wide array of municipal regulation including ‘[a]ny other requirement adopted to ensure safe and reliable for hire vehicle transportation service.’ The Ordinance, while an admittedly novel approach to achieving the specified purposes, falls within the scope of the ‘other requirement’ delegation from the state,” said the court.¹⁸⁶ Judge Lasnik noted that the Seattle city council had expressly found that the reliability and stability of the industry was promoted by “job security provisions, scheduling predictability, job training, methods of communicating health and safety information and enforcing health and safety standards, processes for resolving disputes with minimal rancor or conflict, and reductions in industrial accidents, vehicular accidents, and inoperative or malfunctioning equipment.”¹⁸⁷ The overriding theme in this aspect of the August 1 opinion was the court’s unwillingness to “second-guess the efficacy of the means the municipality has chosen to promote safety, reliability, and stability . . . Otherwise, federal courts would be bogged down in local policy decisions and procedural reviews whenever it is alleged that the municipality, though possessing the delegated authority to act, has exercised that authority in an unwise or procedurally defective way.”¹⁸⁸ Through the state policy of displacing competition in this field the so-called first prong of the test was established.

In examining this first prong, however, the court also noted that the Chamber’s contentions that the for-hire ride hailing companies do not provide transportation services would fall within the clearly-articulated state policy, an argument addressed earlier by Judge Chen in a different context. Said Judge Lasnik:

Plaintiffs maintain that they provide technological support to individuals who happen to offer for-hire transportation services and that they are no more subject to regulation under the statutes than the manufacturer of a GPS device would be if a driver happened to use it when offering rides. Until the state clearly articulates and affirmatively expresses a policy to allow anticompetitive regulations of technology companies, the argument goes, the Sherman Act bars the City’s efforts in this sphere. This argument fails for at least two reasons. First, it is simply a variant on the arguments discussed above. Plaintiffs demand a specific authorization for the exact type of regulation at issue here before Parker immunity applies. Such a rule would require prescience on the part of the state legislature and deprive municipalities of the flexibility they need to address new problems in the for-hire transportation network as they arise. Second, the argument takes too narrow a view of the reach of RCW Ch. 46.72 and the state’s authorization of anticompetitive regulations. When determining whether the challenged Ordinance falls within the purview of the state policy, the Court takes a broad view of the authority granted by the statutes, broader even than would be applied when determining whether the municipality’s action were legal under state law. [citation omitted]. The statutes at issue in this case are broad to begin with: they authorize municipalities to regulate ‘privately operated for hire [and taxicab] transportation service’ within their boundaries for specified purposes. Plaintiffs fall within the reach of these statutes. They have contractual relationships with drivers regarding the provision of privately operated transportation services, the very services state law authorizes municipalities to regulate. Plaintiffs, through various software applications, match the for-hire drivers with whom they have contracted with customers in search of rides. Plaintiffs handle the billing and payment functions associated with these transactions. The same cannot be said for the manufacturer of the GPS device the driver uses or the mechanic who fixes her car. Until very recently, plaintiffs were proud of their role in the transportation sector: in their Amended Complaint, plaintiffs credit their ride-referral applications with helping to meet unmet demand for passenger motor vehicle services in the cities where they operate. Dkt. # 53 at ¶ 27. Given the undisputed facts regarding plaintiffs’ role in organizing and facilitating the provision of private cars for-hire in the Seattle market, it is disingenuous to argue

¹⁸⁶ RCW 46.72.162.

¹⁸⁷ *Id.* at p. 10.

¹⁸⁸ *Id.* at 10-11.

that they are beyond the reach of a statute that deems ‘privately operated for hire transportation services’ vital to the state’s transportation system and authorizes regulation thereof. Plaintiffs’ technology and contractual relationships, which control a number of the very activities RCW 46.72.160 and RCW 81.72.210 expressly authorize municipalities to regulate, put plaintiffs squarely within the scope of local regulation under those statutes. The fact that plaintiffs use ‘independent contractors’ rather than ‘employees’--or ‘apps’ rather than telephones --to derive compensation from the transport of passengers does not mean they are not engaged in privately operated for-hire transportation services, especially when the authorizing statute is read broadly as the Supreme Court directs. Combined with the express authority to suppress competition in this sphere, no more is needed to establish either the City’s authority to regulate and or its antitrust immunity.¹⁸⁹

The second prong, considered at both the first and second stages of analysis, is the state supervision test, i.e., active supervision by the state, a matter left largely unaddressed at the preliminary injunction stage because of the court’s previously-expressed concern about the novel legislative approach established by Seattle. But on August 1 the court noted that where a municipality was involved, as it was here, it is the municipality which must “actively supervise the conduct.”¹⁹⁰ Noting the detailed criteria relevant to the establishment of the collective bargaining process and the procedural hurdles that exist in the rules,¹⁹¹ as well as the establishment of mandatory subjects of bargaining,¹⁹² a mandatory interest arbitration system, and the requirement that the Director of Finance and Administrative Services (DFA) approve an agreement imposed through voluntary negotiation, the court concluded that the city had met the active supervision requirement. The court noted that while Seattle did not purport to impose terms and conditions of parties, the director “may not passively accept the agreement proposed by the parties (or the arbitrator), but must compare the proposal to the legislative goals before determining whether to accept or reject it and issuing a written explanation.”¹⁹³ Accordingly, the court concluded that Seattle had not violated the Sherman Antitrust Act and that statute did not preempt the state and local action in question.¹⁹⁴

When a clearly articulated state policy is present,¹⁹⁵ a municipality need not be supervised by the State in order to obtain a government exception to the antitrust prohibitions.¹⁹⁶ It is enough that the state make clear its intent to grant authority in the area of competition, through policy which provides for a

¹⁸⁹ *Id.* at 11-13.

¹⁹⁰ *Id.* at 13.

¹⁹¹ *Id.* at 14.

¹⁹² Rule FHDR-4 delineates so called mandatory subject to bargaining which are relevant to “safe reliable and economically viable” services as follows: “(1.) Best Practices regarding vehicle equipment standards; (2.) Safe driving training and/or practices; (3.) The manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; (4.) The nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; (5.) Minimum hours of work; (6.) Drivers’ conditions of work; (7.) Rules that apply to drivers including discipline, termination or deactivation. In addition, whether for-hire drivers will be required to become members of or make other payments to an EDR will be a mandatory subject. Other than contract provisions that would be illegal or unenforceable or not in compliance with the SMC, the City defines all other subjects not listed in this Rule as permissive subjects.”

On mandatory subjects of bargaining, *see generally* NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1963); Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). *See also* William B. Gould, *The Supreme Court’s Labor and Employment Docket in the October 1980 Term: Justice Brennan’s Term*, 53 U. COLO. L. REV. 116-18 (1981).

¹⁹³ *Id.* at 16.

¹⁹⁴ The state antitrust claim was denied. *Id.* at p. 17.

¹⁹⁵ Southern Motor Carriers Rate Conference, 471 U.S. at 57.

¹⁹⁶ *Id.* at n. 20.

regulatory agency rather than the market itself. Said the Court: “as long as the State as sovereign entity clearly intends to displace competition in a particular field with a regulatory structure, the first prong [clear articulation] is satisfied.”¹⁹⁷

Again, the second prong is that the processes of organizational activity and collective bargaining provided by the government exemption to antitrust law is the requirement of active supervision of private parties. Some government supervision must review the substance of anticompetitive decision.¹⁹⁸ More than agreement between the parties is required, although the Court has held that a private agreement is adequate if a state agency does not take action within a specific period of time because this can constitute adequate supervision under *Parker*.¹⁹⁹

Both at the preliminary injunction and the motion to dismiss stages, the court rejected the arguments put forward by plaintiffs on preemption. At the preliminary injunction stage, the court first examined the preemption issue from the perspective of the Supreme Court’s *Garmon* decision holding that subject matter “arguably” protected or prohibited was preempted.²⁰⁰ It noted that the Supreme Court was of the view that “Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with specialized knowledge and cumulative experience.”²⁰¹ Notwithstanding the absence of a preemption clause in the NLRA, the intent of Congress to preempt has been inferred from the detailed legislation contained in the NLRA, particularly the Taft-Hartley amendments, in which the variegated laws of the states have been displaced.²⁰² Part of the analysis has fashioned a primary jurisdiction role for the Board, providing that the determinations must be left in the “first instance” to a specialized administrative tribunal, i.e., the Board. In this connection, the Seattle court emphasized that neither the Chamber nor the individual plaintiffs has made the assertion that for-hire drivers are employees:

[B]oth have taken the position that the for-hire drivers covered by the Ordinance are independent contractors and not subject to the NLRA. Thus, the Chamber’s claim of *Garmon* pre-emption is not tethered to the facts alleged. Because no party has asserted that for-hire drivers are employees, the issue will not be considered or resolved in this litigation. It is not enough for the Chamber to simply raise the possibility that for-hire drivers may ultimately prove, in some other case, that they are classified as employees.²⁰³

¹⁹⁷ *Id.* at 63-64.

¹⁹⁸ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S.Ct. 1101, 1110-1111 (2015) (“while the Sherman Act confers immunity on the States’ own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor . . . active market participants cannot be allowed to regulate their own markets free from antitrust accountability . . . under *Parker* and the Supremacy Clause, the States’ greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants.”). (See particularly the strong dissent of Justice Alito in concluding that a state agency that all is required for supervision is the existence of a state agency even if it is composed of private parties. *Id.* at 1117. This could suggest that the Seattle ordinance would have little difficulty with Justice Alito and Justice Thomas who concurred with him along with Justice Scalia. But the Seattle issue makes it a labor case and that might produce a different result for those Justices. See BOB WOODWARD AND SCOTT ARMSTRONG, *THE BROTHERS*, 377-378 (1979). Justice Alito’s labor law views have been discussed in some detail in William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v Quinn: Déjà Vu All Over Again?*, *THE SUPREME COURT REVIEW* 2014 (2014).

¹⁹⁹ *Southern Motor Carriers*, *supra* pg. 30; *Ticor*, 504 U.S. at 639.

²⁰⁰ See *San Diego Bldg. Trades Council v Garmon*, 359 US 239 (1959).

²⁰¹ *Id.* at 242.

²⁰² See generally William B Gould IV, *Garmon Case: Decline and Threshold of “Litigating Elucidation”*, 39 U. DET. L.J. 539 (1962).

²⁰³ *Chamber of Commerce*, *supra* note 167, at 7.

The prerequisite, said the court, was a burden thrust upon the Chamber to put forward enough evidence to enable the court to find that the Board “reasonably concludes that drivers are employees subject to the protections and the prohibitions of the NLRA.”²⁰⁴

The second major Supreme Court decision involving this issue is the so called *Machinists*²⁰⁵ case. The ruling involved the question of whether Congress intended for commerce to be unregulated because the parties were involved in the “free play of economic forces.”²⁰⁶ The theory pursued by the Seattle Chamber of Commerce is that although independent contractors are excluded by the statute, the states may not regulate them just as they are precluded from legislation involving supervisors.²⁰⁷ On the other hand, where, for instance, farmworkers²⁰⁸ and growers and domestic servants²⁰⁹ have been excluded by federal law, the states have been allowed to regulate labor-managerial relations involving these two groups. The district court relied upon on the latter line of authority relating to agricultural workers and domestic servants and concluded that those cases governed the instant dispute. And in a subsequent proceeding,²¹⁰ the court rejected other preemption arguments put forward to the effect that union shop provisions and economic pressure which might be characterized as secondary activity, where there are labor organization issues involved,²¹¹ largely on the grounds that facts relating to a potential collision

²⁰⁴ *Id.* Here the court relied upon *Int’l Longshoreman’s Ass’n v. Davis*, 476 U.S. 380, 395 (1986).

²⁰⁵ *Lodge 76, Int’l Ass’n of Machinists and Aerospace Workers v. Wis. Emp’t Relations Comm’n*, 427 US 132 (1976).

²⁰⁶ *Id.* at 140; *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252 (1964).

²⁰⁷ *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 662 (1974).

²⁰⁸ States remain generally free to legislate as they see fit. *See United Farm Workers of America v. Ariz. Agric. Emp’t Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982); *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 921 (7th Cir. 1990); *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1192-93 (D. Ariz. 2013); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 577-78 (D. Minn. 1977) (“[T]here 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 and because that exclusion standing alone is to be understood to mean that federal policy is indifferent . . . the court has concluded that state regulation has not been preempted”). *See generally* William B Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L. REV. 1243, 1271-1272 (2017).

²⁰⁹ The principle established for farmworkers has been applied to domestic and household workers. *See Greene v. Dayton*, 806 F. 3d. 1146, 1149 (8th Cir. 2015).

²¹⁰ *Clark v. City of Seattle*, No. C17-0370RSL, 2017 WL 3641908 (W.D. Wash. Aug. 24, 2017).

²¹¹ Two Ninth Circuit cases support Judge Lasnik’s opinion that the Teamsters in the current case would not be considered a “labor organization” given their non-NLRA members, i.e., in this case, independent contractors. *See Pacific Maritime Association v. Local 63, Int’l Longshoremen’s Union*, 193 F.3d 1078, 1081 (9th Cir. 1999) (the Ninth Circuit found that the definition of “labor organization” is unambiguous based on the plain meaning of the statute, and under that definition a union local representing public sector employees is not a labor organization under the NLRA); *Air Line Pilots Ass’n v. NLRB*, 525 F.3d 862, 868-70 (9th Cir. 2008) (the Ninth Circuit considers “the substance of the dispute in determining whether the NLRB may exercise jurisdiction” over a union that represents both Railway Labor Act employees NLRA employees, and found that none of the union’s NLRA employees are in any way involved in the present case, making the case “fundamentally a Railway Labor Act dispute and, as such, is *pro tanto* exempt from the National Labor Relations Act”).

At variance with Judge Lasnik’s position, however, the Supreme Court in 1962 deferred to the NLRB and its recognized expertise to determine whether a union representing both supervisors and NLRA employees falls under the definition of a “labor organization.” *See Marine Engineers Beneficial Ass’n v. Interlake S. S. Co.*, 370 U.S. 173, 182 (1962) (“the task of determining what is a ‘labor organization’ in the context of §8(b) must in any doubtful case begin with the National Labor Relations Board, and that the only workable way to assure this result is for the courts to concede that a union is a ‘labor organization’ for §8(b) purposes whenever a reasonably arguable case is made to that effect”).

between federal and state regulatory laws were not developed and thus not yet ripe for judicial or administrative consideration.²¹²

At the motion to dismiss stage, Judge Lasnik adhered to his earlier preliminary injunction approach and focused upon the Supreme Court's *Davis* ruling which held that the *Garmon* "arguably" test which requires that it be determined "initially" by the NLRB is "not satisfied by a conclusory assertion of pre-emption ... where NLRB jurisdiction has been invoked."²¹³ The Court has said that if the *Garmon* arguably test:

is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor... The lack of a Board decision in no way suggests how it would or could decide the case if it had the opportunity to do so... [The] better view is that those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.²¹⁴

In reiterating his view that preemption was not present here notwithstanding the primary jurisdiction of the Board resolving what is "arguable" under the NLRA, Judge Lasnik stressed the point the employer took the position that drivers are independent contractors and therefore the claim of preemption "is not tethered to the facts alleged... It is not enough for the Chamber to simply raise the possibility that for-hire drivers may ultimately prove, in some other case, that they are properly classified as employees."²¹⁵

Finally, the court concluded that the mere chronological coincidence of statutory of exclusions of both supervisors and independent contractors at the same time was not a basis for reaching the same conclusion inasmuch as their respective exclusions were enacted for different reasons. Here the court noted that the supervisors were excluded because they posed both a threat to the independence of labor and the rights of management, considerations that were not present in connection with independent contractors.

However, warranting some discussion here are two hurdles which went unaddressed in Judge Lasnik's opinion. The first relates to both the Supreme Court and Second Circuit decisions providing for preemption where the Board has declined to exercise jurisdiction.²¹⁶ It seems to me that these cases are not *directly* on point inasmuch as they involved areas where presumably the Board *could* have taken jurisdiction in its discretion²¹⁷--in contrast to the independent contractor context where Congress has directly precluded the Board from taking jurisdiction and what remains is a fact intensive examination as to which side of a given worker or a group of workers is on the demarcation line. Perhaps the collision between federal and state regulation is less here.

²¹² *Clark v. City of Seattle*, No. C17-0370RSL, 2017 WL 3641908 (W.D. Wash. Aug. 24, 2017). The court also dismissed first amendment arguments to the effect that exclusive representation of employees was a constitutional violation. *Cf. Brown v. NLRB*, 462 F.2d 699 (9th Cir. 1972). The gravamen of the complaint here was that the application of an agreement excluding nonemployees required the employer to "cease doing business" with third party independent contractors.

²¹³ *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 394 (1986).

²¹⁴ *Id.* at 395-396.

²¹⁵ *Chamber of Commerce*, *supra* note 182, at 19 (August 1, 2017 opinion).

²¹⁶ *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947); *NLRB v. Comm. of Interns and Residents*, and *New York State Labor Relations Bd.*, 566 F.2d 810, 812 (2d Cir. 1977).

²¹⁷ That the above referenced authority seems to fit comfortably with *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957), where the states were deemed to be constitutionally deprived of jurisdiction where the Board had refused to exercise its discretion to take categories of cases, thus creating a "no man's land."

In the Seattle ordinance case, the Board has not entered the picture at all--just as this was true in *Davis*. In *Davis* it is clear that the supervisors were excluded just as independent contractors are--but the exclusive problem there was one of assessment of facts. In that case there was no doubt that supervisors are statutorily excluded--the question was whether the facts involving the individual in question supported his exclusion. Under these circumstances, *Davis* precludes preemption of the state or local jurisdiction where the Board has not taken action and where the party claiming preemption has not introduced evidence to support its position.

One difference between *Davis* and the independent contractor controversy involving drivers in ride-hailing is that while a burden is thrust upon a party to engage in an exclusively fact-intensive analysis to establish preemption, the Seattle case deals with a controversy about a broad category of workers newly minted by technological innovation. This was not the case in *Davis*. The question of whether this new industry is within the NLRA, and I think that it is, is quite clearly one for the Board. In contrast to *Davis*, the issue here requires an examination of not only facts but significant conclusions of law as well. *Federal Express*, like the cases which preceded it, is illustrative of this process (the Court of Appeals in *Federal Express* simply got the conclusion wrong!).

The differences here from the relied-upon *Davis* precedent create the distinct possibility that drivers will be shut out in both the federal and state arenas if broad preemption principles are applied – if the drivers are excluded as independent contractors at the federal level, these principles would also deny them a forum in a state or municipality.

A second preemption problem relates to the fact that, notwithstanding the above referenced differences relating to the independence of unions and the rights of management present in the supervisory context, much of what could be said about supervisory unionization in 1947 might also be said about independent contractors today--at least in the view of the 80th Congress which defined the Taft-Harley amendments and was concerned about subjecting workers--in that case supervisors--to the “leveling processes, seniority, uniformity and standardization” associated with unionization.²¹⁸ This could also be said about independent contractors.²¹⁹ The federal judiciary, led by a fundamentally conservative Supreme Court majority,²²⁰ may discern an intent by the 80th congress to cabin union activity to its traditional stronghold of production workers and the like,²²¹ notwithstanding union attempts to break into white collar and professional ranks. This consideration too went undiscussed at the trial level.

²¹⁸ H. Rep. No. 245, 80th Cong. 1st Session 16-17 (1947), 1 Leg. Hist. 307-308.

²¹⁹ In both instances the Supreme Court authority was being reversed. See *NLRB v. Hearst*, *supra* note 41; *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

²²⁰ See generally William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization and Class Actions: Justice Ginsburg's Term*, 36 UNIV. OF HAW. L. REV. 371 (2014). Cf. BOB WOODWARD AND SCOTT ARMSTRONG, *THE BRETHERN*, 377-378 (1979). Federal labor law will preempt state law where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), cited and relied upon in *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984); *accord Livadas v. Bradshaw*, 512 U.S. 107, 120, 134-135 (1994) (declaring a state action to be unconstitutionally preempted where there is an “intricate scheme provided to remedy violations by private actors”); *Hill v. Florida*, 325 U.S. 538, 542-543 (1945) (concluding that a state regulation was unconstitutional and preempted where it stood as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress”); *Nash v. Fla. Indus. Comm’n*, 389 U.S. 235, 239-240 (1967) (declaring unconstitutionally preempted state conduct which has a “direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board”). Only where it can be said that Congress has intended to promote diversity will preemption not apply. See *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979). See also *Chamber of Commerce v. Brown*, 554 U.S. 60, 76 (2008) (holding that Congress can create tailored exceptions “in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies”).

²²¹ *Scofield v. NLRB*, 394 U.S. 423 (1969).

On one point, however, Judge Lasnik is fundamentally unassailable and correct. The fact is that the supervisory language prohibiting collective bargaining at any level is not present in the independent contractor context. The opinion therefore properly relied upon the case authority which provided for state jurisdiction in connection with other exclusions, i.e., farmworkers and domestic employees. But it is quite possible that the federal judiciary--particularly the Supreme Court--may see it differently,²²² given the undiscussed consideration to which I have alluded.

V. The Next Steps Beyond

What if then the Seattle litigation fails for the city on either preemption or antitrust grounds, a prospect that is somewhat more realizable in the preemption arena? What if the drivers and the unions that represent them lose either before the NLRB or the federal judiciary and are cast into the darkness of the independent contractor category, notwithstanding the fact they are not entrepreneurs who could be engaged in price fixing in any sense of the word? What if class actions are crippled anew by arbitration clauses in the last stand against them involving the compatibility of such agreements with the NLRA and its protection of concerted activity itself (recall that above referenced Ninth Circuit rulings would keep Uber clauses intact even if employees prevail as a general proposition)?²²³

Senator Elizabeth Warren of Massachusetts has outlined four areas for reform which take on particular significance if ride-hailing drivers are found to have no rights under federal or state labor laws. These are: (1) providing for the ability of such workers to pay social security contribution and to buy insurance against disability or illness as well as to obtain the credits for paid leave; (2) portable health benefits which move from employer to employer in much the same way that the Affordable Health Care Act has made it possible for employees to retain insurance even though they move to a new employer; (3) the need to streamline existing labor law and the right of all workers, including independent contractors, to avail themselves of the collective bargaining process.²²⁴ No legislative proposals have moved beyond the elementary discussion stage. Most of the more well-publicized union initiatives have taken place in California and New York.

Seattle Local 174, International Brotherhood of Teamsters, was a major proponent of the above-described Seattle legislation and has attempted to organize such workers. But the Teamsters, long opponents of deregulation in transportation, have thus far rejected this avenue in California.²²⁵ One opportunity, short of litigation on the independent contractor-employee issue before the NLRB and the courts, appears to have been the *O'Connor* litigation which provided for an organizational association to represent the drivers who had disputes about the deactivation or dismissal through a dispute resolution mechanism: "Uber has agreed to recognize and fund peer-run drivers associations in California and Massachusetts as part of the settlement of a class action lawsuit over employer status. So far, the Teamsters seem most interested in the opportunity."²²⁶ The same dynamics are present at Lyft as well,

²²² William B. Gould IV, *The Burger Court and Labor Law: The Beat Goes On – Marcato*, 24 SAN DIEGO L. REV. 51 (1987).

²²³ See *supra* note 138.

²²⁴ *The gig economy needs a bargain for workers*, FINANCIAL TIMES (May 24, 2016), p. 8; Barney Jobson and Leslie Hook, *Warren lashes out against Uber and Lyft*, FINANCIAL TIMES (LONDON) (May 20, 2016), p. 4.

²²⁵ Carolyn Said, *Unions make pitch to Uber, Lyft drivers*, SAN FRANCISCO CHRON. (June 17, 2016), A1 and A16.

²²⁶ *Id.* at A16. The court opinion which approved of this procedure. In the settlement agreement in *O'Connor* that was later rejected by Judge Chen, Uber agreed to "promulgate a comprehensive deactivation policy for drivers in California and Massachusetts . . . [and] deactivation will be allowed only for sufficient cause, not at will." Class Action Settlement and Release, *O'Connor v. Uber Techs.*, Case No. 3:13-cv-03826-EMC at 36 (N.D. Cal. Aug. 16, 2013). In addition, Uber also agreed to "allow for the establishment of an association or committee of drivers (the

where employer financed dispute resolution machinery has been put in place.²²⁷ Although the Teamsters have obtained agreement from the city of San Francisco to cancel late fees and penalties for business registration permits for Uber and Lyft drivers by setting up meetings with the city and the members of the Board of Supervisors, the *O'Connor* agreement has not been approved²²⁸ and at this point its decree is not of help.

In New York, however, a very different picture has unfolded. There Uber has recognized an organization known as the Independent Drivers Guild, affiliated with a regional branch of International Association of Machinists and Aerospace Workers (IAM) and the first of its kind.²²⁹ Recall that Uber opposed unionization in both California and in Seattle where it placed television ads during Seattle

‘Driver Association’)” and will “provide some funding to the Driver Association to pay for incidental expenses . . . to enable the Driver Association to carry out its basic functions.” *Id.* at 38-39.

²²⁷ A series of objections about the arbitration process itself have been put forward: The removal of “Lyft’s current at-will termination provision and replace it with a provision that allows Lyft to deactivate drivers only for specific delineated reasons and after notice and an opportunity to cure period is provided; provide all drivers with an optional pre-arbitration dispute resolution program; and provide that Lyft will pay for arbitration fees and costs unique to arbitration for claims brought by a driver against Lyft related to a driver’s deactivation, pay-related issues, or alleged employment relationship with Lyft. The practical result of these negotiated-for provisions is that fewer drivers will be subject to deactivation in the first place, and drivers who are threatened with deactivation, or who have been deactivated, will have a realistic means of getting back on the Lyft platform.” Notice of Motion and Motion and Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Preliminary Approval of Revised Class Action Settlement, *Cotter et al. v. Lyft, Inc.*, Case No.: 3:13-cv-04065-VC (N.D. Cal. May 11, 2016), at 9-10. “For any drivers who want to challenge their deactivation, or threat of deactivation, as not being justified under the Terms of Service, Lyft will pay all arbitration-specific fees for the drivers to arbitrate these claims before a neutral arbitrator. Lyft will also pay all arbitration-specific fees for any claims brought by drivers relating to driver compensation or relating to an alleged employment relationship. Lyft will implement a pre-arbitration negotiation process (which drivers will have the option to participate in), which will provide drivers with the opportunity to resolve minor disputes with Lyft without having to invoke the arbitration process.” *Id.* at 15. But see the critique provided in Uber Lyft Teamster Rideshare Alliance (Ultra), Teamsters Joint Councils Numbers 7 and 42, Helen Herbert, and Valerie Mitchell’s Objections to Final Approval of Class Settlement, *Cotter et al. v. Lyft, Inc.*, Case No.: 3:13-cv-04065-VC (N.D. Cal. Oct. 31, 2016), at 9: “The settlement touts as a significant benefit the requirement that Lyft may terminate drivers only for a specified list of reasons. . . . They further claim that this is a benefit that most workers do not have, comparing it favorably with the protection workers have under collective bargaining agreements. In fact, that is not the case, as the settlement agreement does not contain a “just cause” or equivalent guarantee of fairness or due process recognized under collect bargaining agreements.” “When a deactivation is the result of a customer complaint, Lyft drivers are not provided the details of the complaint and therefore can not rebut the basis of the deactivation. Although the proposed settlement agreement lists broadly-defined “specific actions,” the benefit is minimal due to the opacity of the deactivation process. Under the settlement, drivers are at a disadvantage in contesting their deactivation because they are not provided the contents of the customer’s complaint, Lyft’s evidence, nor permitted to respond to a complaint, as are grievants under a collective bargaining agreement.” *Id.* at 10-11. “Even if the program is implemented to award bonuses to selected favorite drivers, Lyft has excluded bonuses as a subject for which Lyft will pay arbitration fees. If a dispute were to arise regarding the “favorite driver” bonuses between a driver and Lyft, the driver would be left without a meaningful or economically-viable remedy. . . . Even if the favorite driver feature materialized and awarded cash bonuses to drivers, drivers would not have a way to enforce the promise of bonuses, as the fees to arbitrate these issues would far outstrip the likely value of the bonuses themselves.” *Id.* at 16. *See also* In re Safeway Stores, Inc. and Retail Clerks Union, Local 775, 64 BNA LA 563 (1974).

²²⁸ Class Action Settlement and Release, *O'Connor v. Uber Techs.*, Case No. 3:13-cv-03826-EMC (N.D. Cal. Aug. 16, 2013).

²²⁹ Noam Scheiber and Mike Isaac, *Uber Recognizes New York Drivers’ Group, Short of a Union*, N.Y. TIMES (May 10, 2016); Fredrick Kunkle, *Uber recognizes first drivers association in New York City*, WASH. POST (May 10, 2016).

Seahawks games denouncing alleged union practices and demands.²³⁰ Under the New York agreement which is not available to the public, the Guild has a form of representative status for a period of five years and the agreement provides for monthly meetings between the parties where drivers “can raise issues of concern.”²³¹ A dispute resolution procedure has been put in place which provides that the Guild may represent drivers who are appealing decisions by Uber to bar them from the platform. Moreover, drivers are able to buy discounted legal services, discounted life and disability insurance and discounted roadside help for problems that they confront while driving. However, the agreement precludes bargaining over fares, benefits, and other protections, the understanding being that Uber will continue to control these elements unilaterally. The union pledges not only to enter into a no organizing commitment but also pledges not to organize the drivers through procedures like those of the NLRB where, to engage in procedures, the drivers would have to be recognized as employees rather than independent contractors. Moreover, like the *O'Connor* decree contemplated, Uber financially assists the Guild. This has led the Taxi Drivers Alliance, a rival of the Guild to file unfair labor practice charges with the Board in New York City alleging unlawful company assistance strictures which applied to anyone, i.e., employees, covered by the NLRA itself.

However, whatever the disputes about both the secrecy of the agreement and the assistance provided, it must be recognized that (1) historically many of the unions of the Great Depression of 1930s arose from the ashes of subsequently discredited so-called company unions²³² which were prohibited by the Act and drew its author’s (Senator Robert Wagner) special ire;²³³ (2) the Guild has been able to take credit for a number of reforms that have been instituted. In the first place, the app used by Uber, unlike that of many of the taxis, does not provide for tipping. At one point it was said that Uber, in contrast to Lyft, prohibited tipping but in recent years this was eased and in the summer of 2017 the policy was reversed, providing for tipping of the drivers.²³⁴ As noted, Lyft, which has no organization comparable to the Guild, apparently has encouraged tipping for some time.²³⁵

Another issue apparently addressed by Guild relates to so-called waiting time, i.e., when the customer is not ready the question of whether the driver should be compensated for that time. Under the FLSA of 1938 it appears that such time should be compensated if the worker is in fact an employee. Once again, the issues are complicated by virtue of the independent contractor-employee controversy.

Yet another very important issue arises out of Uber’s accounting which involved its commission on fares that included sales tax, rather than on the pretax portion of the fare in New York: “if, for instance, a passenger paid \$20 for a ride, and if taxes accounted for roughly \$2 of that fare, Uber took its commission on the entire \$20 rather than on \$18.”²³⁶ In this matter, however, the Taxi Workers Alliance,

²³⁰ Jessica Lee, *Unionize Uber? Legal fight over Seattle drivers draws national attention*, SEATTLE TIMES (Mar. 29, 2016), <http://www.thestranger.com/news/2016/12/07/24731875/can-uber-convince-its-drivers-they-dont-need-a-union>; Heidi Groover, *As Seattle Uber Drivers Try to Unionize, the Company Doubles Down on a Scare Campaign*, THE STRANGER (Dec. 7, 2016), <http://www.thestranger.com/news/2016/12/07/24731875/can-uber-convince-its-drivers-they-dont-need-a-union>.

²³¹ *Id.*

²³² See, e.g., *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86, 90 (3d Cir. 1943).

²³³ See discussion of legislative history in *Gerawan Farming, Inc.*, 42 ALRB No. 1 at 73 (2016) (Chairman Gould concurring). Compare, however, with the discussion of modern work developments which do not always present the company union problem in *Keeler Brass Auto. Grp.*, 317 NLRB 1110, 1115 (1995) (Chairman Gould concurring).

²³⁴ Carolyn Said, *Uber finally adds tipping: drivers hail long-sought feature in app*, SAN FRANCISCO CHRON (June 21, 2017), C1; Noam Scheiber, *Uber Has a Union. Sort of.*, N.Y. TIMES (May 14, 2017), at 1. However, the author of this article has not always found it easy to do through a credit card – indeed some drivers have the same problem as of this writing.

²³⁵ *Id.*

²³⁶ Noam Scheiber, *Uber’s Awareness of Error in Paying Drivers May Date to at Least 2015*, N.Y. TIMES (June 2, 2017); the matter is spelled out considerably more detailed in a subsequent article from the same author. See Noam

the Guild rival in New York City, appears to have played a key role, “pointing out ‘improprieties in the way Uber was calculating its commissions, as well as other issues involving improper treatment of drivers.’”²³⁷

Of course, an equally important consideration, as Senator Warren’s comments noted, is the absence of benefits and general protection for workers who are characterized or regarded by their employer as an independent contractor. It seems clear that that aspect of the 1944 Hearst decision which held that the presence of fringe benefits would be a consideration in granting workers employee status, has backfired in major respects for drivers, given that Uber’s openly stated view is that it denies benefits because of the consequences for employee status.²³⁸

A portable benefit system, whether negotiated with a union, instituted unilaterally or the product of legislation at the federal or state level, should undoubtedly include “at least a core of health insurance, retirement, and insurance for injured workers, but could be expanded to include optional types of insurance (like vision, dental, life, etc.), paid time off, education and training and potentially even novel products like income-smoothing tools or wage insurance.”²³⁹ President Obama called for a portable benefits program in his fiscal year 2017 budget, advocating for “the development of programs to provide grants to states and nonprofits to design ways to provide retirement and other employee benefits that can be portable and accommodate contributions for multiple employers.”²⁴⁰ Pooled plans in which contributions are made by both workers and employers have already gained acceptance in industries as dramatically different as motion pictures in Hollywood and the construction sector.

Harris and Krueger, in advocating a new or third classification for independent workers in the gig economy, have proposed that so called “intermediaries,” i.e., ridesharing companies, pay half of “independent workers” contributions towards FICA payroll taxes for social security and Medicare and make half of the FICA contributions. However, they have argued that it “would not be efficient or feasible to require intermediaries to provide this class of workers with other protections and benefits, such as overtime protection or unemployment insurance.”²⁴¹ These proposals seem wrong-headed inasmuch as hours of work for such workers, grounded in the fact that many are truly dependent rather than independent, will constitute an inordinate amount of time, unless the matter is regulated by a legal or collective bargaining process. Indeed, although special legislation to address the peculiar needs of independent or dependent workers is appropriate, I am not sure that this should be devised on the

Scheiber, *How Uber May Have Taken Hundreds of Millions from Drivers*, N.Y. TIMES (July 6, 2017), B5. In 2012, the New York City Taxi and Limousine Commission required taxi medallion owners to deduct 6 cents per fare to fund benefits for drivers by promulgating the Fare Reduction Rules, but this regulation was struck down by the New York State Supreme Court in *Ahmed v. City of New York* in 2014. See Noam Scheiber, *Care.com Creates a \$500 Limited Benefit for Gig-Economy Workers*, N.Y. TIMES, Sept. 14, 2016, at B2; *Ahmed v. City of New York*, 988 N.Y.S.2d 842 (N.Y. Sup. Ct. 2014) (holding that the Fare Reduction Rules violated the separation of powers by infringing on the functions of the legislature, and the promulgation of the Rules were arbitrary and capricious). In response to the *Ahmed* decision, New York City Council members introduced a bill that would require the Taxi and Limousine Commission to establish a program to provide taxi and for-hire vehicle drivers with benefits, funded by a surcharge added to fares. The bill is currently in the Committee on Transportation. See NEW YORK CITY COUNCIL BILL, *Benefits for taxi and for-hire vehicle drivers*, Int 1301-2016 (Oct. 13, 2016).

²³⁷ Scheiber, *Uber’s Awareness*, *supra* note 236.

²³⁸ Travis Kalanick, *Growing and Growing Up*, Uber Newsroom (Apr. 2016), <https://newsroom.uber.com/growing-and-growing-up/>.

²³⁹ THE ASPEN INSTITUTE FUTURE OF WORK INITIATIVE (2016), at 11.

²⁴⁰ Michelle Capezza, *Moving Toward a System of Portable Benefits in the Gig Economy*, NAT. L. REV. (January 30, 2017).

²⁴¹ Harris and Krueger, *supra* note 31 at 23.

assumption that they are not employees, given that a substantial number of these drivers seem to possess the characteristics of employees rather than independent contractors.

Professor Cherry and Aloisi have persuasively argued that a third category should not be created given the inevitable litigation about these boundaries and the fact that it would “result in downgrading employees to intermediate status, that would do nothing to eliminate the problem of bogus contractor status.”²⁴² Relying upon comparative experience, they write that the establishment of “[t]hree categories create more room for mischief than two...”²⁴³ With regard to the contention by Harris and Krueger that hours would be too difficult to compute, they state that “there is no lack of data or any difficulty tracing hours. In fact, the platforms that enable matching workers with consumers who need their services also allow for the gathering of data about the work and the workers on a completely unprecedented scale. . . . Indeed, many platforms can measure precisely how much time and effort a worker spends on a task, down to the minutes spent waiting in traffic (in the case of ridesharing app) or the number of keystrokes (in the case of crowdwork). In fact, one of the major concerns with platform work is not difficulty tracing time, work, and hours, as Harris and Krueger posit, but rather the constant and pervasive surveillance through GPS, phone, and app data.”²⁴⁴ Finally, they note that the Harris and Krueger idea to take gig workers out of minimum wage legislation runs contrary to the move to raise the minimum wage currently in process in the United States. They write: “If there is generally a movement to raise the federal minimum wage, why have a proposal concurrently to eliminate minimum wage completely for gig workers?”²⁴⁵ They note that the elimination of rights afforded to employees in the United States is particularly inappropriate given the comparatively inferior conditions vis-a-vis many industrialized nations throughout the world.²⁴⁶

True, the diversity of the workforce in terms of hours worked is substantial. But, if anything, this warrants an approach similar to that employed by the NLRB and the Seattle ordinance under which a demarcation line was established between those workers who use the app with considerable frequency and those for whom it is truly a sideline job, bordering on an outside leisure supplement to earnings or social security, i.e., working on the weekend or a day or two a week every now and then.

In any event, bills have been put forward at the federal and state level to provide for portable benefits and other protections, reflecting a growing need for protection.²⁴⁷ New York, in expanding the

²⁴² Miriam A. Cherry and Antonio Aloisi, *‘Dependent Contractors’ in the Gig Economy: A Comparative Approach*, 66 AMERICAN UNIV. L. REV. 635, 677 (2017).

²⁴³ *Id.*

²⁴⁴ *Id.* at 678.

²⁴⁵ *Id.* at 679.

²⁴⁶ *Id.* at 680.

²⁴⁷ Monica Rondon, *Policies to Protect Workers in the Patchwork Economy: Portable Benefits*, CENTURY FOUNDATION, Aug. 22, 2017; Natalie Foster and Libby Reder, *New Federal Portable Benefits Legislation Follows State and Local Bills*, ASPEN INSTITUTE, May 25, 2017. Of course, the legislation is not always aimed at providing benefits but sometimes denying them. For instance, According to the National League of Cities, at least 37 state legislatures have passed bills that limit to varying degrees the ability to cities to regulate transportation companies in the sharing economy. These states are Arizona, Arkansas, California, Colorado, Delaware, Georgia, HI , Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin. *See City Rights in an Era of Preemption: A State-by-State Analysis*, NATIONAL LEAGUE OF CITIES (2017), <http://nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf>. In recent months, similar bills have been proposed and passed in Texas and Florida. *See Madlin Mekelburg, Texas enacts statewide legislations for Uber, Lyft*, DALLAS NEWS, May 29, 2017; *Gov. Scott Signs Ridesharing Bill*, CBS MIAMI, May 10, 2017.

Separately, New York recently passed a law that allows ridesharing companies to operate outside of New York City. Sarah Maslin & James Barron, *Relief and Trepidation as Ride Hailing Spreads Across New York*, N.Y.

ride-share service to the entire state, has expanded the Black Car Fund, which had provided for-hire workers in New York City with workers' compensation funded by a small consumer surcharge added to the ride, throughout the entire state of New York.²⁴⁸ Senator Mark Warner²⁴⁹ has introduced a bill that would provide portable benefits for independent workers through a Pilot Program Act. This bill would provide so-called independent workers who "do not have access to benefits and protections typically provided to traditional full time-employment." The bill provides that states, local governments or "nonprofit organizations" are eligible to apply for and receive grants which would be designed to create or modify existing models of relating to approaches for the provision of portable benefits to independent workers. Independent workers are defined as "any worker who is not a traditional full time-employee of the entity hiring the worker for the eligible work, including any independent contractor, contract worker, self-employed individual, freelance worker, temporary worker, or contingent worker."²⁵⁰ One virtue of this approach is that no worker is required to surrender employment rights as the Harris-Krueger approach suggests. Non-traditional employees need not be independent contractors--it seems appropriate for both employees and contractors who are unprotected to have access to the benefits described above.

Bills establishing mechanisms to address portable benefits issues have been introduced in jurisdictions such as New York and New Jersey.²⁵¹ Frequently they provide that those who represent worker interests are to be represented in the decision-making. Some others have suggested that this is akin to a guild type of approach in collective bargaining which, as noted above, has been used in construction, theater and film as well as in entertainment generally for many years.²⁵² Under such a framework the guilds could provide a more centralized mode of representation, which might provide a voice for workers that is increasingly absent due to the decentralized system of representation contained in an "appropriate unit" in the United States today²⁵³ and the consequent complete absence of a democratic voice in the

TIMES, July 3, 2017. As part of the New York legislation, ridesharing drivers have access to workers' compensation coverage funded by a small consumer surcharge, through a program previously only available to for-hire drivers in New York City. Natalie Foster & Libby Reder, *New Federal Portable Benefits Legislation Follows State and Local Bills*, ASPEN INSTITUTE, May 25, 2017. Other states have also proposed bills that promote portable benefits for ridesharing drivers. Washington State Rep. Jessyn Farrell recently proposed a bill that would require companies that use independent contractors to put money towards the worker's benefits. STATE OF WASHINGTON HOUSE BILL 2109, H-1606.3 (Feb. 15, 2017). Similarly, New Jersey Assemblyman Troy Singleton sponsored a bill that would require companies to contribute funds to qualified benefit providers to provide benefits for their independent contractor workforce. NEW JERSEY ASSEMBLY BILL NO. 4705 (Mar. 20, 2017).

²⁴⁸ Sarah Maslin & James Barron, *Relief and Trepidation as Ride Hailing Spreads Across New York*, N.Y. TIMES, July 3, 2017.

²⁴⁹ See generally Jenna Portnoy, *Saving capitalism: A restless senator's new obsession*, WASH. POST, October 1, 2016. The idea that Congress should step into the gig economy arena with new legislative initiatives seems to be supported by Secretary of Labor Acosta. See Chris Opfer and Ben Penn, *Sharing Economy Laws are Congress' Gig, Labor Secretary Says*, BLOOMBERG LAW NEWS (Nov. 9, 2017).

²⁵⁰ Senator Warner Press Release, March 25, 2017. See also Tyrone Richardson, *Gig Worker Benefits Bill Gains Republican Supporter*, BLOOMBERG LAW, July 31, 2017 ("A Democratic bill intended to spur experimentation with health insurance and other portable benefits for gig economy workers has gained the support of a Republican senator, sparking optimism that other GOP lawmakers could follow. Sen. Todd Young (R-Ind.) signed on as the only co-sponsor for the Portable Benefits for Independent Workers Pilot Program Act (S. 1251, H.R. 2685). The bill was introduced May 25 by Sen. Mark Warner (D-Va.), a longtime advocate of benefits for gig workers, such as those with Uber and Postmates. Congress needs to "embrace the emerging gig economy as a way to generate upward mobility for Americans," Young told Bloomberg BNA July 31." A House version was introduced with three Democratic co-sponsors).

²⁵¹ See *supra* note 247.

²⁵² Alvin Goldman, *Providing a Collective Voice for Workers in the Changing Work Environment*, EMPLOYEE INVOLVEMENT IN A GLOBALIZED WORLD: LIBER AMICORUM MANFRED WEISS (Berlin Springer, 2005).

²⁵³ David Rolf, Shelby Clark, and Corrie Watterson Bryant, *Portable Benefits in the 21st Century* (June 2016). The Board has held that an appropriate unit in multilocation industries is presumptively a single location. See Sav-On

workplace, let alone union representation. One should expect more activity in this arena as the independent contractor issue heats up--particularly if Democrats and Republicans can come together to reverse *Hearst Newspapers* on its determination that the existence of fringe benefits is a factor arguing in favor of employee status under the NLRA. As noted above, this is a factor which provides a practical obstacle to any kind of consensus in addressing those so-called independent workers who are currently excluded from protection.

To sum up, my own judgment is that Harris-Krueger support for a third classification is misguided given the fact that litigation will produce facts in a good number of instances supporting employee status for such drivers. Yet the fact that *Federal Express* points in the opposite direction, and that preemption as well as antitrust hurdles remain for the Seattle ordinance and those that follow in its wake, could make such a classification an option--though, for the reasons stated by Professor Cherry and Aloisi, hardly the best of all options. Of one thing we can be sure--expanding the independent contractor classification as some gig economy employers want in exchange for a portable benefits program should be a non-starter.²⁵⁴

VI. Conclusion

My own judgment is that a substantial number of the drivers in the ride-sharing taxis are properly characterized as employees rather than independent contractors. The early trucking cases established, for the most part, employee status. The major characteristic which supports the opposite conclusion is the flexibility and number of hours possessed by such workers. But for those who work on a regular basis of 30, 40, 50 hours or more per week, this is likely to be a difference in form as opposed to substance. And, as the Court of Appeals for the District of Columbia has made clear in *Lancaster Symphony*, the notion of part-time work for multiple employers deprives them of employee status is fundamentally inconsistent with the NLRA.

There are two major problems, however. If the D.C. Circuit view of *Federal Express* as opposed to *Lancaster Symphony* is a proper indicator of what future rulings will be, Uber and Lyft would fall into the independent contractor category. If anything, *Federal Express* was a stronger case--or at least equal to the ride hailing cases for employee status--as compared to that which is likely to exist in Uber and Lyft. Again, *Lancaster Symphony*, which is the more recent of the two,²⁵⁵ would seem to undercut the strength of this ruling.

A second and somewhat unfortunate irony is that for Seattle, which has an ordinance covering the more active drivers and asserts jurisdiction because they are independent contractors, my analysis would tend to make the drivers employees and thus more arguably preempted under a *Garmon* or *Machinists* standard. Nonetheless, these will be individualized fact-intensive disputes under *Davis*, preserving the above-noted reliance on that ruling.

Drugs, Inc., 138 NLRB 1032 (1962), *Frisch's Big Boy III-Mar, Inc.*, 147 NLRB 551 (1964), enf. denied, 356 F.2d 895 (7th Cir. 1966); *F.W. Woolworth Co.*, 144 NLRB 807 (1968); *Dixie Belle Mills, Inc.*, 139 NLRB 629 (1962); *Metropolitan Life Ins. Co.*, 156 NLRB 1408 (1966); *Wyandotte Savings Bank*, 245 NLRB 1002 (1979); and *Bowie Hall Trucking, Inc.*, 290 NLRB 41 (1988). Under some circumstances this may be rebutted. *See Prince Telecom*, 347 NLRB 789 (2006).

²⁵⁴ Chris Opfer, *Gig Worker Organizers Still Looking for Road Map*, BLOOMBERG LAW, May 26, 2017 (“A draft bill backed by Handy, Instacart, TaskRabbit, Postmates, GrubHub and other on-demand businesses that’s floating around the New York state legislature, for example, would expand the legal definition of “independent contractor” in exchange for creating a portable benefits system. That kind of deal is a non-starter for some labor groups”).

²⁵⁵ *FedEx I* was issued in 2009, and though *FedEx II* was issued this year, it completely relied upon the reasoning of the earlier decision. *See FedEx Home Delivery v. NLRB (FedEx I)*, 563 F.3d 492 (D.C. Cir. 2009); *FedEx Home Delivery v. NLRB (FedEx II)*, 849 F.3d 1123 (D.C. Cir. 2017). *See supra* note 50.

But even if the employee status issue is won, as I contend it should be, it may be a pyrrhic victory at best because of institutional features which stands in the way of a victory's realization. The first is that because, as noted, all such disputes are inevitably fact specific and different conclusions can be properly reached with regard to different groups of drivers.

The second is that, as a general proposition, there is and will be considerable delay before the NLRB due to its convoluted procedures.²⁵⁶ And, in any event, it is quite likely that in the short run a new and conservative NLRB hostile to employee status, like the Court of Appeals in *Federal Express*, will emerge.

Third, notwithstanding special features for California,²⁵⁷ the issues which have been presented to the Supreme Court in cases involving the compatibility of employer prohibitions of class actions are likely to be won by employers, given the Court's recent precedent and predilections.

Fourth, there is the prospect of state or local legislation. But California has not taken this step. Even if Seattle is successful – and that road contains substantial hurdles--it is likely that corporate influence will induce most states to follow the lead of Texas and others and preempt such legislation. After all, such legislation only has a chance when the state itself has clearly articulated a policy warranting immunization from antitrust law. As bold and imaginative as is the Seattle ordinance, whatever its prospects on appeal, it is noteworthy that no municipality has yet followed in Seattle's footsteps, though some may remain interested. It seems likely that antitrust and preemption law will haunt legislative initiatives, given the composition of the Court and the general tenor of our times.

This then is a twilight struggle, one portion of the policy debate on reducing inequality between our people. In the years to come, it will occupy an increasing amount of public attention in the debate about a reshaped balance of power between labor and capital.²⁵⁸ New litigation, always lengthy and arduous, may take us to the realm of a driverless economy in which jobs involved in the current litigation may no longer exist,²⁵⁹ when the debate could turn to basic issues involving adequate income for all of our people²⁶⁰ regardless of employment or employment status.

²⁵⁶ See WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 38-50 (Cambridge University Press, 5th ed. 2013) (Describing the composition and processes of the Board as a two-section administrative agency with both prosecutorial and judicial functions, and outlining the doctrines of preemption and primary jurisdiction of the Board's work).

²⁵⁷ See Private Attorney General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698-2699.5.

²⁵⁸ Substituting for the platform in the future, those who seek services within the gig economy may utilize Blockchains, the new technology that creates an online ledger of all transactions that anyone can have access to. Blockchain technology has existed for a few years in the financial services industry, but is just beginning to be applied to the employment and job-sharing context. The most important part about this technology in the sharing economy is the fact that we may get to a point where we no longer have a need for platforms like Uber and Lyft. This is because those who seek services (such as a ride) can post their needs in real time on the online ledger simultaneous to those looking to provide the service (the drivers). The system will match these two individuals in a transparent way and maximize the efficiency for both parties, making sure that the information transfer is fair and secure. See Jasmine Ye Han, *Gigs Gone Wild: Could Blockchain Make Freelancing the Norm?*, Bloomberg BNA Daily Labor Report (Nov. 30, 2017). My research assistant, David Huang, has been helpful in explaining this concept to me. See Email from David Huang to the author, December 3, 2017.

²⁵⁹ See Russ Mitchell, *Driverless cars are the future, and the ugly battle to dominate the field is on*, L.A. TIMES, May 16, 2017. *But see Not So Fast on Self-Driving Cars*, N.Y. TIMES, Oct. 15, 2017 at 8:

"There's no doubt that a driverless future would profoundly change society, even in ways we're not even considering yet. People might stop buying cars because services like Uber, once its cars are automated, would be cheaper to use. That could cause mass unemployment for taxi drivers and greatly reduce car sales, potentially

hurting the economy. It would also make parking garages and parking spaces superfluous, freeing up valuable real estate.

More people might decide to live, say, 100 miles from their workplaces because algorithms would make traffic flow more smoothly and allow people to nap, work or watch Netflix while commuting.

Cities could be forced to put up barriers separating cars from pedestrians, who might feel emboldened to walk into traffic believing that cars would automatically stop for them...

Automakers, lawmakers and regulators need to do more to perfect this technology, and reassure the public. There is a lot riding on that work.”

²⁶⁰ See, e.g., ANDY STERN, WITH LEE KRAVITZ, *RAISING THE FLOOR: HOW A UNIVERSAL BASIC INCOME CAN RENEW OUR ECONOMY AND REBUILD THE AMERICAN DREAM* (2016).