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## Labor's Antitrust Problem: A Case for Worker Welfare

**ABSTRACT.** The common-law definition of “employee” has been subject to increased scrutiny after accusations that companies, notably Uber and Lyft, deprive workers of benefits by classifying them as independent contractors. States have responded by broadening the definition of “employee,” but these workers remain subject to antitrust liability for organizing. This Note demonstrates that such worker liability is economically suboptimal and inconsistent with legislative history, and that antitrust law must preserve worker welfare. Returning to the liability currently faced by independent contractors, this Note proposes a two-pronged approach, based in federal agency guidance and state legislation, for importing a broader definition of “employee” into the antitrust context.

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## INTRODUCTION

In 2016, an Ethiopian immigrant Uber driver filed for bankruptcy after Uber decided that his Lincoln Town Car no longer qualified for its premium Uber Black service.<sup>1</sup> Despite driving sixteen hours per day for Uber's standard service, he was unable to make payments on his Uber-provided car and phone. In an interview, he explained:

The thing is, we don't have [a] union, and nobody [is] going to listen to us, and we just accept[] whatever they say. So we don't have any choice to fight with these people. They're millionaires, they have the money, so they can do what they want, and there's no competition.<sup>2</sup>

According to an estimate by McKinsey, up to twenty to thirty percent of the working-age population in Europe and the United States engage in "independent work" of the sort engaged in by Uber drivers.<sup>3</sup> While many forms of independent work pay well, anecdotes from for-hire drivers reveal that many independent contractors fear for their personal safety and work long hours for little pay, while having limited leverage to demand better.<sup>4</sup>

The same year, Seattle tested the boundaries of antitrust law by passing Ordinance 124968, which allows for-hire vehicle drivers to bargain collectively with their managers.<sup>5</sup> Many for-hire drivers, like Uber and Lyft drivers, are not

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1. Kalmanovitz Initiative for Labor & the Working Poor, *The Uber Workplace in D.C.*, GEO. U. 7 (2020), <https://lwp.georgetown.edu/wp-content/uploads/sites/319/uploads/Uber-Workplace.pdf> [<https://perma.cc/V8WS-F825>].
  2. *Id.*
  3. McKinsey Glob. Inst., *Independent Work: Choice, Necessity, and the Gig Economy*, MCKINSEY & COMPANY 26, 31-32 (Oct. 2016), <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> [<https://perma.cc/GXY9-N2YP>].
  4. See Kalmanovitz Initiative for Labor & the Working Poor, *supra* note 1, at 7, 14-15; Lawrence Mishel, *Uber and the Labor Market*, ECON. POL'Y INST. 2 (May 15, 2018), <https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy> [<https://perma.cc/L7FH-NLBR>] (computing average Uber driver's wage to be \$9.21/hour); Michael Sainato, 'I Made \$3.75 an Hour': Lyft and Uber Drivers Push to Unionize for Better Pay, GUARDIAN (Mar. 22, 2019, 2:00 PM EDT), <https://www.theguardian.com/us-news/2019/mar/22/uber-lyft-ipo-drivers-unionize-low-pay-expenses> [<https://perma.cc/MXM3-CAVT>].
  5. Seattle, Wash., Ordinance 124968 (Dec. 14, 2015) (codified at SEATTLE, WASH., MUN. CODE § 6.310.735 (2020)). For an example of labor activism within the gig economy, see Hannah Jones, *Minneapolis Uber Drivers Are Striking May 8 over Sub-Minimum Wages*, CITY PAGES (May 1, 2019), <http://www.citypages.com/news/minneapolis-uber-drivers-are-striking-may-8-over-sub-minimum-wages/509223101> [<https://perma.cc/T7SK-FKUP>].

formally employed by their managers and do not fall under the collective bargaining protections of the National Labor Relations Act (NLRA), which applies only to employees.<sup>6</sup> By granting independent contractors the right to bargain collectively, Seattle's ordinance sits at the boundary of antitrust law's labor exemption. While unions of *employees* are exempt from antitrust liability under express provisions in the antitrust statutes,<sup>7</sup> courts have long held that associations of *independent contractors* are not exempt.<sup>8</sup> Therefore, contractor organizations enabled by the Seattle ordinance may violate the antitrust laws.<sup>9</sup>

The ordinance is one response to growing concern over the rights of independent contractors in the gig economy, where workers have autonomy over some aspects of their work (e.g., hours) but also often lack control over their wages and are subject to stringent conditions regulating use of the gig platform.<sup>10</sup> States have passed legislation to expand the legal definition of employment used in minimum-wage orders, benefits requirements, and unemployment insurance statutes<sup>11</sup> — but what remains notably absent from the discussion, and this resulting legislation, is whether independent contractors should be protected from antitrust scrutiny. The Seattle ordinance brings this question to the fore and poses a larger question about the broader goals of antitrust: how should the law balance its concern for deconcentrating power against the recognized right of labor to organize, and under what guiding principle?

To maximize social welfare and give force to the original purpose of the federal antitrust laws, antitrust law must preserve worker welfare. This Note develops and applies a worker welfare standard to the specific case of independent

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6. 29 U.S.C. § 157 (2018).
  7. 15 U.S.C. § 17 (2018); *see also* *United States v. Hutcheson*, 312 U.S. 219, 232 (1941) (discussing the “explicit command” of the antitrust statutes exempting “trade union conduct directed against an employer”); *Taylor v. Local No. 7, Int’l Union of Journeymen Horseshoers*, 353 F.2d 593, 605 (4th Cir. 1965) (noting that “boycotting and price-fixing activities” by employees against their employers are exempt under antitrust laws).
  8. *See infra* note 94 and accompanying text.
  9. *See* *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 776 (9th Cir. 2018).
  10. *See generally* DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2017) (describing the broader phenomenon of “fissuring,” in which companies contract out work rather than hire employees, and its negative effects on workers); Valerio De Stefano, *The Rise of the “Just-in-Time” Workforce: On-Demand Work, Crowdsourcing, and Labor Protection in the “Gig-Economy,”* 37 *COMP. LAB. L. & POL’Y J.* 471 (2016) (discussing misclassification in the gig economy and the importance of recognizing an intermediate category of workers between employees and independent contractors).
  11. *See, e.g.*, 2019 Cal. Stat. 2888. *See generally* Anna Deknatel & 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. CHANGE* 53, 55 n.11 (2015) (collecting examples of such legislation).

contractors to show that such contractors should be allowed to organize under certain conditions. While the question of independent-contractor organizing is not new<sup>12</sup>—nor is the notion that antitrust law should protect laborers<sup>13</sup>—this Note contributes to the literature by (1) outlining a worker welfare standard for antitrust law, drawn from legislative history and welfare economics and (2) proposing that agency guidance and state action are two potential mechanisms for promoting independent-contractor welfare.

As a policy matter, the objectives of antitrust law in the United States remain hotly contested.<sup>14</sup> While the proximate goals of antitrust are generally clear—to prevent the accumulation and exercise of market power—case-by-case analysis reveals subtleties and competing concerns that can only be resolved by appealing to some larger guiding principle. Perhaps the most familiar guiding principle is consumer welfare: one understanding of consumer welfare, pioneered by economists of the Chicago School, suggests that antitrust enforcers should be primarily concerned with maximizing output and minimizing price, because both are good for consumers.<sup>15</sup> Under this view of consumer welfare, a merger between two large companies is viewed as generally harmless from an antitrust perspective if it results in lower prices. But many have critiqued this formulation for excluding important factors like quality and innovation.<sup>16</sup> And more recently, scholars in the neo-Brandeisian tradition argue that antitrust enforcers should prioritize competition—that is, they should ensure that companies must fight for business to prevent the undue concentration of economic and political power

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12. See Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016); see also Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727 (2018) (discussing nontraditional modes of worker organization within the technology sector).
  13. See, e.g., Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019); see also Becky Chao, *At the Intersection of Labor, Employment, and Antitrust Law*, NEW AM. BLOG (Mar. 13, 2018), <https://www.newamerica.org/millennials/dm/intersection-labor-employment-and-antitrust-law> [<https://perma.cc/H52S-PB3N>].
  14. See, e.g., Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987); Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013).
  15. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 107-10 (1978).
  16. See, e.g., *Capitalism’s Populists*, CHI. BOOTH REV. (Aug. 8, 2018), <https://review.chicagobooth.edu/public-policy/2018/article/capitalism-t-populists> [<https://perma.cc/WW9V-FUU2>].

in any single entity.<sup>17</sup> Following this latter approach, a large company that reduces prices may still be harmful if it excludes competitors.

But these principles alone cannot justify antitrust law's labor exception. From the consumer welfare perspective, labor organizing may be detrimental because it can lead to increased consumer good prices and restricted output. Likewise, if the goal of antitrust is to better society by limiting consolidation among economic actors, one would expect antitrust law to limit union activity.<sup>18</sup> But the antitrust statutes do the opposite: labor organizations are exempted from antitrust liability under section 6 of the Clayton Act,<sup>19</sup> and federal courts no longer have jurisdiction to enjoin lawful labor actions, even for antitrust reasons, under the Norris-LaGuardia Act.<sup>20</sup> To an observer who believes antitrust exists to reduce consumer prices and increase output, these provisions may seem like anomalies. But we can resolve these anomalies in at least a couple of ways – modify our normative assumption about the aims of antitrust law or regard the union exemption as the product of interest-group politics. Even if we take the latter path, interest-group politics can reflect the democratic will and provide important insights into the purpose of antitrust.

In this Note, I show that the union exemption should be read to encompass a broader concern for the welfare of workers. In other words, antitrust law should be seen not merely as protecting consumers from producers, but also labor from capital. My primary justification is drawn from welfare economics and the “theory of the second best,” which suggests that when a certain market distortion cannot be removed, it may be economically optimal (i.e., the next best

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17. See, e.g., Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 *FORDHAM L. REV.* 2543 (2013); Sanjukta Paul & Sandeep Vaheesan, *Make Antitrust Democratic Again!*, *NATION* (Nov. 12, 2019), <https://www.thenation.com/article/economy/antitrust-monopoly-economy> [<https://perma.cc/7ZN8-NMWX>] (explaining that uncritical emphasis on competition without a focus on fostering “cooperation among consumers and small players” would be insufficient for a successful, progressive antitrust regime).

18. Sanjukta Paul argues that the role of antitrust law is not merely to promote competition but to “allocate economic coordination rights,” and highlights how firms themselves are quintessential examples of economic coordination that have largely been exempted. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 *UCLA L. REV.* 378, 380 (2020). Paul ultimately suggests there would be nothing anomalous about granting workers more leeway to organize and argues that distribution of coordination rights would be no more or less preferable than the one in the status quo. *Id.* at 382.

19. 15 U.S.C. § 17 (2018). For labor practices that are specifically protected, see also section 20 of the Clayton Act, 29 U.S.C. § 52 (2018).

20. 29 U.S.C. § 105 (2018).

option) to introduce a countervailing distortion.<sup>21</sup> An ideal competitive labor market would have no market power on either the supply side or demand side, but some degree of rent-extracting market power on the demand side (i.e., firms) is inevitable due to the limited resources of enforcement agencies and labor-market frictions. If concentration is inevitable among employers, permitting concentration among workers is the next best way to (1) counteract abuse and rent-extractive behavior from employers and (2) move income from capitalists to workers, who by virtue of their relatively low income may receive higher marginal utility from income.<sup>22</sup> Further justification can be found in the legislative history of the major antitrust statutes. During congressional debate over the antitrust laws, key legislators expressed their intent not only to preserve the organizing power of labor, but also to support affirmatively the accumulation of labor power to contest concentrations of capital.<sup>23</sup> Thus, legislative intent provides justification for worker welfare beyond a strictly economic reading of the antitrust laws. Even when labor organizing may not be the most “efficient” economic choice,<sup>24</sup> it may still comport with the drafters’ goal of protecting individuals from the economic power of corporations.

Worker rights under the antitrust laws have received more attention recently,<sup>25</sup> particularly within the context of labor monopsony, or concentration in labor demand;<sup>26</sup> but there is no judicial, political, or scholarly consensus around how or whether regulators should consider the welfare of workers when

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21. R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). For another application, see Paul Krugman, Opinion, *The Big Green Test*, N.Y. TIMES (June 22, 2014), <https://www.nytimes.com/2014/06/23/opinion/paul-krugman-conservatives-and-climate-change.html> [<https://perma.cc/65SX-4T4T>].
  22. See *infra* Section I.A.
  23. See *infra* Section I.B.
  24. For approaches to describing economic efficiency, see *infra* note 36 and accompanying text.
  25. See generally Lao, *supra* note 12 (critiquing the antitrust liability faced by gig-economy workers who attempt to organize); Paul, *supra* note 12 (tracking the history of independent contractor antitrust liability and suggesting legal approaches to reconsider that liability).
  26. See, e.g., Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, HAMILTON PROJECT (Feb. 2018), [https://www.hamiltonproject.org/assets/files/protecting\\_low\\_income\\_workers\\_from\\_monopsony\\_collusion\\_krueger\\_posner\\_pp.pdf](https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf) [<https://perma.cc/LV3H-FG4U>]; Ioana Marinescu & Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony* (Dec. 21, 2018) (unpublished manuscript), <https://rooseveltinstitute.org/publications/a-proposal-to-enhance-antitrust-protection-against-labor-market-monopsony> [<https://perma.cc/FN2Y-EUXQ>].

conducting antitrust analysis.<sup>27</sup> This Note proposes a conceptual framework of worker welfare and then applies it to the case study of independent contractors' organizations—an issue of concentration in labor supply. While independent-contractor liability under antitrust law for organizing has been well documented and criticized,<sup>28</sup> this Note contributes to the literature by assessing that liability under a broader worker welfare standard and setting forth a policy proposal to remedy that liability.

In Part I of this Note, I present a normative framework, drawing on welfare economics and legislative history, to demonstrate that the goals of unions and workers are generally consistent with antitrust law. In Part II, I propose a doctrinal definition of worker welfare, drawing from the existing consumer welfare standard and labor economics. In Part III, I apply the standard to the case study of independent-contractor organizations, and present a two-pronged proposal for promoting worker welfare through those organizations, focusing on agency guidance and state action. Part IV concludes.

## I. THE NORMATIVE CASE FOR WORKER WELFARE

The brevity of the federal antitrust statutes requires jurists and policymakers to resort to other means of shaping antitrust policy. Though legislative history is often referenced,<sup>29</sup> economic reasoning has become the predominant mode of antitrust analysis in the last several decades.<sup>30</sup> While jurists and economists have debated the exact objective of antitrust law even under an economic analysis,<sup>31</sup> this Part demonstrates how labor organization is instrumental to a commonly asserted economic objective—welfare maximization—and also consistent with the intent of the drafters of the federal antitrust statutes.

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27. In 1973, Sar Levitan and Robert Taggart proposed an index of worker welfare based on “[e]mployment and earnings [i]nadequacy,” which was to describe the fraction of the nation’s labor force that was “subemployed” with below-average incomes. While that proposal is similar in spirit to the one made by this Note, it differs distinctly in purpose because it is macroeconomic and analyzes the nation as opposed to transactions. Workers are treated as binary outcomes based only on employment and wage (a reasonable and essential simplification for a macroeconomic index), and other characteristics, such as working conditions and training, are ignored. Sar A. Levitan & Robert Taggart, *Employment and Earnings Inadequacy: A Measure of Worker Welfare*, 96 MONTHLY LAB. REV. 19, 21 (1973).

28. See Lao, *supra* note 12; Paul, *supra* note 12; see also Hirsch & Seiner, *supra* note 12.

29. For an overview of the legislative history of the Sherman Act, see Elzinga, *supra* note 14, at 1191 n.2.

30. See Brodley, *supra* note 14, at 1025 (“[E]conomic efficiency increasingly dominates antitrust discourse.”). *But see* Wright & Ginsburg, *supra* note 14, at 2407–09 (responding to the nascent consumer-choice-or-competition framework, which they describe as noneconomic).

31. See, e.g., Brodley, *supra* note 14; Elzinga, *supra* note 14.



### A. *Welfare Maximization*

The primary justification for promoting labor organization through antitrust is that doing so would maximize social welfare given institutional constraints. Social welfare refers to general well-being or utility<sup>32</sup> and differs from Posner's concept of "wealth" or economic surplus, which refers to the amount society is willing to pay for things the economy produces.<sup>33</sup> One common approach in antitrust is to look at "consumer welfare," which may be a confusing term because it is often used to denote the economic surplus of final good purchasers, a concept closer to Posner's concept of "wealth" than the economic concept of social welfare.<sup>34</sup> Under an approach that seeks to maximize consumer surplus, if price decreases and output increases, consumers are assumed to be better off.<sup>35</sup> But while maximizing economic surplus leads to economically efficient outcomes,<sup>36</sup> it ignores distributional issues.<sup>37</sup> This is because surplus, unlike utility, does not diminish on the margin.<sup>38</sup> For example, although we might assume that two

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32. A useful technical explanation is provided by the standard graduate microeconomics textbook, ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, *MICROECONOMIC THEORY* 825-31 (1995), which traces this approach back to PAUL A. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* (1947); and Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. ECON. 310 (1938).
33. For an explanation and justification of wealth maximization, see RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 60-96 (1983). For a useful comparison to social welfare and critique of wealth maximization, see Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1658-62 (2018). The Law and Political Economy School has also critiqued Posner's approach for omitting considerations of power and politics from market issues. See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1818-23 (2020).
34. See Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm., *Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get* 4-5 (Feb. 15, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1455663/welfare\\_standard\\_speech\\_-\\_cmr-wilson.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf) [<https://perma.cc/23N5-L3HV>].
35. *Id.*
36. Although beyond the scope of this Note, economists have different ways of describing economic efficiency. Wealth maximization produces "Kaldor-Hicks efficiency," which only requires that total economic surplus has been maximized. In the pursuit of Kaldor-Hicks efficiency, it is permissible to enact policies that hurt some and help others, as long as the net effect is positive. This is to be contrasted with the "Pareto efficiency" criterion, under which no remaining policies can be enacted without making at least one person worse off. Enacting a policy that hurts some and helps others does not directly approach Pareto efficiency. See Liscow, *supra* note 33, at 1658-60.
37. *Id.* at 1660-61.
38. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 197-201 (1980); Liscow, *supra* note 33, at 1660-61.

people each with \$50 have greater aggregate utility (happiness) than a person with \$100 and a person with \$0, there is no difference in the surplus held by two people with \$50 and one with \$100. By focusing on social welfare, this Section aims to highlight the distributional issues implicated by antitrust law. But rather than analyze welfare along traditional producer-consumer lines, it examines the comparative welfare of labor suppliers and labor demanders—or, in another sense, labor and capital—and demonstrates that the economic power of labor has a disproportionate effect in determining the welfare of society as a whole.

This argument is drawn from the “theory of the second best,” or the notion that certain market distortions, if they are inevitable or prohibitively difficult to correct, are best addressed by introducing a countervailing distortion.<sup>39</sup> An efficient market requires perfect competition on both sides of the labor market; firms and labor would be atomistic and there would be no market power.<sup>40</sup> In such a market, all workers receive wages that are commensurate with labor performed. But some degree of market power on the labor demand side (i.e., firms)<sup>41</sup> is inevitable because enforcement agencies have limited resources—in practice, labor monopsony has rarely been challenged—and workers are subject to moving costs and job-search frictions.<sup>42</sup> On the other hand, concentration of labor supply is comparatively difficult and far from inevitable, because organizing incurs fixed costs that laborers may have neither an incentive, nor the capacity, to bear individually (e.g., costs associated with overcoming existing bars to organization or existing disparities in bargaining power). By promoting labor organizing, policymakers can enable workers to fight rent-extractive behavior by firms and thereby allocate economic resources more equitably. The resulting

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39. See *supra* text accompanying note 21. In a similar vein, the existence of monopsony power in the labor market has been used to refute the notion that a minimum wage is inefficient and increases unemployment. Rather, a minimum wage may force employment to approximate economically efficient levels more closely and will not necessarily increase unemployment, because monopsonistic employers are purposely hiring less than is efficient.

40. For a technical discussion of competitive equilibrium, see MAS-COLELL, WHINSTON & GREEN, *supra* note 32, at 311-28, 545-50, which discusses efficiency of competitive markets using partial and general equilibrium, respectively. For a discussion of the inefficiencies resulting from market power and how increasing the number of firms asymptotically approaches a competitive equilibrium, see *id.* at 383-413.

41. Market concentration can be measured in a number of ways, but a conventional measure is the Herfindahl-Hirschman Index (HHI), which is the sum of squared market shares. The federal antitrust agencies have established HHI threshold levels that indicate moderate or high market concentration. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 18-19 (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<https://perma.cc/6644-72S3>].

42. See *infra* notes 84-85 and accompanying text. Sanjukta Paul goes further to argue that firms themselves are quintessential examples of economic coordination (i.e., among capitalists) that antitrust law presently condones. See Paul, *supra* note 18, at 401-13.

labor-market equilibrium may be efficient if unions raise wages to competitive levels and counteract the monopsonist's purposeful suppression of labor demanded. Further, because the monopsonist no longer has an incentive to reduce hiring to keep down labor costs, its *effective* marginal cost of labor may decrease, increasing supply in the downstream product market. But even independent of these effects, redistribution may be welfare maximizing given that the negative effects of unions on productivity appear to be generally small,<sup>43</sup> and many workers will receive greater utility on the margin from income than firm owners.<sup>44</sup> This type of conduct exemplifies John Kenneth Galbraith's concept of "countervailing power," or the notion that one form of power can be used to contest another,<sup>45</sup> a notion that is also echoed in the legislative history discussed below.<sup>46</sup> Some scholars have written that establishing countervailing power can be a justification in itself, separate from a welfarist analysis, as it advances larger democratic goals.<sup>47</sup>

### B. Legislative History

Some of these economic arguments for worker welfare, like countervailing power or equitable redistribution, were a central part of legislative debates over the federal antitrust statutes. A useful introduction to the legislative history of the antitrust statutes as they concern labor—especially the Sherman Act—can be

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43. Compare John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 73-83 (1989) (summarizing studies and finding no consensus as to whether unions have a negative or positive effect on productivity), with Erling Barth, Alex Bryson & Harald Dale-Olsen, *Union Density, Productivity, and Wages*, IZA INST. LAB. ECON. 24-26 (Oct. 2017), <https://www.econstor.eu/bitstream/10419/174021/1/dp11111.pdf> [<https://perma.cc/UC9U-UENJ>] (finding a positive effect of unions on the productivity of Norwegian firms by using a union tax subsidy as an instrumental variable).
44. But why not leave redistribution to the tax system and maximize the size of the pie through efficient legal rules? Kaplow and Shavell argue that income-targeted legal rules lead to a double distortion, first by distorting the regulated behavior and second by distorting incentives to work. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667-68 (1994). That said, this Note's proposal is not income based. Rather, it seeks to redistribute across labor and capital and thus does not distort incentives to accumulate income. The proposal is possibly distortive from an efficiency perspective, but not doubly distortive. See Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2482, 2490 (2014).
45. See generally JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1952) (discussing countervailing economic powers).
46. See *infra* Section I.B.
47. See *supra* note 17 and accompanying text.

found in a recent article by Sandeep Vaheesan.<sup>48</sup> Supporters of the Sherman Act proposed to exempt unions and labor organizations from the Act, and although that proposal was rejected,<sup>49</sup> the issue resurfaced in debates over the Clayton Act, where the labor exemption was ultimately enacted. This Section develops current understandings of the legislative history of the antitrust laws by tracing two normative strands in legislators' comments about unions: one emphasizing the need for unions to organize against existing combinations of capital, and the other emphasizing positive externalities generated by unions.

### 1. *Countervailing Power*

During debates over both the Clayton and Sherman Acts, legislators emphasized the need for laborers to organize and defend themselves against combinations of capital. As Senator Hiscock observed during debates of the Sherman Act, "the only safety to labor rests in the power to combine as against capital and assert its rights and defend itself."<sup>50</sup> Senator Stewart emphasized the need for "counter combinations among the people,"<sup>51</sup> reminiscent of John Kenneth Galbraith's notion of "countervailing power."<sup>52</sup>

This line of congressional argument had at least three motivations: imbalances in bargaining power between capital and labor, technological change, and redistribution. As Senator Ashurst observed during debates over the Clayton Act, "[i]n many instances the power of the employer to withhold a subsistence is a more effective weapon than the power of the employee to refuse to labor . . . . [T]he relative position of the employee and the capitalist is not the same."<sup>53</sup> In doing so, Ashurst suggested that workers are in a weaker position *ex ante* due to their dependence on wage income. Shortly thereafter, Congressman Graham emphasized that imbalances in bargaining power were being exacerbated by technological progress: as machinery developed that could substitute for labor, stockholders in large companies began demanding that managers purchase more machinery and lower wages to increase shareholder dividends.<sup>54</sup> Graham also argued that increasingly machine-intensive production processes increase the emotional distance between employer and employee, increasing the

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48. Vaheesan, *supra* note 13.

49. *Id.* at 781.

50. 21 CONG. REC. 2468 (1890) (statement of Sen. Hiscock).

51. *Id.* at 2565 (statement of Sen. Stewart).

52. See GALBRAITH, *supra* note 45.

53. 51 CONG. REC. 13,667 (1914) (statement of Sen. Ashurst).

54. *Id.* at 9249 (statement of Rep. Graham).

likelihood of alienation and abuse.<sup>55</sup> Ultimately, supporters of the labor exemption in the Clayton Act saw it as a way to distribute the fruits of industry more fairly, and to allow labor to claim, as Senator Jones termed it, a “fairer and more equitable share of the products of its toil secured.”<sup>56</sup> This line of argumentation illustrates that Congress was concerned with equity as well as economic efficiency when drafting the antitrust laws.

## 2. *Positive Externalities*

Supporters of the Sherman and Clayton Acts also argued that labor organizations provide value beyond their membership. During debates over the Clayton Act’s union exemption, Senator Borah emphasized that unions boost working conditions generally and are “indirectly, of benefit to those who are not members of the organizations.”<sup>57</sup> During debates over the Sherman Act, legislators discussed how worker happiness is crucial to democratic morale and stability. On the floor of the House, Congressman Fithian read a letter from a constituent discussing the drop in worker morale and productivity during the late Roman Empire, and concluded that “protecting labor from the avaricious and grasping power of capital” was crucial to “permanent prosperity and power.”<sup>58</sup> In an earlier discussion of the Sherman Act, Senator Hoar famously (even if somewhat vaguely) suggested that wages and working conditions were matters uniquely deserving of public solicitude, because they “[touch] the very existence and character of government and the state itself.”<sup>59</sup> He stated that the activities of unions “[make] republican government itself possible, and without [unions,] . . . the Republic cannot in substance, however it may nominally do in form, continue to exist.”<sup>60</sup> Hoar believed that unions were crucial to the functioning of democracy, and that democracy would thrive only if America protected its workers, especially those without access to an abundance of economic and political power.

The legislative history of the federal antitrust statutes and the labor exemption reveals a concern not just for the viability of organized labor, but also for worker welfare generally, as a matter of economic fairness and national values. Comments like Congressman Fithian’s, recognizing the perpetual conflict

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55. *Id.*

56. *Id.* at 14,019 (statement of Sen. Jones).

57. *Id.* at 13,918 (statement of Sen. Borah).

58. 21 CONG. REC. 4103 (1890) (statement of Rep. Fithian).

59. *Id.* at 2728 (statement of Sen. Hoar).

60. *Id.*

between capital and labor and the need to protect the latter,<sup>61</sup> reveal another axis along which antitrust law was intended to be understood, and to resonate today, when rapid technological change and increased consolidation have ushered in what could be called a “new Gilded Age.”<sup>62</sup> Policymakers today must grapple once more with the question of how worker welfare will and ought to be secured amidst concentration in capital.<sup>63</sup>

## II. THE WORKER WELFARE STANDARD

If courts and policymakers are to give voice to the concerns of the drafters and maximize social welfare, antitrust analysis must account for the welfare of workers. Courts and economic experts can assess worker welfare through factors that are analogous to those used to analyze consumer welfare and competition in product markets. Price, output, quality, and innovation in product markets translate into wages and benefits, hours, working conditions, and training in labor markets. Constructing such a worker welfare standard builds upon existing analytical frameworks by (1) providing a justification for labor organizing that is currently absent from conventional economic antitrust analysis and (2) drawing attention to workers as a relevant and uniquely situated constituency that is often ignored in practice.<sup>64</sup> This Part draws on the labor-economics literature to show how these proposed worker welfare factors might be used in antitrust analysis, and to illustrate how the worker welfare standard fills the gaps in the traditional consumer welfare approach.

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61. *Id.* at 4103 (statement of Rep. Fithian).

62. TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

63. It is commonly argued that Congress's failure to amend a statute like the Sherman Act implies that Congress intended to acquiesce to judicial interpretations of the statute. *See, e.g.*, William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70-78 (1988). However, the Sherman Act and its legislative history must be read in light of the antitrust statutes that followed it, like the Clayton Act. For example, one of the leading cases on legislative inaction, *Apex Hosiery v. Leader*, held that Congress's failure to amend the Sherman Act after it was applied to unions reflected an intent that labor unions be “subject to” it. 310 U.S. 469, 488 (1940). But the Court eventually found the union activity in the case to be exempted, due to statutes like the Clayton Act and Norris-LaGuardia Act, which permitted union activity. *Id.* at 502-04, 504 n.24. Sanjukta Paul critiques this meandering approach to labor antitrust liability, arguing that it posits worker liability as the baseline, with the labor exception as a one-off, unprincipled exemption. *See* Paul, *supra* note 12, at 1026. This Note attempts to provide a principle for the exemption. But the *Apex Hosiery* line of legislative-inaction cases stresses that the antitrust statutes, and the judicial decisions stemming from them, cannot be read in isolation.

64. *See infra* Section II.B.

### A. *Defining the Standard*

Just as consumer welfare can be measured through economic factors like price, output, quality, and innovation, courts and economic experts can assess worker welfare through a set of analogous factors: wages and benefits, hours, working conditions,<sup>65</sup> and training. One major tension between these two standards is that workers benefit from higher wages while consumers benefit from lower prices, but these factors capture similar characteristics of equilibria in both markets.<sup>66</sup> Wages and hours are the labor-market analogs of price and quantity, and benefits can be considered along with wages as a type of compensation. Working conditions reflect heterogeneity within a single type of employment, just as quality reflects heterogeneity within a single type of product. And training reflects how labor markets can be dynamic, just as innovation reflects how product markets can be dynamic: that is, labor productivity can improve over time, just as firm productivity can improve over time. As in product-market analysis, courts and economic experts can assess how a contested activity (e.g., a merger) affects these factors and estimate the net effect on worker welfare.

A worker welfare standard would be similar to a consumer welfare standard in that much of its application would fall on economic experts, whose work would be assessed and weighed by courts. Of course, some cases will be clearer and may be amenable to per se analysis, like an agreement between firms to fix wages. But, as in product markets, other cases will be subtle, and economics will have a role to play. Just as economic models are used to forecast the effects of certain market events on price and quantity, and aggregate those effects to estimate net effects on consumer welfare,<sup>67</sup> economics will also be instrumental in forecasting the effects of market events on wages and hours, and aggregating those effects to estimate net effects on worker welfare. Antitrust analysis is highly

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65. It is possible that working conditions could be incorporated into wages to create “quality-adjusted wages” as a single factor, akin to quality-adjusted price in product markets. For examples of the use of quality-adjusted price in product markets, see Wright & Ginsburg, *supra* note 14, at 2410 nn.29-32.

66. As for hours, it may seem counterintuitive to say that workers benefit from longer hours like consumers benefit from greater output, but this stems in large part from the idiomatic interpretation of long hours as long *required* hours. Assuming long hours are not compelled by terms of employment, the ability to work for longer (as opposed to, say, an underemployed state or part-time job) is strictly preferable because it gives the worker the option to earn more income. This is to be contrasted with situations where there is no demand or limited demand for a worker’s services. Insofar as long required hours reduce worker choice and cause burn-out, they are considered a negative working condition for the purposes of this Note.

67. Economic experts are ubiquitous in antitrust litigation, but for one prominent example of expert testimony and judicial scrutiny of that testimony, see *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 219-41 (D.D.C. 2018), which discusses at length the expert testimony of economist Carl Shapiro.



technical in the status quo,<sup>68</sup> and a worker welfare standard would not be any different in its reliance on economics. The main difference is that a worker welfare standard focuses attention on the interests of workers, who are often neglected despite their vulnerability to rent-extractive firm behavior, and recognizes that advancing the interests of workers may require more than advancing the interests of consumers.

These proposed factors reflect the central grounds of debate in the rich labor-economics literature concerning the impact of mergers and other economic events on workers, which would provide a foundation for expert testimony on worker welfare issues.<sup>69</sup> For example, economists have found conflicting results on the effects of mergers on wages – some have found that mergers can increase wages because they improve firm efficiency, especially when the merger involves two firms in the same industry,<sup>70</sup> while others have found that mergers decrease wages because they increase firm bargaining power, especially for workers with narrow skill sets.<sup>71</sup> The fact that hours and employment can decrease after mergers is well documented,<sup>72</sup> but some economists have questioned that claim, and others have countered that mergers can lead to improved human-capital development and the matching of workers to appropriate jobs.<sup>73</sup> Similarly, scholars have studied the effect of mergers on quality of work—for instance, on worker stress levels and employee-employer relations.<sup>74</sup> These factors—wages and

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68. Some courts have found that antitrust cases can occasionally be so complex that a jury trial is inappropriate. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1073-75, 1086 (3d Cir. 1980) (deeming the antitrust litigation to be too complex to go before a jury).
69. For a leading study on the effects of mergers on workers and other stakeholders, and the potential for transfers from stakeholders to shareholders, see generally Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in *CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES* 33, 33-57 (Alan J. Auerbach ed., 1988).
70. See, e.g., Martin J. Conyon, Sourafel Girma, Steve Thompson & Peter W. Wright, *Do Wages Rise or Fall Following Merger?*, 66 *OXFORD BULL. ECON. & STAT.* 847, 860 (2004).
71. See, e.g., Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* 3 (Feb. 2019) (unpublished manuscript), <https://equitablegrowth.org/working-papers/employer-consolidation-and-wages-evidence-from-hospitals> [<https://perma.cc/A8ML-2GL6>].
72. See, e.g., Martin J. Conyon, Sourafel Girma, Steve Thompson & Peter W. Wright, *The Impact of Mergers and Acquisitions on Company Employment in the United Kingdom*, 46 *EUR. ECON. REV.* 31, 47 (2002); Eero Lehto & Petri Böckerman, *Analysing the Employment Effects of Mergers and Acquisitions*, 68 *J. ECON. BEHAV. & ORG.* 112, 122-23 (2008).
73. See, e.g., Klaus Gugler & B. Burcin Yurtoglu, *The Effects of Mergers on Company Employment in the USA and Europe*, 22 *INT'L J. INDUS. ORG.* 481, 498-99 (2004) (finding no effect of mergers on labor demand in the United States, and attributing that to low labor adjustment costs).
74. See, e.g., Sue Cartwright & Cary L. Cooper, *The Impact of Mergers and Acquisitions on People at Work: Existing Research and Issues*, 1 *BRIT. J. MGMT.* 65, 71-72 (1990); Ka Keat Lim, *Impact of*



benefits, hours, working conditions, and training—reflect existing grounds of debate in the labor-economics literature on the impact of firm conduct on workers. As such, courts and economic experts can build on preexisting frameworks and models when analyzing these factors beyond the merger context. Further, this research demonstrates that a worker welfare standard is not necessarily hostile to the aims of firms, as certain transactions can plausibly benefit both labor and capital. The net effect of economic activities on worker welfare will be up for debate, and like other economic questions in antitrust enforcement, ought to be assessed on a case-by-case basis.<sup>75</sup>

### B. *Worker v. Consumer Welfare*

Although worker welfare analysis would parallel consumer welfare analysis in many ways, it addresses two major gaps in the prevailing consumer welfare framework: (1) it robustly supports worker organizing, and (2) it focuses attention on workers as uniquely situated stakeholders in corporate transactions.

A consumer welfare standard on its own will not necessarily support the right of labor to organize; rather, the result will depend on how consumer welfare is defined and whether demand for labor is concentrated. Labor organizing increases wages, which is likely to increase consumer prices and decrease output in an otherwise competitive market.<sup>76</sup> Under a static definition of consumer welfare that focuses on consumer price and output, labor organizing may appear undesirable.<sup>77</sup> In contrast, assuming labor monopsony, labor organizing may appear desirable because it increases wages from subcompetitive levels and increases production. Further, under a dynamic definition of consumer welfare, higher wages ensure that workers have the proper incentives to invest in their own training and education. So, while a consumer welfare standard does not necessarily oppose labor organizing, it does not necessarily promote it, either. A

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*Hospital Mergers on Staff Job Satisfaction: A Quantitative Study*, 12 HUM. RESOURCES FOR HEALTH 70, 78 (2014).

75. For a discussion of some of the other benefits that firm transactions like mergers can have on worker welfare, see Naidu, Posner & Weyl, *supra* note 26, at 585-89, which discusses, for example, complementarities from the fusion of workforces and increased productivity from greater specialization.
76. In an otherwise competitive labor market, increasing wages above competitive levels will decrease hours worked at equilibrium and should decrease output of the final good. In contrast, if there is labor monopsony, increasing wages to a competitive level will increase hours worked at equilibrium by undoing the monopsonist's artificial suppression of labor demand, and should increase output of the final good.
77. The increase in wages could have a countervailing effect on consumer welfare because workers are consumers, and greater wages mean greater purchasing power, but these effects would need to be weighed.

worker welfare standard affirmatively supports labor organization because it tends to improve worker outcomes and moors itself not just to concerns for efficiency, but concerns for equity: it recognizes legislators' beliefs that labor is not a typical commodity, and that for many workers, the ability to organize and demand a fair wage is often a matter of survival rather than profitability.<sup>78</sup> Even if organizing is harmful for firm owners and sometimes end-consumers, a worker welfare standard recognizes that labor markets are different, and that countervailing power and distributive concerns support some level of supply-side concentration.<sup>79</sup>

The consumer welfare approach is adaptable to the issue of concentration in labor demand (monopsony) but in practice often ignores workers and the unique attributes of labor that make it distinct from other economic goods.<sup>80</sup> The Horizontal Merger Guidelines promulgated by the Department of Justice (DOJ) and Federal Trade Commission (FTC), which memorialize the prevailing approach to antitrust, briefly mention the issue of monopsony but without any explicit reference to labor.<sup>81</sup> In practice, the impact of corporate consolidation on workers has been rarely considered in an enforcement context. For this reason, many scholars have urged agencies and enforcers to consider the effects of firm mergers on workers and have proposed new economic frameworks for considering those effects.<sup>82</sup> Agencies have begun to respond to this call for action, in part by more aggressively targeting no-poach agreements between firms – one form of labor-demand coordination.<sup>83</sup> A worker welfare standard would build on this momentum and provide an additional conduit for assessing the effects of labor demand concentration, which are well studied in the economics literature<sup>84</sup> but rarely raised in antitrust litigation. This enhanced focus on labor is especially critical given that the labor market is subject to unique frictions – such as moving costs and job-search frictions – that can exacerbate the effects of demand-side

78. See *supra* Section I.B.1.

79. See *supra* Sections I.A, I.B.1.

80. For a historical and more theoretical criticism of treating labor as a commodity like any other market good, see KARL POLANYI, *THE GREAT TRANSFORMATION* 71-80 (Beacon Press 2d ed. 2001) (1944).

81. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 41, at 32-33.

82. See *supra* note 26 and accompanying text.

83. See *Division Update Spring 2019: No-Poach Approach*, U.S. DEP'T JUST. (Sept. 30, 2019), <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach> [<https://perma.cc/3GTA-FMQ7>]; *Division Update Spring 2018: No More No-Poach*, U.S. DEP'T JUST. (Apr. 10, 2018), <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements> [<https://perma.cc/N4SR-BJBK>].

84. See, e.g., Symposium, *Modern Models of Monopsony in Labor Markets: Tests and Estimates*, 28 J. LAB. ECON. 203 (2010).

concentration, even in seemingly low-friction sectors such as the online economy.<sup>85</sup>

Worker welfare analysis should be used to supplement, rather than supplant, consumer welfare analysis. Its relevance to courts will depend on whether courts are examining market power on the labor-supply (labor-organizing) or labor-demand (monopsony) side of the market. Within the labor supply context, legislative text and history indicate that worker welfare strictly trumps consumer welfare. In addition to comments in the legislative history indicating that the drafters wanted labor to be able to organize,<sup>86</sup> section 6 of the Clayton Act specifically authorizes “labor . . . organizations,”<sup>87</sup> and section 5 of the Norris-LaGuardia Act prohibits federal courts from issuing injunctions on the grounds that “persons participating . . . in a labor dispute . . . are engaged in an unlawful combination or conspiracy.”<sup>88</sup> These clauses constitute express statutory exemptions for organized labor. Further, in cases of labor monopsony, concentration in labor supply can restore efficient conditions in the labor market by raising wages and employment back to competitive levels.<sup>89</sup> In this case, it is possible that both consumers and workers benefit at the monopsonist’s expense.

On the labor-demand side, while concerns of legislative history for labor carry over, there is no express statutory prohibition on labor monopsony, meaning courts must consider consumer welfare alongside worker welfare. One can imagine a merger that harms workers due to wage or job cuts but enhances consumer welfare by passing the reduced input costs or other efficiencies onto consumers. These cases will be rare for at least two reasons. First, if two merging firms compete in the labor market, it is conceivable that they compete in the

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85. See Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets*, 2 AM. ECON. REV.: INSIGHTS 33, 44-45 (2020) (finding that online labor markets can experience significant search frictions); Tyler Ransom, *Labor Market Frictions and Moving Costs of the Employed and Unemployed*, IZA INST. LAB. ECON. 2, 8-9 (Feb. 2019), <http://ftp.iza.org/dp12139.pdf> [<https://perma.cc/MM7L-RZ3C>] (discussing the effects of worker mobility on labor markets and building a related simulation). *But see* Geert Ridder & Gerard J. van den Berg, *Measuring Labor Market Frictions: A Cross-Country Comparison*, 1 J. EUR. ECON. ASS’N 224, 238 (2003) (finding job-search frictions in the United States to be low relative to other Western countries).

86. See *supra* Section I.B.

87. Clayton Antitrust Act, Pub. L. No. 63-212, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 17 (2018)).

88. Norris-LaGuardia Act, Pub. L. No. 72-65, § 5, 47 Stat. 70, 71 (1932) (codified as amended at 29 U.S.C. § 105 (2018)).

89. Mark Stelzner & Mark Paul, *How Does Market Power Affect Wages? Monopsony and Collective Action in an Institutional Context* 15 (Dec. 2018) (unpublished manuscript), <https://equitablegrowth.org/working-papers/how-does-market-power-affect-wages-monopsony-and-collective-action-in-an-institutional-context> [<https://perma.cc/6U57-3F42>].

product market as well. The merger may lead to market power in the product market and increase consumer prices. Second, while monopsony decreases wages, it increases the firm's effective marginal cost of labor, which will tend to increase consumer prices.<sup>90</sup> When consumer and worker welfare actually conflict, the traditional rule is that efficiencies in one market cannot generally be used to justify anticompetitive conduct in another.<sup>91</sup> In other words, a firm cannot justify a merger simply because it reduces labor costs by creating monopsony power.<sup>92</sup> As in product markets, antitrust agencies can shape remedies that preserve the competitive benefits of a merger or other economic activity while minimizing its harms.<sup>93</sup>

### III. IMPLEMENTING WORKER WELFARE: THE CASE OF INDEPENDENT CONTRACTORS

The current treatment of independent contractors under antitrust law exemplifies how focusing on consumers can leave workers subject to economic coercion and rent extraction. Independent contractors' organizations are illegal under current antitrust law,<sup>94</sup> in large part because consumers benefit from cheaper labor. But under a broader vision of social welfare, these organizations serve as a

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90. See Naidu, Posner & Weyl, *supra* note 26, at 587-88.

91. 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 972 (4th ed. 2016).

92. See *id.*

93. *Id.*

94. Courts have so held for various types of independent contractors, ranging from for-hire drivers to doctors and lawyers. See, e.g., FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 428 (1990) (holding that court-appointed counsel for indigent criminal defendants violated the antitrust laws by organizing to increase wages); N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 352 (5th Cir. 2008) (holding that independent physicians who attempted to bargain collectively with insurers to obtain higher reimbursement rates violated the antitrust laws); Wilk v. Am. Med. Ass'n, 895 F.2d 352, 355 (7th Cir. 1990) (holding that physicians who had instituted an ethical rule prohibiting association with chiropractors violated the antitrust laws); Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 606 (4th Cir. 1965) (holding that horseshoers violated the antitrust laws through a complex series of organizing tactics); see also H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 717 n.20 (1981) (noting that independent contractors are not covered by antitrust statutory exemptions for labor organizations); Chamber of Commerce v. City of Seattle, 890 F.3d 769, 779-80 (9th Cir. 2018) (determining that a Seattle ordinance allowing independent contractors to bargain collectively was not subject to state-action immunity). Naturally, these independent contractors vary significantly in the degree of control they exercise over their work and the degree to which they form a recognized trade or profession, factors that can be used to determine the boundaries of workers' right to organize. See *infra* text accompanying notes 112-132. For a history of the interactions between labor and the antitrust laws, see generally Paul, *supra* note 12, at 990-1033.

bulwark against concentration in labor demand, which prevailing antitrust frameworks have struggled to address. Section A of this Part makes the case that extending the labor exemption to certain independent contractors would enhance worker welfare and further the economic and political goals of the antitrust laws, and discusses one legal framework, the ABC test, for determining how far the exemption should extend. Sections III.B and III.C discuss how agency guidance and state legislation can be used to extend the exemption, and Section III.D discusses the benefits and risks of a two-pronged approach.

### A. Worker Welfare and the Scope of the Labor Exemption

Although independent contractors' organizations are illegal under current antitrust law, courts applying a worker welfare standard would most likely find that many such organizations are consistent with the economic and political logic of the antitrust laws and are thereby permissible. This Section makes the intuitive case that organization among for-hire drivers would enhance their welfare, as measured by the four-factor standard introduced in Part II.

Courts are likely to find that driver organizing would promote worker welfare along at least two of the four proposed worker welfare factors: wages and benefits, and work conditions. Workers who organize gain bargaining power that can be used to confront management (using the threat of strike as leverage) and seek improved wages or working conditions—an argument that has been extensively demonstrated in the literature.<sup>95</sup> Crucially, empirical studies have found that worker organizing can mitigate the downward wage pressure that results from firm mergers and labor monopsony, illustrating how labor organizations can be used to contest combinations in capital.<sup>96</sup> Anecdotaly, for-hire drivers have looked to adjacent sectors for examples of the power of organized labor. One news article drew a contrast between dock workers, whose union is one of the strongest forces in American labor,<sup>97</sup> and harbor truck drivers, many of whom are independent contractors and attribute their relatively poor

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95. See generally John W. Budd, *The Effect of Unions on Employee Benefits and Non-Wage Compensation*, in WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE 160 (James T. Bennett & Bruce E. Kaufman eds., 2017) (showing that unionization increases worker benefits); C.J. Parsley, *Labor Union Effects on Wage Gains: A Survey of Recent Literature*, 18 J. ECON. LITERATURE 1 (1980) (showing that unionization increases workers' wages).

96. See, e.g., Prager & Schmitt, *supra* note 71, at 24–26.

97. For an overview of the success of organized dock workers, see Steven Greenhouse, *The \$100,000 Longshoreman: A Union Wins the Global Game*, N.Y. TIMES (Oct. 6, 2002), <https://www.nytimes.com/2002/10/06/weekinreview/the-nation-the-100000-longshoreman-a-union-wins-the-global-game.html> [<https://perma.cc/KZ5T-3RSM>].

conditions in part to their inability to organize.<sup>98</sup> While many harbor truck drivers work “18 hours a day for less than the minimum wage,”<sup>99</sup> “sit in long lines . . . haul broken-down chassis . . . and experience verbal abuse,” many dock workers on the West Coast earn more than \$100,000 a year, with “generous benefits packages,” in large part due to a strong union that can essentially “shut down maritime operations along an entire coast.”<sup>100</sup> The dock workers’ union is not a common case, but to some harbor truck drivers, its success is a powerful illustration of the potential of organized labor, and a reminder of the rights they lack.<sup>101</sup>

Courts observing the legislative history of the labor exemption are likely to be compelled by the disparities in pay between drivers and their managers as a key reason for allowing drivers to organize. Evidence of these disparities came to the fore in the lead-up to Uber’s initial public offering (IPO), when many drivers went on strike to protest gross inequities in pay.<sup>102</sup> One organizer noted, “[w]ith the IPO, Uber’s corporate owners are set to make billions, all while drivers are left in poverty and go bankrupt.”<sup>103</sup> One driver lamented Uber’s silence on stock grants for drivers, and another calculated that he had recently made \$3.75 an hour, after expenses, driving in dangerous weather.<sup>104</sup> In contrast, in 2019, Uber’s top seven executives were paid a combined \$11.4 million in salary and cash bonuses, and \$71 million in equity awards.<sup>105</sup> The compensation received by for-hire drivers, especially in comparison to the compensation of their managers, raises the same concerns for inequality and rent extraction that motivated

98. Bill Mongelluzzo, *Operators Seek to Organize*, JOC.COM (Dec. 1, 1999, 7:00 PM EST), [https://www.joc.com/operators-seek-organize\\_19991201.html](https://www.joc.com/operators-seek-organize_19991201.html) [<https://perma.cc/U77U-R4AJ>].

99. *Id.* (internal quotation marks omitted) (quoting Tony Fernandez, President, Jacksonville United Container Movers Association).

100. *Id.*

101. For a history of what today is called the International Longshore and Warehouse Union, see Lawrence M. Kahn, *Unions and Internal Labor Markets: The Case of the San Francisco Longshoremen*, 21 LAB. HIST. 369 (1980). Kahn describes the initial proposal to create a “coastwide federation of longshore unions,” *id.* at 378, and describes the mechanization of dock work—in particular, the specialized skills needed to operate the equipment—as one factor potentially explaining its consolidation of bargaining power, *id.* at 381.

102. See Sara Ashley O’Brien, *Why Uber and Lyft Drivers Are Striking*, CNN BUS. (May 8, 2019, 11:34 AM ET), <https://www.cnn.com/2019/05/07/tech/uber-driver-strike-ipo/index.html> [<https://perma.cc/TMT7-KPVV>].

103. *Id.*

104. See Sainato, *supra* note 4.

105. Sissi Cao, *Big Uber Shareholders Rebel on CEO’s Huge Pay Package Amid Coronavirus Layoffs*, OBSERVER (May 13, 2020, 9:31 AM), <https://observer.com/2020/05/uber-ceo-pay-shareholder-backlash-coronavirus> [<https://perma.cc/JCU2-YHB4>].



drafters of the labor exemption. Foreclosing the possibility of worker organizing under antitrust law would prevent drivers from attaining a “fairer and more equitable share of the products [their] toil secured,” as the drafters intended.<sup>106</sup>

Opponents of independent contractor organizing may argue that organizing harms worker welfare by reducing hours and employment. In a basic monopoly or oligopoly model, an economic party with market power increases its surplus and raises prices by reducing quantity,<sup>107</sup> which in the case of labor would translate into reduced hours. In the labor context, labor organizations would prefer not to reduce quantity, but may concede to hour reductions to secure wage increases. While this effect has been observed in the data, one study found the trade-off between wages and hours to be small: a 10% increase in the percent of a workforce unionized decreased the likelihood of employment by 0.2%.<sup>108</sup> Further, labor laws provide labor organizations with the right, not the obligation, to bargain collectively, mitigating the risk of worker harm.<sup>109</sup> If a union found that the harms of organizing on hours outweighed the benefits on wages, the union would simply not use its power to bargain. The case for worker welfare would be more complex if unions were extracting rents not from capital but from other nonunionized workers; but the empirical literature on this topic has found that nonunion wages tend to increase with union activity, in part because unions establish workplace norms that spill over to nonunionized workers.<sup>110</sup> Further, policies to promote worker organizing can be tailored to cover as broad a

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106. 51 CONG. REC. 14,019 (1914) (statement of Sen. Jones); see *supra* Section I.B.1.

107. See MAS-COLELL, WHINSTON & GREEN, *supra* note 32, at 384-87, 389-91 (discussing monopoly and Cournot-duopoly models).

108. Edward Montgomery, *Employment and Unemployment Effects of Unions*, 7 J. LAB. ECON. 170, 187 (1989); see also Richard B. Freeman & Morris M. Kleiner, *The Impact of New Unionization on Wages and Working Conditions*, 8 J. LAB. ECON. S8, S9, S20-21 (1990) (finding a “modest” effect on employment in newly unionized firms, though that effect was concentrated in firms where collective bargaining failed).

109. 29 U.S.C. § 157 (2018).

110. Lawrence Mishel & Matthew Walters, *How Unions Help All Workers* 8 (Econ. Policy Inst., Briefing Paper No. 143, 2003), <https://files.epi.org/page/-/old/briefingpapers/143/bp143.pdf> [<https://perma.cc/XP6G-VR3P>]. Economists contrast the “threat effect,” whereby unions cause nonunion employers to increase wages to stave off the threat of unionization, and the “crowding effect,” whereby union employers layoff workers who then move to nonunion employers, depressing wages. David Neumark & Michael L. Wachter, *Union Effects on Nonunion Wages: Evidence from Panel Data on Industries and Cities*, 49 INDUS. & LAB. REL. REV. 20, 20 (1995). Neumark and Wachter’s study found that unions tended to decrease nonunion wage differentials within the same industry (suggesting the crowding effect predominates within industries) but increased nonunion wages within the same city (suggesting the threat effect predominates at the city level). *Id.* at 35.

worker base as reasonable.<sup>111</sup> Because of this, courts are most likely to find that for-hire driver unions, on net, have a positive effect on worker welfare and permit them under a worker welfare standard.

The traditional justification for treating independent contractors differently from employees, who are permitted to organize under the NLRA,<sup>112</sup> is that the former more closely resembles a business than a laborer.<sup>113</sup> While the law often requires workers to be categorized as one or the other, some independent contractors have so little control relative to their hirers that they resemble employees and trigger the same concerns that motivated the drafters of the antitrust labor exemption. For example, while no traditional American court has deemed Uber or Lyft drivers to be employees,<sup>114</sup> their rates of compensation are set by an external authority,<sup>115</sup> and their ability to use the platform is contingent on their

111. Seattle's ordinance leaves it to the Director of Finance and Administrative Services to determine which gig-economy drivers qualify for collective bargaining and instructs the Director only to consider whether drivers work enough hours as to "affect the safety and reliability of for-hire transportation," one of the ordinance's policy purposes. SEATTLE, WASH., MUN. CODE § 6.310.110 (2019). But one observer has suggested Seattle's ordinance covers too few workers. See Avi Asher-Schapiro, *Trump Administration Fights Effort to Unionize Uber Drivers*, INTERCEPT (Mar. 26, 2018, 1:14 PM), <https://theintercept.com/2018/03/26/uber-drivers-union-seattle> [<https://perma.cc/8GN7-KMRA>] (citing Christopher Koopman, who suggests that boycotts or work stoppages may be more broad-based alternatives).

112. See 29 U.S.C. § 157 (2018).

113. See, e.g., *Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers*, 353 F.2d 593, 606 (4th Cir. 1965).

114. See, e.g., *Razak v. Uber Techs., Inc.*, No. 16-573, 2018 U.S. Dist. LEXIS 61230, at \*54 (E.D. Pa. Apr. 11, 2018) (holding that Uber Black drivers are not employees under the Fair Labor Standards Act (FLSA)); *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 223-24, 226 (Fla. Dist. Ct. App. 2017) (holding that Uber drivers are independent contractors under the common-law test); see also *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, No. 14-0941, 2015 U.S. Dist. LEXIS 28867, at \*6 (S.D. Tex. Mar. 10, 2015) (noting in dicta that Uber does not "employ" drivers); Ben Hancock, *Uber Driver Is Independent Contractor, Arbitrator Rules*, RECORDER (Jan. 11, 2017, 9:33 PM), <http://www.therecorder.com/id=1202776655398/Uber-Driver-Is-Independent-Contractor-Arbitrator-Rules> [<https://perma.cc/EFA2-2VPD>] (discussing the first private U.S. arbitration case on the issue). But see *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 785, 790 (N.D. Cal. 2016) (denying defendant's motion to dismiss because drivers could be found to be employees by a jury). For cases on drivers working for other platforms, see *Saleem v. Corp. Transp. Grp.*, 854 F.3d 131, 134 (2d Cir. 2017), which held that drivers working for a platform that set drivers' rates and monitored drivers were independent contractors under the FLSA; and *Valadez v. CSX Intermodal Terminals, Inc.*, 298 F. Supp. 3d 1254, 1283-84 (N.D. Cal. 2018), which denied plaintiffs' motion for summary judgment because drivers could be independent contractors.

115. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015). One scholar raises the issue of whether Uber's price rules may constitute illegal price-fixing and highlights the inconsistency in allowing Uber to set prices while barring its drivers from organizing. Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 238-48, 258-61 (2017).



ability to meet externally imposed service standards.<sup>116</sup> The way that jurists distinguish independent contractors and employees is more art than science, and raises the question of whether some workers currently categorized as independent contractors are sufficiently similar to employees that they, too, should be covered by the labor exemption, and whether subjecting them to antitrust liability frustrates legislative goals.

One example of how courts have attempted to categorize for-hire drivers under current law is the D.C. Circuit's 2009 decision in *FedEx Home Delivery v. NLRB*, which considered whether FedEx delivery drivers are employees covered by the NLRA or independent contractors.<sup>117</sup> The court applied the common-law agency test,<sup>118</sup> a multifactor test<sup>119</sup> that has been summarized as evaluating the level of control the hirer has over the work performed: workers subject to less control tend to be classified as independent contractors.<sup>120</sup> The D.C. Circuit in *FedEx* described how control has been interpreted narrowly to exclude factors like "evidence of unequal bargaining power" or "efforts to monitor, evaluate, and improve" a worker's performance,<sup>121</sup> and it downplayed the National Labor Relations Board's (NLRB's) argument that drivers "perform a function that is a

116. See *O'Connor*, 82 F. Supp. at 1137, 1149.

117. 563 F.3d 492, 495 (D.C. Cir. 2009).

118. *Id.* at 495-96.

119. *Id.* at 496. These factors include:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Cnty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958)). One other commonly applied approach for determining employee status is the "economic-realities test." This approach defines employees as workers who are economically dependent on the hirer. See, e.g., *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985); *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 32-33 (1961). For a useful overview of the different existing definitions of "employee," see *Dynamex Operations West v. Superior Court*, 416 P.3d 1, 30-31, 30 & n.20 (Cal. 2018).

120. See, e.g., *FedEx*, 563 F.3d at 496-97 ("For a time, when applying this common law test, we spoke in terms of an employer's right to exercise control, making the extent of actual supervision of the means and manner of the worker's performance a key consideration in the totality of the circumstances assessment."); *Dynamex*, 416 P.3d at 30 n.20. But see *Cnty. for Creative Non-Violence*, 490 U.S. at 752-53 (noting that control is "not dispositive" and citing the importance of other factors).

121. *FedEx*, 563 F.3d at 496-97 (quoting *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989)).

regular and essential part of FedEx Home's normal operations."<sup>122</sup> Rather, the court held that the drivers in question are not employees because they have "entrepreneurial potential"<sup>123</sup> and emphasized that FedEx drivers are able to hire their own employees and sell their rights to deliver along certain routes.<sup>124</sup>

Five years later, the Ninth Circuit revisited the question of the drivers' status but painted a different picture.<sup>125</sup> While recognizing the D.C. Circuit's finding of entrepreneurial potential,<sup>126</sup> the Ninth Circuit concluded that the drivers were employees under California law,<sup>127</sup> which at the time looked to the hirer's "right to control the manner and means of accomplishing the result desired."<sup>128</sup> The decision emphasized that FedEx drivers are subject to strict supervision regarding their appearance and the appearance of their vehicles, the times they can work, and how and when they can deliver packages.<sup>129</sup> Further, the court concluded that drivers' "entrepreneurial opportunities" were limited by the fact that FedEx retained a veto right over any attempt to hire a helper or sell a route.<sup>130</sup> Whatever one's opinions of the merits, the Ninth Circuit and D.C. Circuit opinions illustrate both the malleability of the employment inquiry as well as how interpretations of the prevailing common-law test may fail to capture all of the ways businesses exert control over their workers.

Concerned by the limits of existing definitions of "employee," some states, including California, have adopted a broader definition of "employee" under a three-pronged analysis known as the "ABC test," which presumes that workers are employees and allows them to be classified as independent contractors only if the following conditions are all met:

- (A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) the worker performs work that is outside the usual course of the hiring entity's business; and

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122. *Id.* at 502.

123. *Id.* at 498.

124. *Id.* at 499.

125. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

126. *Id.* at 993.

127. *Id.* at 997.

128. *Id.* at 988 (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)).

129. *Id.* at 990.

130. *Id.* at 993-94.

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.<sup>131</sup>

Other jurisdictions offer slight variations on this test. For instance, New Jersey allows prong (B) to be satisfied if the work is “either outside the usual course of the business for which such service is performed, or . . . such service is performed outside of all the places of business of the enterprise for which such service is performed.”<sup>132</sup> By introducing a presumption in favor of employee status, the ABC test differs from the common-law agency test by placing the burden on the hirer to prove that the worker is not an employee. And while two of the factors considered by the ABC test and the common law are the same – control, and the usual scope of the hiring entity’s business – the ABC test considers them conjunctively, in addition to the question of whether the worker is customarily engaged in an independently established trade, and it draws attention to these non-control factors by requiring them to be part of a court’s analysis.

By 2015, the ABC test had been adopted in some form by fourteen states.<sup>133</sup> In September 2019, the California state legislature enacted Assembly Bill 5, which codifies the California Supreme Court’s holding in *Dynamex* that the ABC test is an acceptable definition of employee for the purpose of the California Wage Orders.<sup>134</sup> This statute was and is the subject of significant media coverage, in large part because it seems to require that gig-economy drivers and many other workers be classified as employees, and not independent contractors, and that they are therefore entitled to the associated protections and benefits of employee status.<sup>135</sup>

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131. See CAL. LAB. CODE § 2750.3 (West 2020); *Dynamex Operations W., Inc. v. Superior Court of L.A. Cty.*, 416 P.3d 1, 34 (Cal. 2018); see also DEL. CODE ANN. tit. 19, §§ 3501(a)(7), 3503(c) (2019) (enacting similar definitions of employment); MASS. GEN. LAWS ch. 149, § 148B (2019) (same).

132. N.J. STAT. ANN. § 43:21-19(i)(6)(B) (West 2019).

133. Deknatel & Hoff-Downing, *supra* note 11, at 79.

134. *Dynamex*, 416 P.3d at 7. In particular, the court stated this was an acceptable interpretation of the phrase “suffer or permit to work,” which is part of the definition of “employ” in the wage order. *Id.* at 6-7.

135. See, e.g., Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html> [<https://perma.cc/XM9J-FXN8>]; Kate Conger & Noam Scheiber, *California’s Contractor Law Stirs Confusion Beyond the Gig Economy*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/business/economy/uber-california-bill.html> [<https://perma.cc/T9TL-2F33>]; Alejandro Lazo, *California Enacts Law to Classify Some Gig Workers as Employees*, WALL ST. J. (Sept. 18, 2019, 6:35 PM EST), <https://www.wsj.com/articles/california-enacts-law-to-classify-some-gig-workers-as-employees-11568831719> [<https://perma.cc/E9HR-VCJC>].

However, federal agencies are not bound by state definitions of “employee.” This means that whatever rights are secured for gig-economy drivers under the ABC test adopted by states, attempts by those workers to bargain collectively may still be construed as collusion and subject to antitrust challenges by federal agencies adhering to a common law test. Although this threat constitutes a major impediment to worker welfare, the ABC test can be applied to collective bargaining as well, both as a way of furthering worker welfare and defining its boundaries.

This Note proposes two mechanisms for applying the ABC test to collective bargaining, one involving guidance from federal antitrust agencies, and the other involving state legislatures. The focus on federal agencies stems from the fact that both the DOJ and the FTC play major leadership roles in coordinating state antitrust-enforcement activities and leading national investigations, and they have themselves been involved in various actions against organized labor. The focus on state legislatures stems from the fact that many states have already adopted the ABC test within the employee-benefits context through legislation, evidencing political will within certain states for protecting a greater number of workers.

The proposal notably excludes judicial action. While courts are capable of catalyzing policy shifts, as exemplified by the California Supreme Court’s decision in *Dynamex*, statutory enactments and, to a lesser extent, agency action have the benefit of bearing the imprimatur of democratic will, and both can speak with greater general applicability than judicial decisions, which arise out of individual fact patterns. Further, federal courts would be building on an antitrust jurisprudence that has left little room for independent contractors to organize.<sup>136</sup> Legislatures and agencies may have more freedom to shape policy changes and pursue worker welfare<sup>137</sup> in a way that respects original intent and maximizes aggregate social welfare.

The following two Sections address agency guidance and state legislation in turn. Each Section outlines the basic proposal, and then proceeds to justify the proposal and discuss its implementation and feasibility.

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136. See *supra* note 94.

137. Sandeep Vaheesan argues that status quo antitrust jurisprudence accommodates capital at the expense of labor and suggests congressional and executive action as alternatives to judicial action. See generally Vaheesan, *supra* note 13 (arguing that courts have interpreted the antitrust laws contrary to legislative intent).

## B. Federal Agency Guidance

### 1. The Proposal

The federal antitrust agencies—namely, the Bureau of Competition at the FTC and the Antitrust Division of the DOJ—should issue a joint guidance document (in similar fashion to the jointly issued Horizontal Merger Guidelines), stating that prosecution of employee organizations is not a priority for the agencies. To accommodate evolving notions of labor within the gig economy and elsewhere, both agencies should use a definition of employee based on the ABC test to clarify that workers who are nominally independent but resemble employees in several key ways are unlikely to be subjected to antitrust scrutiny. One sample guidance document is provided in the Appendix, which outlines the ABC test and contextualizes it in statutory text, legislative history, and modern developments in the labor market.

Under the current state of the law, the federal government has investigated and litigated against numerous workers' associations, claiming that these associations are engaged in collusive or otherwise anticompetitive activity.<sup>138</sup> These groups range from associations of public defenders seeking higher compensation,<sup>139</sup> to physicians jointly dealing with insurers,<sup>140</sup> to truck drivers seeking better pay and work conditions.<sup>141</sup> In many of these cases, organizing activities have been enjoined and participants subjected to agency supervision.<sup>142</sup> An agency policy based on the ABC test would not foreclose all of the actions agencies have historically brought against workers' organizations, but it should foreclose most actions that are inconsistent with the concern for worker welfare underlying the antitrust laws. Consider, for example, *North Texas Specialty Physicians*, which addressed an agreement by independent physicians regarding how they would negotiate payments with payors (like insurance companies, health maintenance organizations, and preferred provider organizations).<sup>143</sup> Agencies would still have leeway to prosecute these sorts of actions because independent doctors are probably not considered employees under the ABC test:

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138. See Lao, *supra* note 12, at 1563 n.88 (describing DOJ and FTC actions against associations of doctors); Vaheesan, *supra* note 13, at 812 nn.357-64 (concerning FTC "actions against animal breeders, electricians, ice skating teachers, managers of commercial and residential properties, music teachers, organists, and public defenders" (footnotes omitted)).

139. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

140. *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

141. See Paul, *supra* note 12, at 981 n.40 (citing Mongelluzzo, *supra* note 98).

142. See, e.g., *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 420; *In re N. Tex. Specialty Physicians*, No. 9312, 2005 WL 3366979, at \*2-3 (F.T.C. Dec. 1, 2005).

143. *N. Tex. Specialty Physicians*, 528 F.3d at 346.

they control their own work; to the extent they are hired by patients, they do a different type of work than the patient; and they are engaged in an independently established trade. On the other hand, consider the recent FTC action against a group of port truck drivers who had organized and initiated work stoppages to contest sub-minimum-wage pay and long hours.<sup>144</sup> These actions are more questionable under the proposed guidance, given that the drivers lack control over crucial aspects of their job, such as pay and conditions of work.<sup>145</sup> Distinguishing workers' organizations based on these factors – in particular, the extent of hirer control – serves the normative goals of the framework introduced in Part I. From an economic perspective, efforts by physicians to organize should be subject to greater scrutiny because they tend to be more regressive than efforts by truck drivers to do the same. From a legislative-history perspective, if the purpose of the union exemption is to allow workers to balance disparities in bargaining power, the extent of control that workers have over their work should be a decisive factor in determining whether to extend the antitrust exemption.

## 2. *Normative Justification*

Even if workers' organizations have ambiguous or negative effects on consumers, the fact that they enhance worker welfare is an independent reason to enable them, in light of both the exploitation that many workers face due to concentration in capital, as well as the concern for labor expressed through statutory text and legislative history. Although worker organization can have marginally negative effects on employment, studies have shown that unionization can have significant positive effects on wages and working conditions for union and non-union workers alike, leading to a net positive effect on worker welfare.<sup>146</sup>

Using the ABC test fulfills the redistributive aims of the worker welfare standard by focusing the exemption on workers who lack bargaining power within the work relationship. While the common-law distinction between independent contractors and employees reflects differences in worker control, it also masks variation in bargaining power that can exist within each context. Certain employees, by virtue of their profitability to the firm, unique skills, or industry connections, may have much greater bargaining power in interactions with their managers and be subject to less stringent control than certain independent contractors, who in turn have freedom over certain aspects of their work but are still

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144. See Paul, *supra* note 12, at 981.

145. See Mongelluzzo, *supra* note 98. For an overview of conditions in the trucking industry after deregulation, see generally MICHAEL H. BELZER, *SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION* (2000).

146. See *supra* Section III.A.

subject to their hirer's control in fundamental aspects of their work. As discussed above, Uber drivers, while arguably independent contractors, have their rates set by Uber, must comply with certain service standards, and may be excluded from the platform if their ratings are too low.<sup>147</sup> These aspects of control make them more similar to employees than other types of independent contractors, as recognized by tribunals and agencies outside the United States.<sup>148</sup> Justice Douglas expressed a similar concern about the existing independent-contractor classification in his dissent in *Los Angeles Meat & Provision Drivers Union v. United States*, where he wrote, referencing *Hearst Publications*:

We noted that numerous types of "independent contractors" had formed or joined unions for collective bargaining—musicians, actors, writers, artists, architects, engineers, and insurance agents. We pointed out that there were marginal groups who, though entrepreneurial in form, lacked the bargaining power necessary to obtain decent compensation, decent hours, and decent working conditions. We emphasized that "the economic facts of the relation" may make it "more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation."<sup>149</sup>

*Hearst Publications*, since superseded by statute as it applies to the NLRA and labor law, serves as a reminder that labor lies along a spectrum and may still guide our analysis of antitrust law. Even if one is skeptical about shielding all worker organizations from antitrust liability, the common-law definition of employee is not necessarily the best way to draw the line. By expanding protections to a greater number of workers who have limited control over their working conditions, the proposal would enable workers to organize in a way that is consistent with the original intent of the labor exemption.<sup>150</sup> Rather than seeking to protect workers of a particular legal classification, the original proponents of a labor exemption saw it as a way to balance inequities in bargaining power and equip labor to counteract the consolidation and dominance of capital.<sup>151</sup>

As a matter of statutory text, section 6 of the Clayton Act, the original source of the labor exemption, does not distinguish between types of workers.<sup>152</sup>

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147. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015); Lao, *supra* note 12, at 1569.

148. Lao, *supra* note 12, at 1554 n.39.

149. 371 U.S. 94, 109 (1962) (Douglas, J., dissenting) (citations omitted) (quoting *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 126-28 (1944)).

150. See *supra* Section I.B.1.

151. *Id.*

152. Pub. L. No. 63-212, § 6, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17 (2018)).



Further, section 13(c) of the Norris-LaGuardia Act—which defines the term “labor dispute”—covers workers that do not “stand in the proximate relation of employer and employee,” thereby reflecting an interest in broadening coverage beyond a particular legal relation.<sup>153</sup>

As a policy matter, enabling a greater number of workers to organize—and in particular, those workers who do not fulfill one or more prongs of the ABC test—serves society’s interests in welfare maximization and horizontal equity. The argument for the former is the same as presented earlier: union activity enables workers at lower income levels to fight rent-extractive behavior from consolidated firms, leading to a net social welfare gain.<sup>154</sup> Enacting the ABC test promotes horizontal equity insofar as it enables workers who perform similar forms of work to be treated similarly under antitrust law, even if legal relationships with their hirers may be structured differently. Under a common-law approach, a group of taxi drivers may be allowed to organize if they seem to be employees (e.g., they work fixed hours and wear a uniform), but forbidden if they are hired on an ad hoc basis as independent contractors. If both types of workers do similar work and are subject to similar levels of control on other factors like wage and termination, it is worth reconsidering why one type of worker should be allowed to organize while the other is not.

### 3. Implementation

Given that agencies have nearly nonreviewable discretion over which cases to pursue,<sup>155</sup> an agency commitment to deprioritize labor antitrust suits can be easily implemented. This is especially true within the antitrust context, where statutory requirements are sparse. For example, many scholars and jurists see the Horizontal Merger Guidelines, which are formally non-binding, as a

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153. Pub. L. No. 72-65, § 13(c), 47 Stat. 70, 73 (1932) (codified at 29 U.S.C. § 113(c) (2018)). Within the realm of statutory interpretation, one argument for applying antitrust liability to independent contractors is intertextual—namely, that because independent contractors are excluded from the protection of the NLRA, *see* 29 U.S.C. § 152(3) (2018), they should also be excluded from the antitrust liability shield. But Congress’s amendments to the NLRA in the Taft-Hartley Act suggest that the coverage of the two fields was not intended to be the same. When Congress passed the Taft-Hartley Act, it limited the scope of the NLRA by revising the definition of “employee” but left the Clayton Act, as well as the Norris-LaGuardia Act’s Section 13(c) definition of “labor dispute,” untouched. Even though associations of independent contractors may not benefit from the protections of labor law, that does not imply that they should be subject to antitrust liability.

154. *See supra* Section I.A.

155. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).



foundational framework for merger review and litigation.<sup>156</sup> If the agencies decide that workers' associations are not an enforcement priority and invest fewer resources into investigating those associations, antitrust litigation against workers' associations would diminish significantly. The remaining source of litigation would be private legal actions, but those are addressed by the state legislation proposed below.

Guidance is easier to issue than legislation is to enact, given that the procedural requirements to issue guidance are significantly less onerous than bicameral presentment. While antitrust agencies have voluntarily adopted heightened procedures for certain guidance documents, most notably the Horizontal Merger Guidelines,<sup>157</sup> even these procedures are much more lenient than the legislative process, which subjects proposals to strict vetogates.<sup>158</sup> To ensure that the policy can be issued as a guidance document and not a legislative rule that requires notice and comment, any such policy should avoid mandatory language, which can suggest to courts that a guidance document is actually a legislative rule.<sup>159</sup>

#### 4. Feasibility

However the guidance is worded, one key question is whether the agencies themselves want to adopt it. Predictably, this will depend on the priorities of the presidential administration. In recent years, the federal antitrust agencies have started to make moves to protect labor, though their progress in that regard has not been consistent. Perhaps the most promising example is the increased attention to no-poach agreements among employers.<sup>160</sup> In a no-poach agreement, a group of employers agrees not to solicit or hire each other's employees. These agreements suppress competition for labor and depress wages. In announcing its focus on prosecuting these agreements, the agencies have cited a general concern for labor as motivating their heightened scrutiny. In 2019, during the Trump administration, the DOJ noted that the "[Antitrust] Division protects labor markets and employees" and has an interest in ensuring that workers can

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156. See Christine A. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution*, 77 ANTITRUST L.J. 651, 652 (2011) (describing favorable consideration by the Antitrust Modernization Commission, Fifth Circuit, DOJ, and FTC workshop participants).

157. See, e.g., Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 49-50 (2010).

158. See William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 757-59 (2015).

159. See *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384-85 (D.C. Cir. 2002); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000).

160. See *Division Update Spring 2019: No-Poach Approach*, *supra* note 83; *Division Update Spring 2018: No More No-Poach*, *supra* note 83.

“negotiate better terms of employment.”<sup>161</sup> But also in 2019, the DOJ intervened in the Washington State Attorney General’s prosecution of no-poach agreements between franchises, arguing that no-poach agreements can have economic benefits within the franchise context and promoting the use of the rule of reason over a more worker-friendly quick-look analysis.<sup>162</sup> And in Ninth Circuit litigation against Seattle’s gig-worker ordinance, the agencies intervened to argue that state-action immunity did not extend to a municipality in that case.<sup>163</sup> Thus, it is risky to assume that the federal antitrust agencies will behave consistently toward labor, because administrations and their priorities change. At a minimum, the renewed interest in no-poach agreements illustrates the agencies’ awareness that enforcing the antitrust laws may involve protecting labor.

In 1999, the FTC fiercely opposed proposed legislation that would allow independent physicians and healthcare workers to bargain collectively with health plans.<sup>164</sup> But the proposed guidance does not necessarily approve of such behavior, and in fact, it is unlikely that independent physicians in these scenarios would pass the ABC test given their significant autonomy. The point is not to exempt all workers considered independent contractors, but to permit organizing among low-income workers currently on the fringes of the classification, like gig-economy workers.

### C. State Legislation

#### 1. The Proposal

While agency guidance has the appeal of procedural simplicity, it does not address private antitrust actions against workers’ organizations. This Section proposes that states should enact statutes creating procedures for independent contractors both to bargain collectively with their employers and to obtain periodic review of resulting agreements by the state, thus conferring antitrust immunity due to state-action immunity from application of the antitrust laws. Under the *Parker* state action doctrine, restraints of trade arising from state

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161. See *Division Update Spring 2019: No-Poach Approach*, *supra* note 83.

162. Boris Bershteyn, Karen M. Lent, Tara L. Reinhart & Zachary C. Siegler, *No-Poach Update: DOJ Seeks to Rein in Franchise Suits*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Feb. 11, 2019), <https://www.skadden.com/insights/publications/2019/02/no-poach-update> [<https://perma.cc/VY4U-VRKR>].

163. Brief for the United States & the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640).

164. *Quality Health-Care Coalition Act of 1999: Hearing on H.R. 1304 Before the H. Comm. on the Judiciary*, 106th Cong. 16-24 (1999) (statement of Robert Pitofsky, Chairman, FTC).

regulation are not subject to antitrust liability.<sup>165</sup> While the political feasibility of this approach will be a state-by-state question, several states have already shown a willingness to extend protections to a greater number of workers.

As discussed above, several states, most recently California, have enacted statutes expanding the state definition of “employee” with the purpose of extending various minimum-wage protections and labor benefits such as unemployment insurance.<sup>166</sup> While these statutes promise to expand the rights of large numbers of workers, their definition of “employee” applies only to specific parts of state labor laws<sup>167</sup> and does not shield these workers from federal antitrust suits. Even in the absence of federal antitrust enforcement, the lack of explicit language preserving a right to bargain creates uncertainty and limits any leverage workers may have due to the threat of private antitrust litigation.<sup>168</sup> Because the principle underlying this Note’s proposal is similar to the principle that justifies recent changes to state definitions of “employee” — namely, a concern for the welfare of workers who are currently considered independent contractors in spite of their limited control over their work—there is no reason that the same democratic will that led to those definitional changes could not also be used to protect the right of those workers to organize.

This Note proposes that states consider adopting statutes similar to Seattle Ordinance 124968, which provides procedures allowing for-hire vehicle drivers to bargain collectively with their “driver coordinators” or hirers.<sup>169</sup> Under Seattle’s ordinance, the bargaining is to occur through exclusive driver representatives (EDRs) that are elected and approved by Seattle’s Director of Financial and Administrative Services.<sup>170</sup> The ordinance requires that the driver coordinator and the EDR “meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director,” including: “best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; minimum hours of work, conditions of work, and applicable

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165. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

166. See Deknatel & Hoff-Downing, *supra* note 11, at 64-65.

167. See, e.g., 2019 Cal. Stat. 2888 (codified as amended at CAL. LAB. CODE §§ 2750.3, 3351 (West 2020) and CAL. UNEMP. INS. CODE §§ 606.5, 621 (West 2020)).

168. New York legislators have proposed legislation to enable collective bargaining for gig-economy workers. Chris Opfer & Keshia Clukey, *Uber, Lyft Drivers Could Form Unions Under New York Proposal*, BLOOMBERG L. (Dec. 2, 2019, 6:01 AM), <https://news.bloomberglaw.com/daily-labor-report/new-york-proposal-aims-to-let-uber-lyft-drivers-form-unions> [<https://perma.cc/P8NV-K8E8>].

169. SEATTLE, WASH., MUN. CODE § 6.310.735.H (2020).

170. *Id.* § 6.310.735.F.

rules.”<sup>171</sup> The ordinance originally included payments to drivers as a topic of bargaining, but this was removed as part of a litigation settlement, discussed below.<sup>172</sup> Any agreement to emerge from the bargaining process would then be reviewed by the Director and approved if it complies with Seattle law and “promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance[s] the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of [this] [o]rdinance.”<sup>173</sup> If negotiations break down, either party has the right to demand that the negotiations be submitted to arbitration.<sup>174</sup>

Shortly after it was enacted, the Seattle ordinance was challenged on federal preemption grounds, both under federal antitrust and labor law.<sup>175</sup> While the Ninth Circuit held that the Seattle ordinance was preempted by federal antitrust law, leading Seattle to compromise on the text of its ordinance and remove payments to drivers as a topic of bargaining,<sup>176</sup> this Section discusses how state legislators, unlike municipal governments, are well positioned to craft statutes that avoid antitrust preemption under *Parker*<sup>177</sup> and analyzes case law to demonstrate that a proposal like Seattle’s is not preempted by the NLRA.<sup>178</sup>

## 2. Normative Justification

A state legislative approach would promote worker welfare in a way similar to the federal guidance proposal: with greater liberty to organize, workers can obtain higher wages and better working conditions.<sup>179</sup> By permitting workers to seek a fair wage for their services and granting bargaining power to those in our society with the least economic and political leverage, the proposal would bring to fruition the original purposes of the antitrust labor exemption while also maximizing total social welfare.<sup>180</sup>

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171. *Id.* § 6.310.735.H.1.

172. See Hal Singer, *Uber Under the Antitrust Microscope: Is There a ‘Firm Exemption’ To Antitrust?*, FORBES (Feb. 25, 2019, 3:15 PM EST), <https://www.forbes.com/sites/washingtonbytes/2019/02/25/uber-under-the-antitrust-microscope-is-there-a-firm-exemption-to-antitrust> [<https://perma.cc/KK9U-CKBH>].

173. SEATTLE, WASH., MUN. CODE § 6.310.735.H.2 (2020).

174. *Id.* § 6.310.735.I.

175. See *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 775-76 (9th Cir. 2018).

176. Singer, *supra* note 172.

177. See *infra* Section III.C.3.

178. See *infra* Section III.C.4.

179. See *supra* Section III.A.

180. See *supra* Part I.

Although a state approach lacks the uniformity of a federal agency approach, it has two advantages. First, it shields workers' organizations from both private and government lawsuits. Second, a state legislative proposal benefits from the force of law and democratic imprimatur afforded to state statutes that agency guidance lacks. Citizens of states like California have already demonstrated their interest in protecting gig-economy workers, and that democratic interest is a justification in and of itself.

A state legislative approach is likely to be implemented piecemeal: in some states, there may not be the political will for a pro-labor policy, and in others, the gig economy may not be politically or economically salient. But, perhaps unsurprisingly, the states with the most interest in regulating the gig economy are the ones where it is most strongly present: for example, California and New York either have<sup>181</sup> or are considering<sup>182</sup> expanded protections for gig workers, and Uber's three busiest cities, in terms of bookings, are in those states (the fourth and fifth busiest are abroad).<sup>183</sup> For-hire drivers are geographically concentrated,<sup>184</sup> meaning that individual states will have disproportionate power to regulate that sector of the economy.

### 3. *Implementation: Parker Immunity*

The key value of state legislation in this context is the complete exemption of state regulation from private and public enforcement actions under the federal antitrust laws. The doctrine of state-action immunity was articulated in the landmark case *Parker v. Brown*, which concerned a California statute that facilitated coordination among California farmers.<sup>185</sup> The statute "authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers."<sup>186</sup> The program at issue was an agreement among raisin producers to restrict the quantity of raisins produced, in part by disposing of "inferior" and

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181. See 2019 Cal. Stat. 2888 (codified as amended at CAL. LAB. CODE §§ 2750.3, 3351 (West 2020) and CAL. UNEMP. INS. CODE §§ 606.5, 621 (West 2020)) (California's AB5 legislation).

182. Opfer & Clukey, *supra* note 168 (discussing proposed legislation in New York).

183. See Henry Grabar, *Uber Reveals One of Its Big Vulnerabilities*, SLATE (Apr. 12, 2019, 9:53 AM), <https://slate.com/business/2019/04/uber-ipo-nyc-london-risks.html> [<https://perma.cc/VSD7-JD44>].

184. *Id.*

185. 317 U.S. 341 (1943).

186. *Id.* at 346.

“substandard” raisins and collecting excess raisins in a “stabilization pool.”<sup>187</sup> A group of raisin producers sued to enjoin enforcement of the program, alleging among other claims that the program was illegal under the Sherman Act.<sup>188</sup> But the Supreme Court upheld the program and the statute from which it arose, holding that the Sherman Act prohibited “individual and not state action.”<sup>189</sup> California was free to “[create] the machinery for establishing the prorate program.”<sup>190</sup> The Court emphasized that California could not simply authorize cartels by applying its imprimatur to private collusion, but rather had to take an active role in adopting and enforcing any programs among the raisin producers.<sup>191</sup>

For a state restraint of competition to trigger *Parker* immunity, two prongs must be met: (1) the “restraint must be ‘one clearly articulated and affirmatively expressed as state policy;’” and (2) “the policy must be ‘actively supervised’ by the State itself.”<sup>192</sup> The case most frequently cited for this two-pronged articulation of *Parker* is *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*, which concerned a statute establishing a state-sponsored resale-price maintenance scheme for wine.<sup>193</sup> The Court held that the statute met the first prong, because “[t]he legislative policy [was] forthrightly stated and clear in its purpose to permit resale price maintenance.”<sup>194</sup> But the statute failed the second prong, largely because the Court believed California was merely acting as a rubber stamp for private collusive behavior:

The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any “pointed reexamination” of the program. The national policy in favor of competition cannot be thwarted by casting

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187. *Id.* at 348.

188. *Id.* at 344.

189. *Id.* at 352.

190. *Id.*

191. *Id.* at 350, 352.

192. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

193. *Id.* at 100.

194. *Id.* at 105.

such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.<sup>195</sup>

Later cases add further clarity to what does and does not constitute “active supervision.” In *Patrick v. Burget*, the Supreme Court struck down a hospital’s peer-review standards for doctors on antitrust grounds, implying that such standards constituted an attempt by doctors to exclude competitors, even though hospitals were required to have such standards by Oregon’s Health Division.<sup>196</sup> The role of the Health Division was to make sure that peer-review procedures were in place, not to review them substantively, and the Court held that this arrangement did not constitute active supervision.<sup>197</sup> Later, in *FTC v. Ticor*, the Supreme Court held that it was insufficient for a state to imply its approval of a private-party agreement by failing to raise objections.<sup>198</sup>

Most recently, in *North Carolina Board of Dental Examiners*, the Supreme Court held that a state-organized board of dentists could not escape antitrust scrutiny for regulating the dental profession, because “active market participants” are unable to provide active state supervision as required under *Midcal*.<sup>199</sup> The Court held that the State must accept “political accountability” for its actions<sup>200</sup> and named a few “constant requirements of active supervision:”

The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it [citing *Patrick*]; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy [same]; and the “mere potential for state supervision is not an adequate substitute for a decision by the State.” Further, the state supervisor may not itself be an active market participant.<sup>201</sup>

Seattle’s ordinance was challenged on *Parker* grounds, and the Ninth Circuit held that the Ordinance met neither *Midcal* prong.<sup>202</sup> But Seattle faced a major legal obstacle because it was acting as a municipality rather than as a state.

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195. *Id.* at 105-06 (footnote omitted).

196. 486 U.S. 94, 105-06 (1988).

197. *Id.* at 102-03. The Court also explained that other state bodies, like the Board of Medical Examiners and the state judiciary, did not actively supervise the peer-review standards. *Id.* at 103.

198. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638-39 (1992).

199. *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 510 (2015).

200. *Id.* at 505.

201. *Id.* at 515 (first citing *Patrick*, 486 U.S. at 102-03; and then quoting *Ticor*, 504 U.S. at 638).

202. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 781-90 (9th Cir. 2018).



Because there is no antitrust-immunity exception for municipalities,<sup>203</sup> Seattle had to prove that the State of Washington intended to create an antitrust exemption for gig-economy drivers, in part by referencing state statutes that permit municipalities to regulate the industry.<sup>204</sup> But the Ninth Circuit held that this was insufficient to constitute a clearly articulated antitrust exemption, in part because the ordinance was not a “foreseeable” result of the state statutes.<sup>205</sup> Similarly, although the Ordinance contained procedures for local-government review of collective bargaining agreements made between gig-economy workers and their coordinators, the Ninth Circuit held that there needed to be active supervision by the State of Washington, which the court deemed absent.<sup>206</sup>

States can implement statutes that are similar in form to Seattle Ordinance 124968, with adjustments to ensure that the statutes fall under *Parker* antitrust immunity. States, not municipalities, are the intended beneficiaries of *Parker* immunity, and as such, there would be fewer legal obstacles for state legislation. State legislatures can shape statutes to match the *Parker* prongs, unlike municipalities, which must rely on the enactments of a separate legislative body. Moreover, states can restore payments to drivers as an appropriate topic of bargaining, a provision Seattle was forced to drop as a result of preemption concerns.<sup>207</sup> But even though the Seattle ordinance was struck down largely because of the attenuated connection to state action, the same rule, if passed by a state, would not necessarily qualify.

States considering a statute similar to the Seattle ordinance would need to make sure that their intent is clearly articulated, and that there is active state supervision and regulation of collective-bargaining activity, rather than rubber-stamp approval. On the first prong, the “[l]egislative policy [should be] forthrightly stated and clear in its purpose to permit” anticompetitive conduct.<sup>208</sup> In the 2013 case *FTC v. Phoebe Putney Health System, Inc.*, the Supreme Court held that it was insufficient for a state to grant regulators a “general power to act;”<sup>209</sup> rather, “the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.”<sup>210</sup> States can look for guidance to statutes that were upheld by the Supreme Court, such as the North Carolina rate-

203. See *Cnty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389 (1978).

204. *City of Seattle*, 890 F.3d at 783.

205. *Id.*

206. *Id.* at 789.

207. Singer, *supra* note 172.

208. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

209. 568 U.S. 216, 231 (2013).

210. *Id.* at 229.



setting statute that was considered in *Southern Motor Carriers Rate Conference, Inc. v. United States* and was deemed to pass the “clearly articulated” policy prong.<sup>211</sup> The statute begins with a statement of legislative policy and an intent to fix rates:

For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates . . . by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier . . . may . . . apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement . . . if it finds that, by reason of furtherance of the transportation policy and goal declared in this section and in G.S. 62-2 or G.S. 62-259 . . . the relief provided in subsection (h) shall apply [antitrust immunity].<sup>212</sup>

Legislatures will need to consider what their purposes are in enacting something similar to Seattle’s ordinance, and in particular whether to expand the scope of Seattle’s ordinance to cover categories of workers other than Uber and Lyft drivers. The latter question poses issues of federal labor-law preemption (which are discussed in the next Section),<sup>213</sup> but a sample statement of purpose might include the following language:

For the purpose of promoting the provision of safe, reliable, and economical for-hire transportation services and ensuring that for-hire drivers work under fair and reasonable terms, it shall be the policy of this State to permit for-hire drivers to bargain collectively with their hirers and to agree collectively upon terms of employment including but not limited to vehicle equipment standards, safe driving practices, compensation, minimum hours of work, conditions of work, and applicable rules.

On the second *Midcal* prong, states are unlikely to receive *Parker* immunity unless they adopt a procedure similar to Seattle’s, whereby state officials review each proposed collective-bargaining agreement for compliance with the purposes of the statute. States have a greater chance of receiving immunity if they take “political accountability” for approved agreements.<sup>214</sup> One way to do this could be to articulate standards of review and supervision—for example, by specifying that worker compensation must be reasonable and equitable, or that

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211. 471 U.S. 48, 65-66 (1985).

212. N.C. GEN. STAT. § 62-152.1(b) (2020).

213. See *infra* Section III.C.4.

214. N.C. State Bd. of Dental Exam’rs v. FTC, 574 U.S. 494, 505 (2015).

there must be reasonable procedures governing expulsion or termination. Further, state officials supervising these agreements are less likely to be preempted by federal law if they are not drivers themselves and if they reserve the right to veto collective bargaining agreements.<sup>215</sup> States can address the concerns raised in *Midcal*<sup>216</sup> by engaging in periodic review of “market conditions”<sup>217</sup> and offering proposed benchmark compensation levels, and could also establish procedures for gathering additional facts and evidence on specific collective-bargaining negotiations, like the procedures outlined in the Seattle ordinance.<sup>218</sup>

#### 4. *Feasibility: Garmon and Machinists Preemption*

One obstacle to state-enacted labor regulations is that the NLRA has been construed broadly to preempt state labor laws. In *San Diego Building Trades Council, Millmen’s Union, Local 2020 v. Garmon*, the Supreme Court held that states may not regulate conduct that falls under the primary jurisdiction of the National Labor Relations Board, a doctrine that is often referred to as “*Garmon* preemption.”<sup>219</sup> The Court in *Garmon* held:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act [protecting the right to organize and collectively bargain], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.<sup>220</sup>

Since the NLRB has jurisdiction to protect collective-bargaining rights of employees,<sup>221</sup> state statutes that broaden collective-bargaining rights for a broad category of workers may be preempted under *Garmon* if they regulate employees and impinge on the NLRB’s jurisdiction. The scope of federal labor-law preemption was expanded in *Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Commission*, which held that “a particular activity might be

215. *Id.* at 515 (listing requirements for active supervision).

216. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105-06 (1980) (“The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts.”).

217. *Id.*

218. *See, e.g., SEATTLE, WASH., MUN. CODE* § 6.310.735.H.2 (2019).

219. 359 U.S. 236, 244 (1959).

220. *Id.*

221. *See* 29 U.S.C. § 157 (2018); *see also id.* § 152(3) (defining “employee”).

‘protected’ by federal law not only when it fell within section 7, but also when it was an activity that Congress intended to be ‘unrestricted by *any* governmental power to regulate.’”<sup>222</sup> This doctrine, often referred to as “*Machinists* preemption,” in effect suggests that the absence of congressional regulation could itself be intentional and preemptive of state regulation.<sup>223</sup> Since the NLRA grants the NLRB jurisdiction over employees<sup>224</sup> but defines “employee” to exclude independent contractors,<sup>225</sup> a state statute that broadens collective-bargaining rights for workers currently classified as independent contractors may be preempted if Congress intended to leave those workers unregulated by excluding them.

Although this Note’s state-legislation proposal may raise labor-preemption concerns, this Section provides three reasons to believe that those concerns are surmountable. First, the NLRB has declined jurisdiction over for-hire drivers, the focus of this Note’s proposal, and states seeking broad legislation can draft statutory text likely to evade preemption under *Garmon*. Second, a close reading of the case law regarding *Machinists* preemption suggests that it would not apply to the case of independent contractors. Finally, even though the Supreme Court has construed labor preemption very broadly, often to the exclusion of worker-friendly state legislation, expanding preemption to cover this Note’s proposal would destabilize precedent and jeopardize both worker-friendly and employer-friendly state legislation.<sup>226</sup>

States that narrowly legislate to enable collective bargaining by gig-economy drivers are unlikely to face preemption under *Garmon* given that the NLRB has recently declined jurisdiction over Uber drivers.<sup>227</sup> In an April 2019 advice memo, counsel at the NLRB opined that Uber drivers are independent contractors under the common-law employment test and therefore beyond the NLRB’s jurisdiction over employees.<sup>228</sup> Given that the NLRB itself has declined

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222. 427 U.S. 132, 141 (1976) (quoting *NLRB v. Ins. Agents Int’l Union*, 361 U.S. 477, 488 (1960) (emphasis added)).

223. *Id.* at 140 (referring to conduct that was left “to be controlled by the free play of economic forces” (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971))).

224. *See* 29 U.S.C. § 157.

225. *Id.* § 152(3).

226. Moreover, even if federal law is held to preempt state regulation of independent contractors’ organizing rights, there is significant reason to believe that federal guidance on its own would be effective. *See infra* Section III.D.

227. *Advice Memorandum on Uber Technologies, Case 13-CA-163062*, NAT’L LAB. REL. BOARD 3 (Apr. 16, 2019), <https://apps.nlr.gov/link/document.aspx/09031d4582bd1a2e> [<https://perma.cc/K9EB-AD3L>].

228. *Id.*; *see also* *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 980 (2d Cir. 1975) (holding that the status of workers as employees or independent contractors is “critical to a determination of the Board’s exclusive jurisdiction”).

jurisdiction over Uber drivers, plaintiffs will have difficulty arguing that state legislation in that area infringes on federal authority under *Garmon*. The NLRB's memo is consistent with existing case law on the topic,<sup>229</sup> which suggests the Board's determination may persist through new administrations. But even if the NLRB were to reverse course and declare that Uber drivers were employees, preempting state legislation under *Garmon*, that would be a pyrrhic victory for challengers of state legislation: Uber drivers, once allowed to organize under State supervision, would still be allowed to organize, just under the supervision of the NLRB.

There is a significant risk of preemption under *Garmon* if states adopt a version of the Seattle ordinance that applies to any worker that qualifies as an employee under the ABC test, because some of these workers are probably considered employees under the common-law test currently employed by the NLRB and therefore are under the jurisdiction of the NLRB. But the risk of preemption decreases for enactments that cover specific categories of workers, like Uber and Lyft drivers, who are deemed to be independent contractors under the common law and are unlikely to fall under the NLRB's jurisdiction.<sup>230</sup> States may also consider adopting Seattle's disclaimer that the enactment does not make any determinations about the legal status of any worker, avoiding arguments that the determination of worker status is itself under the jurisdiction of the NLRB.<sup>231</sup>

The question of preemption under *Machinists* is more difficult given the dearth of case law on state regulation of independent contractors, but existing case law strongly suggests that Congress did not intend to preclude state regulation in that area. In the challenge to the Seattle ordinance, the Ninth Circuit held that the ordinance is not preempted by *Machinists* after reviewing the legislative history of the NLRA and concluding that there was no congressional intent to prevent independent contractors from organizing and to leave them to the forces of the free market. The Ninth Circuit looked to the legislative history surrounding the Taft-Hartley Act, which modified the NLRA's definition of "employee" to exclude independent contractors<sup>232</sup> and was passed in response to the Supreme Court's decision in *Hearst Publications*, which in turn approved of the

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229. See *Fedex Home Delivery v. NLRB*, 563 F.3d 492, 499 (D.C. Cir. 2009).

230. As such, the statute could plausibly be expanded to cover plumbers, electricians, hairdressers, or other independent contractors, though this would be a matter of legislative judgment for each state. And, even if a court held that a state statute was preempted under *Garmon*, that would be a pyrrhic victory for the plaintiffs as it would imply that the covered workers are indeed under the protection of the NLRB. See *supra* note 229 and accompanying text.

231. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 794 (9th Cir. 2018).

232. Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 101, § 2(3), 61 Stat. 136, 137-38.

NLRB's attempt to broaden the definition of "employee."<sup>233</sup> The Ninth Circuit held that even if Congress wanted to "return to the status quo" agency definition of employee for the purpose of the NLRA, there was no evidence of intent to "preempt state or local regulation of independent contractors."<sup>234</sup>

Other courts have similarly held that Congress did not intend to preempt state regulation of other categories of workers that are excluded from the NLRA's protection. In *Davenport v. Washington Education Ass'n*, Justice Scalia wrote that the NLRA "leaves States free to regulate their labor relationships with their public employees," citing the section of the NLRA that excludes government employers from the set of employers covered by the Act.<sup>235</sup> Similarly, in *Greene v. Dayton*, the Eighth Circuit held that states are free to facilitate collective bargaining of domestic service workers who, like independent contractors, are excluded from the NLRA's definition of employee.<sup>236</sup> Referencing cases from the Seventh and Ninth Circuits holding that states are free to regulate agricultural workers (another excluded category), the court noted that "[t]he two groups of employees are treated identically in the text of the statute."<sup>237</sup> Independent contractors are excluded from the NLRA's definition of employee in the same way as agricultural workers and domestic workers, and under the Eighth Circuit's reasoning, state regulation of independent contractors is unlikely to be preempted under *Machinists*.<sup>238</sup>

Finally, although the Supreme Court has construed labor-law preemption broadly, often to the exclusion of worker-friendly state laws,<sup>239</sup> there are reasons to believe the Court would still be unlikely to strike down this Note's proposal through *Machinists* preemption. First, expansive federal labor-law preemption does not discriminate between worker- and employer-friendly state

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233. *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 115-18 (1944).

234. *Chamber of Commerce*, 890 F.3d at 793.

235. 551 U.S. 177, 181 (2007) (citing 29 U.S.C. § 152(2) (2018)).

236. 806 F.3d 1146, 1149 (8th Cir. 2015) (citing 29 U.S.C. § 152(3) (2018)).

237. *Id.* (citing *Villegas v. Princeton Farms*, 893 F.2d 919, 921 (7th Cir. 1990); and *United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982)).

238. *Cf.* *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1193 (D. Ariz. 2013) (holding that state regulation of independent contractors is not preempted, by reasoning that "the NLRA does not apply when the employer is a state or any political subdivision thereof. Nor does it apply to agricultural laborers, domestic servants, employees of immediate family members, independent contractors, supervisors, or railroad laborers. Thus, [the state regulation] is not preempted as to these specific employers and employees" (citations omitted)).

239. Moshe Z. Marvit, *The Way Forward for Labor is Through the States*, AM. PROSPECT (Sept. 1, 2017), <https://prospect.org/labor/way-forward-labor-states> [<https://perma.cc/E2K4-T9L9>].

legislation.<sup>240</sup> A decision to expand the scope of preemption and strike down a worker-friendly state statute could be used in later years to strike down employer-friendly state legislation.<sup>241</sup> *Garmon* and *Machinists* themselves were ostensibly worker-friendly decisions when they were decided. *Garmon* held that when the NLRB declines jurisdiction over a matter, a state court cannot award damages to an employer for union activity that is arguably protected under federal labor laws.<sup>242</sup> *Machinists* held that when the NLRB determines that union conduct does not violate the NLRA, an employer cannot seek a remedy under a state unfair-labor-practice provision.<sup>243</sup> Second, precedent makes it difficult to distinguish independent contractors from other workers under the NLRA. Given that agricultural workers, domestic workers, and independent contractors are all exempted from the NLRA in the same section,<sup>244</sup> it is unclear why only independent contractors could not be regulated by states. Without a way to distinguish these types of workers, a judgment that state regulation of independent contractors is preempted would implicitly prohibit state regulation of all of the other types of workers exempted from the NLRA, which could have unpredictable consequences.

#### D. Combining State and Federal Regulatory Responses

The proposal for federal guidance and state legislation described above would be most effective if the two were adopted in tandem: nonenforcement by federal agencies would remove a significant source of antitrust liability for workers' organizations, and legislation in individual states would shield workers in those states from both private and state-government lawsuits. But in a world with only the proposed federal guidance, workers' organizations would not be shielded from private lawsuits.<sup>245</sup> And in a world with only state legislation,

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240. See, e.g., *Int'l Union of Operating Eng'rs Local 399 v. Vill. of Lincolnshire*, 905 F.3d 995, 997-98, 1008 (7th Cir. 2018) (striking down a municipal right-to-work law on preemption grounds).

241. For an overview of the recent wave of employer-friendly state legislation, see Joseph DiGrazia & Marc Dixon, *The Conservative Upsurge and Labor Policy in the States*, 47 *WORK & OCCUPATIONS* 439, 448 tbl.1 (2019).

242. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239, 244 (1959).

243. *Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 148-51, 154 (1976).

244. 29 U.S.C. § 152(3) (2018).

245. Agency nonenforcement may have an indirect deterrent effect on private lawsuits, as many private parties wait for government agencies to initiate suits and build on the government investigation. See, e.g., *Relationship Between Public and Private Antitrust Enforcement: United States*, DIRECTORATE FOR FIN. & ENTER. AFFAIRS COMPETITION COMM. 4-5, 9 (June 15, 2015), <https://www.justice.gov/atr/file/823166/download> [<https://perma.cc/XDJ2-DTTU>].

workers could be investigated by the federal government in states that had not adopted processes for collective bargaining. If states and federal antitrust agencies are able to cooperate, the resulting regulatory regime would combine the strengths of both approaches.

Antitrust enforcement has historically relied on cooperation among federal and state authorities: agencies at both levels routinely share information, expertise, and resources, and they often file antitrust actions jointly or in parallel.<sup>246</sup> But the history of state-federal antitrust cooperation suggests that cooperation is often driven by aligned political interests and not just an interest in cooperation per se. Rather than fall in line for the sake of falling in line, states have often pursued aggressive antitrust agendas when federal enforcement has been lacking, precisely *because* federal enforcement has been lacking, and have developed independent agendas that have sometimes converged with and at other times diverged from the federal agenda.<sup>247</sup> The Trump administration has been a period of divergence, marked by visible conflicts between federal and state authorities: most notably, state authorities filed suit against the merger of T-Mobile and Sprint after the DOJ had cleared it, and the DOJ intervened to suggest a more defendant-friendly standard in state prosecutions of franchise no-poach agreements.<sup>248</sup> The question of whether these conflicts will continue, or cooperation will be restored, seems like it will in large part depend on politics.

But these conflicts between state and federal antitrust authorities illustrate how state authorities are willing to be leaders in antitrust enforcement when the federal government does not go far enough. By paying extra attention to no-poach agreements or particular mergers, states have shaped the national dialogue around those issues. This is true within labor law as well: in February 2020, the House passed the Protecting the Right to Organize Act, which would nationalize provisions in California's AB5 legislation, suggesting that moves at

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246. Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, *Cooperative Federalism in the Enforcement of Antitrust and Consumer Protection Laws 6-7* (Sept. 23, 2004), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/cooperative-federalism-enforcement-antitrust-and-consumer-protection-laws/040923coopfed.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/cooperative-federalism-enforcement-antitrust-and-consumer-protection-laws/040923coopfed.pdf) [<https://perma.cc/KB7N-UT9Z>]; Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust Federalism: Enhancing Federal/State Cooperation 2-6* (Oct. 7, 2009), <https://www.justice.gov/atr/file/519861/download> [<https://perma.cc/3TAM-SB3F>].
247. Juan A. Arteaga & Jordan Ludwig, *The Rule of US State Antitrust Enforcement*, GLOBAL COMPETITION REV. (Nov. 19, 2019), <https://globalcompetitionreview.com/insight/private-litigation-guide/1211049/the-role-of-us-state-antitrust-enforcement> [<https://perma.cc/46JX-NB92>].
248. *Id.*; Tim Wu, *Opinion, With One Move, New York Cuts Sprint and T-Mobile Down to Size*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/opinion/sprint-tmobile.html> [<https://perma.cc/LX6W-BHTF>].



the state level are impacting legislative discussions at the federal level.<sup>249</sup> While a federal structure of government presents opportunities for conflict between state and federal regulation, it also presents opportunities for moves at one level to influence policymakers at the other. Further, despite public conflicts between state and federal antitrust authorities in recent years, both seem increasingly aware of the impact that antitrust can have on labor: even if states and the federal government disagree on the extent to which no-poach agreements should be prosecuted, they agree that such agreements should be subject to scrutiny. The renewed interest in labor from antitrust enforcers suggests that they are beginning to see their duties more broadly.

## CONCLUSION

Expanding antitrust protections for workers is both welfare-maximizing, given assumptions about current institutional constraints and market conditions, and consistent with legislative intent, as revealed through the debates over the major antitrust statutes. This Note has outlined a standard through which jurists and policymakers can consider the impacts of various economic activities on worker welfare within antitrust law and has applied that standard to the issue of independent-contractor organizing.

Although the legislative history of the antitrust statutes provides some guidance on how they should be interpreted, the statutes are among the most open-ended in the U.S. Code. On the one hand, this vagueness is frustrating. Interpretations of antitrust law have fluctuated over time, sometimes unpredictably, to the chagrin of enforcers and regulated parties alike. But on the other hand, this open-endedness provides an opportunity to discuss what antitrust law can and should achieve. Policymakers and their constituents have great sway over the direction of antitrust enforcement, and they have the power to shape antitrust in a way that promotes both democratic and economic values.

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249. John Gallagher, *House Democrats Approve 'Federal AB5' Legislation*, FREIGHTWAVES (Feb. 6, 2020), <https://www.freightwaves.com/news/house-democrats-approve-federal-ab5-legislation> [<https://perma.cc/Q9UU-FTEP>].

**APPENDIX****SAMPLE AGENCY GUIDANCE**

Pursuant to section 6 of the Clayton Act, the Bureau of Competition of the FTC and the Antitrust Division of the DOJ (the “Agencies”) do not consider the existence of worker organizations and unions to be an enforcement priority under the antitrust laws. In drafting section 6 of the Clayton Act, and similar statutory provisions like section 5 of the Norris-LaGuardia Act, Congress intended that the antitrust laws not be used to prevent workers from organizing in all circumstances. In particular, the Agencies recognize the rapidly changing nature of work, and the growing number of gig-economy workers who are independent contractors under the common law of agency but resemble employees because they are subject to the control of their hirers.

In determining whether an individual is an independent contractor, the Agencies will consider the following factors:

- (A) Whether the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) Whether the worker performs work outside the usual course of the hiring entity’s business; and
- (C) Whether the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Organizations of workers that do not meet all factors are unlikely to be the subject of agency enforcement, given the history of the antitrust laws and current agency priorities. But if a group of workers meets all three of these factors, then its attempt to organize may be subject to an enforcement action under the federal antitrust laws.