

# FISSURING AND THE FIRM EXEMPTION

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## I

### INTRODUCTION: ANTITRUST’S MONOPOLY ON LICENSING ECONOMIC COORDINATION

Workers beyond the bounds of employment and other small players are deprived of coordination rights under fissuring<sup>1</sup> in addition to being subject to the control of relatively large, powerful firms. But this absence of coordination rights is neither an inexorable force of nature as the economy changes, nor is it a free-standing legal fact. Rather, the conditions under which workers and small enterprises are deprived of coordination rights in these business arrangements are instead part of an *overall* allocation of coordination rights—an affirmative policy choice on the part of antitrust law—that *grants* coordination rights to some actors while denying them to others. Indeed, as I argue elsewhere, antitrust law’s basic function is to license some forms of economic coordination and bar others.<sup>2</sup> Private parties may not decide by contract whether they will or will not coordinate: they must have public approval to do so. Furthermore, where and how antitrust law has historically drawn, and today does draw, the line between exempt and non-exempt economic arrangements is not in reality outsourced to any external referent: not property law, not corporate law, and not economics. In the 1970’s, Robert Bork and others invoked the notion of “efficiency” internal to mainstream economics—thereby borrowing for a particular allocation of coordination rights its prestige—in order to bless unrelated and erroneous ideas about “productive efficiencies,” i.e., the virtues of authoritarian hierarchy, which are embodied in the traditional firm and extended under firm fissuring. In truth, coordination rights are allocated on the basis of self-referential criteria internal to antitrust law.<sup>3</sup>

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1. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014) (I use the term “fissuring” to refer to fissured *business* structures generally speaking, not only the workplace as such.). *See also* Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 *LOYOLA UNIV. CHICAGO L. J.* 969 (2016).

2. Sanjukta M. Paul, *Antitrust as Allocator of Coordination Rights*, 67 *UCLA L. REV.* (forthcoming 2020).

3. *Id.*

This paper now applies that framework to first explain how “lead firms”—as David Weil calls them—in fissured business arrangements take advantage of the expansion of antitrust permission to engage in economic coordination in the form of *control* beyond the firm, as well as the contraction of antitrust permission to engage in coordination in the form of *cooperation* beyond the firm. In the first sense, lead firms—franchisors, firms that make use of individual or small independent contractors, and now many tech platforms—are able to control smaller actors in their orbits without the censure of antitrust law. In the second sense, these firms are protected from any countervailing power that these smaller actors might bring to bear upon their relationships with them. This paper then goes on to show how that lead firms’ coordination exceeds or stretches regions of both the deep grammar (in the sense of deeply held assumptions that aren’t necessarily expressly articulated) and the surface grammar (in the sense of expressly articulated doctrine) of antitrust law. Moreover, the bar on smaller actors’ coordination itself internalizes what I call “the firm exemption,” as I show through a close look at the Supreme Court’s decision in *FTC v. Superior Court Trial Lawyers Ass’n*, which is perhaps the strongest articulation of that rule.

The price coordination that takes place within a firm is typically—if one digs far enough—putatively justified by the property rights of investors, even though it is not logically derivable from them. Imagine a firm that sells a service: playing the organ for special events, for example. Organists who band together to engage in price coordination or market allocation are denied such coordination rights by antitrust, as indeed a recent prosecution by the FTC confirmed.<sup>4</sup> On the other hand, if investors jointly create a corporation that then hires the same organists, their price-setting (or internal market allocation) activity is deemed untouchable by antitrust. Notably, this is currently also true even if the firm only *contracts* with the organists, even though that arrangement undercuts all the available reasons for the firm exemption in the first place.

Many fissured business arrangements take this disjunction further. Imagine if the same corporation presents itself as a tech platform selling the use of an app to both organists and their customers. In the current regulatory environment, it will be able to engage in price coordination beyond firm boundaries: setting the price of a product it does not even purport to sell, namely organist services. At the same time, the organists themselves are barred from joint price-setting or joint bargaining; they are effectively forced to pay the corporation for use of the license to engage in price coordination that it receives free of charge from the state.

Ride-hailing tech firms like Uber and Lyft, fast-food franchisors, as well as firms that rely primarily upon services provided by independent contractors, all engage in price coordination beyond firm boundaries. Meanwhile, the law prohibits the workers and small enterprises in the orbits of such firms from

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4. See Am. Guild of Organists, F.T.C. 151 0159 (2017).

engaging in economic coordination, either directly,<sup>5</sup> or by selectively and inconsistently ascribing firm status as between antitrust and other areas of law, notably labor law. In each of these respects, antitrust's affirmative edicts, its omissions, and its latent and softer influences upon policy all combine to extend its underlying express preference for allocating coordination rights to *existing* concentrations of economic power—even as the internal justifications for that preference comes increasingly undone.

## II

### THE EXPANSION OF COORDINATION RIGHTS IN FISSURED ARRANGEMENTS

Antitrust's fundamental function is to allocate economic coordination rights, demarcating spaces of competition and coordination in economic life.<sup>6</sup> Moreover, the firm exemption creates the paradigm space for coordination chosen by today's antitrust law.<sup>7</sup> Applying this framework to the phenomenon of fissuring, and its legal treatment, we see more clearly both the tensions in the firm exemption and how this exemption has interacted with intentional business decisions aimed at expanding it. The dynamic that has driven this expansion of coordination rights involves four components: (1) developments in antitrust doctrine, notably in the area of vertical restraints but also the single entity doctrine, that have liberalized coordination rights centered in large, powerful firms; (2) the tacit expansion of the deeper-rooted legal concept of the firm and its boundaries within antitrust, i.e., the firm exemption; (3) intentional business practices, such as the replacement of employees with independent contractors, franchising, and “platform” arrangements like Uber's, that have sought to legitimize themselves in the eyes of institutional actors and the public, in turn reinforcing both (1) and (2); and (4) arguments associated with law and economics scholarship about what sorts of business arrangements—and limits upon competition—are “efficiency-enhancing.”

Policy debates sometimes proceed as if antitrust law is, or should be, simply an implementation of (4). But in fact, antitrust law tacitly relies upon legal categories at the level of either surface or deep grammar, even when it purports to simply implement economic theory.<sup>8</sup> We see this in the context of fissuring in terms of the reliance upon legal categories furnished by the law of vertical restraints and at a deeper level by the firm exemption. Moreover, it is not even logically possible for antitrust to simply implement the prescriptions of economic theory, given that some prior normative limitations upon competition are both necessary and not themselves derivable from neutral principles. Instead, the administration of competition policy entails initial political and moral choices.

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5. Under its current interpretation by the courts, Section 1 of the Sherman Act bars much inter-firm horizontal coordination, including price coordination. *See* 15 USC §1 (1890); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

6. Paul, *supra* note 2.

7. *Id.*

8. Paul, *supra* note 2.

The doctrinal mechanisms of the expanded permission to exert control beyond the firm—what I am calling the legal surface grammar—are the law of vertical restraints and to some extent the single entity doctrine, both of which have been made significantly more permissive since the late 1970's. Meanwhile, the coordination rights granted to small players have been narrowed through an increasingly rigid norm against horizontal coordination beyond firm boundaries.<sup>9</sup>

Yet despite these superficially favorable developments from the perspective of firms experimenting with new business arrangements, a deeper disconnect plagues their antitrust treatment. In today's fissured business arrangements, even the relatively thin putative justifications for this asymmetric allocation of coordination rights, centered in antitrust's firm exemption, have come unmoored from actual conditions. The firm exemption and its expansion in the Borkian revolution are grounded ultimately in arguments about the productive efficiencies that flow from managerial hierarchies and enterprise integration.<sup>10</sup> But these arguments about economies of scale, and about the efficiencies of managerial hierarchies, are centered largely upon the manufacturing context, whereas many of today's fissured business arrangements involve retail or services.<sup>11</sup> Even more, as the rest of this Part shows, insofar as fissured business arrangements are precisely defined by reorganizing intra-firm relations as inter-firm ones, they continue to claim the benefits of antitrust's firm exemption even as—according to their own self-representations—the conditions of its applicability (assuming, *arguendo*, their validity) no longer apply.

#### A. Franchising

Franchising typifies the dynamic that has driven the expansion of large firms' coordination rights under conditions of business fissuring: an iterative interaction between shifting legal norms and affirmative decisions about structuring business arrangements. Franchisors succeeded in normalizing their business model in the eyes of the public, institutional actors, and the decisional law, relying to a large extent upon arguments that the business arrangement is efficiency-enhancing, ultimately benefiting consumers.<sup>12</sup> However, aspects of the standard franchising

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9. *Infra*, part III. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (holding minimum fee schedules for lawyers violated § 1 of the Sherman Act); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (finding Society's prevention of competitive bidding by members was per se illegal); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (ruling against an agreement among independent trial lawyers to withhold services until compensation for appointments was increased).

10. Paul, *supra* note 2.

11. The literature on operational efficiencies to be realized through concentration and managerial hierarchies was largely based on the manufacturing context. *See, e.g.*, FREDERIC M. SCHERER ET AL., *THE ECONOMICS OF MULTI-PLANT OPERATION: AN INTERNATIONAL COMPARISONS STUDY* (1975); David B. Audretsch, *Corporate Form and Spatial Form*, in *THE OXFORD HANDBOOK OF ECONOMIC GEOGRAPHY* 333 (Gordon L. Clark et al. eds., 2000); F.M. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 *YALE L.J.* 974 (1977).

12. *See* Brian Callaci, *Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising*, 2, 11 (U. Mass. Amherst, Dept. Econ., Working Paper, Sep. 5, 2018) (finding economists and economic historians have largely emphasized franchising as firms' response to "exogenous

business model still outstrip the now-permissive vertical restraints cases, and reveal tensions in the reigning consumer welfare standard.

Overall, by confining antitrust-immunized control relations largely to the space within the firm—and to a few more democratic arrangements outside the firm—mid-century antitrust had historically placed some limits on the unreciprocal control exerted by franchisors over franchisees. Mid-century antitrust took a dim view of control imposed through vertical, contractual restraints, for example by franchisors upon franchisees. Importantly, this view was motivated more by a norm of non-domination than by an idea of realizing ideal competitive prices, or of attaining the lowest possible consumer prices.<sup>13</sup> The Borkian turn in antitrust law that took hold in the 1970s worked to remove these limits on vertical restraints.<sup>14</sup> By doing so, it demonstrated that its fundamental preference for allocating coordination rights is not only *within* firms, but also *by* large, powerful firms (at least so long as that coordination too is in the form of control over less-powerful actors). Around the same period, the Borkian turn expanded antitrust law’s concept of the firm itself, to capture parent-subsidiary relationships and other corporate groups, and thus extended antitrust immunity to any coordination between separate corporations within these relationships.<sup>15</sup> The single entity doctrine, as it is called, expressly inscribes the preference for economic coordination in the form of control, preferably grounded in concentrated ownership interests.<sup>16</sup> Franchisors have used and relied upon both of these changes in antitrust law to justify their control over franchisees and at times, franchisees’ employees.

Fast-food franchisors coordinate their franchising families various ways. They exert control over key elements of franchisees’ supply, labor, and product decisions. Notably, they even exert control over the prices of the products sold

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technological changes” by “adopt[ing] more efficient organizational techniques”) and 11. *See also, e.g.*, ROBERT BORK, *THE ANTITRUST PARADOX* 108 (1978) (arguing that vertical restraints imposed by contract are efficient and benefit consumers).

13. *See, e.g.*, *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13 (1964) (finding vertically imposed maximum prices by oil company on gas station re-sellers was illegal, where the Court’s reasoning is based as much upon the freedom of the small dealers, as it is on promoting the competitive price); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (holding that geographical and other restrictions upon franchisees’ sale of goods, once franchisees had taken title, violated Section 1). *See also* *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951) (holding vertical restrictions on gas station operators by the oil company were impermissible, and reasoning that gas station operators were tenants, not employees, and thus principles of subordination inherent in hierarchical vertical coordination were inappropriate). *See also* Marshall Steinbaum, *Antitrust, the Gig Economy and Labor Market Power*, 82 *LAW & CONTEMP. PROBS.* No. 3, at 45 2019.

14. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (expanding the permission of geographical market allocation restraints placed by franchisors upon franchisees); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (legalizing maximum price restraints by powerful firms upon small re-sellers); *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (permitting minimum price restraints upon re-sellers).

15. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) (holding parent company and subsidiary incapable of conspiring with each other for purposes of § 1 of the Sherman Act). *See also* Paul, *supra* note 2.

16. *Id.*; *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 191–92, 200-01 (2010).

by franchisee firms, typically in the direction of driving them down. One McDonald's franchisee noted that "participation in deals and pricing is voluntary only in theory," and that on an occasion when its coffee price was a nickel over the franchisor-advertised sale price, "the head of the McDonald's region came in and he said: 'You are over. You can't do this.'"<sup>17</sup> Some other franchisors even more straightforwardly set the prices charged by franchisee firms; for example, janitorial franchisors often directly bargain contracts with customers on franchisees' behalf.<sup>18</sup> Burger King, like McDonald's, exerts the same downward pressure on its franchisees' prices through its "Value Menu."<sup>19</sup>

Franchisors have also placed limits upon worker mobility within franchise "families" through so-called no-poaching provisions placed into franchisee contracts. In the past, franchisors have successfully claimed immunity for these controls under *Copperweld*, or the single entity doctrine, thereby claiming that franchisees are effectively extensions of the franchisor itself.<sup>20</sup> Such provisions have recently come in for new criticism, and have been challenged by workers in a number of pending cases.<sup>21</sup> In the current disputes, some franchisors have again raised the single entity defense, but thus far a judge has not ratified it. To expressly ratify this theory would be to make explicit the selective application of firm status to franchise "families" as between antitrust and labor law. Franchisees themselves are denied coordination rights by antitrust law,<sup>22</sup> further cementing franchisors' power. Meanwhile, franchisees' *employees'* fight for coordination rights, for example in the form of unionization, has also been frustrated by franchisors' position that they are completely separate from franchisees, which would require workers to separately unionize numerous small franchisees. In short, franchisors have thus far been permitted to disclaim affiliation with

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17. Jana Kasperkevic, *McDonald's franchise owners: what they really think about the fight for \$15*, THE GUARDIAN, Apr. 14, 2015.

18. WEIL, *supra* note 1.

19. *Burger King Corp. v. E-Z Eating 8th Corp.*, No. 07-20181, 2008 WL 11330723 (S.D. Fla., May 22, 2008) (documenting an order on motion for summary judgment in lawsuit by franchisor Burger King Corporation against franchisees for breach of contract, on the ground that they shut down prior to the contract's expiration. Franchisees counter-claimed that they were operating under "extreme losses" due to franchisor's imposition of the "Value Menu"). *See also* *Burger King Corp. v. E-Z Eating*, 572 F.3d 1306 (11th Cir. 2009) (upholding summary judgment for Burger King Corporation on the ground that its imposition of the Value Menu on franchisors did not violate the implied covenant of good faith and fair dealing).

20. *See* *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (dismissing former employee's claim that "no-switching" provision in franchising agreement violated Sherman Act, on the basis that franchisor and franchisee cannot conspire under *Copperweld*).

21. A number of plaintiffs have recently challenged coordination within franchise families that limits the hiring of former employees. *See, e.g.*, *DesLandes v. McDonald's USA, LLC*, No. 17-cv-04857, 2018 WL 3105955 (N.D. Ill. June 25, 2018); *Ion v. Pizza Hut, LLC.*, No. 4:17-cv-00788 (E.D. Tex., dismissed July 16, 2018); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786 (S.D. Ill. 2018). Meanwhile, franchisors continue to disclaim single entity status for purpose of labor regulation, whether of wages or collective bargaining. *See, e.g.*, *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS, 2016 US Dist. LEXIS 10876 (N.D. Cal. Aug. 16, 2016) (arising under the California Labor Code); *McDonald's USA, LLC*, 363 N.L.R.B. 144 (2016) (dealing with a complaint arising under the National Labor Relations Act).

22. The legal basis for denying franchisees coordination rights is discussed in Part III, *infra*.

franchisee firms altogether under labor law, even as they frequently claim that franchisees are extensions of the firm under antitrust, in both cases cementing their exclusive coordination rights in the overall arrangement.

The pending no-poach cases also illustrate the operation of the law of vertical restraints and franchisors' attempts to stretch its limits. To see this, note first that even franchisors' control over franchisee product pricing decisions ought to be uncertain territory. As noted, franchisors exert control over consumer prices charged by franchisees, in addition to aspects of their dealings with suppliers and workers. Even under the existing law's profound preference for vertical control over horizontal coordination, franchisors' control over franchisee pricing—which in turn has direct, negative implications for franchisees' labor relationships and workers' wages<sup>23</sup>—does not obviously fit within the parameters of legal vertical restraints. The paradigm cases, from *GTE Sylvania* (geographic market allocation) to *Khan* (maximum prices) to *Leegin* (minimum prices), all deal with *re-sale* of a product sold by the actor seeking to impose the restraint. Franchisors do not sell hamburgers to franchisees, who then re-sell them. This problem is not necessarily resolved by extending the principles of these cases to intangible property—such as the franchise brand—which are covered.<sup>24</sup>

There is, in any event, no credible argument for extending these precedents to *labor-facing* restraints imposed by franchisors upon franchisees. Franchisors do not hire out workers to franchisees. No proprietary technology licensed by franchisors to franchisees is implicated in those relationships. Yet the Department of Justice chose to file a brief in these pending cases effectively supporting franchisors' position and suggesting that no-poach agreements limiting mobility among some of the lowest-wage, most vulnerable workers have legally cognizable benefits.<sup>25</sup> This is notable in part because it dramatizes the tensions in antitrust law's current governing normative framework. The DOJ brief purports to treat labor market restraints symmetrically with product market restraints. But this is belied by their own arguments about the putative countervailing efficiencies of no-poach agreements, which are framed purely in terms of *consumer* benefits, namely lower prices. This points up a basic tension within the existing legal framework, which simultaneously claims to treat worker welfare equally with consumer welfare, but which only admits evidence of countervailing benefits to *consumers*, primarily price benefits, when evaluating forms of permitted coordination. In short, the DOJ's briefs supporting

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23. See, e.g., Lydia DePillis, *McDonald's franchisee says the company told her "just pay your employees less,"* WASH. POST, Aug. 4, 2014.

24. The Department of Justice's *Antitrust Guidelines for the Licensing of Intellectual Property* do extend the principles of resale price maintenance to intangible technologies, but even if hamburgers could be said to qualify as incorporating a "licensed technology," these guidelines refer to price *maintenance* and not maximum prices required by franchisors. DOJ & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.2 (Jan. 12, 2017), <https://www.justice.gov/atr/IPguidelines/download> [<https://perma.cc/4T6Y-YBVM>].

25. Corrected Statement of Interest of the United States of America, *Harris v. CJ Star, LLC*, No. 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019), ECF No. 38.

franchisors' position in the pending cases brought by fast food workers to invalidate employee no-poach agreements imposed by franchisors upon franchisees stretch existing tendencies in the law to favor control by powerful firms, which is presumed to confer consumer benefits.

In effect, the DOJ's brief seeks to enshrine in the official, surface grammar of the law what has heretofore been only a tacit expansion at the level of its deeper grammar, where the firm exemption partially resides. That tacit expansion of the borders of the firm exemption has been achieved through decades of creating facts on the ground by naturalizing franchisors' business model, and through economic arguments that these arrangements are efficiency-enhancing because of lower consumer prices.

### B. Ride-Hailing Firms

In his account of the political economy of franchising in its critical decades of regulatory change, Brian Callaci has noted that franchisors' endeavor to "persuade regulators, legislators, and courts that their business form was sui generis and should not be regulated according to existing conceptions" will "be familiar to observers of twenty-first century gig economy firms."<sup>26</sup> The ride-hailing apps represent the forward prow of "platform" arrangements that are, by all accounts, popping up throughout the service sector. These firms set the price of rides. They also contend that those rides are sold by independent businesses—drivers—not by the firms. Therefore, these firms facilitate horizontal price coordination among sellers beyond firm boundaries, leading at least one district court judge to recognize a cognizable claim for a per se violation of Section 1 of the Sherman Act.<sup>27</sup> Overall, the Uber problem is a more brazen version of the franchising problem, and it creates a more obvious conflict under existing antitrust law. Still, it is basically continuous with franchising—a fact that could either lead us to revisit the asymmetric allocation of coordination rights in franchising, or to bless the even more starkly asymmetric allocation of coordination rights in the ride-hailing sector. The current antitrust authorities have signaled their preference for the latter. Meanwhile, the antitrust implications of platform labor/services arrangements remain far less fully explored than, for example, their labor and employment law implications.<sup>28</sup>

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26. Brian Callaci, *Vertical Dis-Integration and the Creation of a New Business Form: Franchising 1960-1980*, 10 (Washington Center for Equitable Growth Working Paper Series, 2018).

27. See, e.g., *Meyer v. Kalanick*, No. 15-9796, 174 F. Supp. 3d 817 (S.D.N.Y. 2016). Uber's subsequent successful motion to compel arbitration in this dispute with riders prevents us from seeing this legal contest unfold.

28. A few exceptions include Marshall Steinbaum, *supra* note 13, Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016); Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implication*, BJELL 2017; Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?*, 2017 COLUM. BUS. L. REV. 859 (2017). Huffman and Anderson acknowledge that Uber has an antitrust problem. Without taking a definitive position on whether Uber would be subject to the per se rule or the rule of reason under current law, they argue that its business model ought to be permitted as a policy matter, and propose changes to antitrust to accommodate it: namely a liberalization of the



What public debate there has been on the antitrust implications of the ride-hailing firms' pricing practices has focused to a large extent on algorithmic pricing.<sup>29</sup> Algorithmic pricing is certainly an interesting and important topic in itself, but the immediate antitrust questions relating to Uber and similar firms do not stem from the fact that they set prices for ride services through an algorithm. Rather, they stem from the fact that Uber sets prices for ride services in the first place. Similarly, there are a slew of articles on the "efficiencies" brought about by Uber. Deeper normative questions aside for the moment, these are not in themselves legal justifications for Uber's coordination; they must fit within existing legal categories that, in effect, condition the justificatory power of such putative benefits. This conditioning role for legal categories is non-optional: arguments about efficiency are not free-standing but ultimately themselves presuppose legal categories—notably, the firm exemption—for organizing coordination.

These firms have even more obvious problems than franchising in the surface structure of existing antitrust law. A ride-hailing tech platform cannot straightforwardly argue that its relationship to its drivers constitutes a single entity for antitrust purposes, as this is inconsistent with its claim that drivers are its consumers, and is also inconsistent with its defense in employment cases alleging that drivers are really employees. In the employee misclassification cases, these firms argue they lack control over drivers and engage in little or no top-down coordination.<sup>30</sup> Since ownership is already dispersed in terms of the primary relevant physical capital (vehicles), top-down coordination simply *is* the only other factor the firms have available to argue under *Copperweld*. Uber's ability to immunize its coordination under the *Copperweld* line of cases is doubtful; its ability to do so and to maintain its defense in the employee misclassification cases is virtually impossible.

Moreover, Uber and similar firms are unlikely to succeed in showing that their price coordination constitutes a permissible vertical restraint if current law is interpreted fairly. The paradigm cases that liberalized the law of vertical restraints never immunized price restraints *as far removed* from the transaction that Uber claims to have with its drivers. Uber and similar firms say that they license the use of software to drivers, which facilitates drivers' transactions with riders. But the price restraints Uber places on drivers relate to the *rides themselves*. As Judge Rakoff pointed out in rejecting Uber's argument of

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*Copperweld* defense that would allow for the consideration of degrees of integration and risk-sharing, rather than a binary decision on single entity status. To the extent that they argue that rule of reason treatment is not foreclosed for Uber, however, Anderson and Huffman's position also generally supports drivers' own coordination, although they do not directly address it. Other commentators, many of them economists, also argue that Uber confers consumer benefits without making it clear what the legal relevance of those benefits is, given the nature of Uber's business model. See, e.g., Judd Cramer & Alan Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, 106 AM. ECON. REV. 177 (2016).

29. See, e.g., Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016).

30. See, e.g., *O'Connor v. Uber Tech.'s., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

verticality and denying its motion to dismiss the Section 1 lawsuit brought against it by consumers, drivers are not re-selling ride services sold to them by Uber, which is the classic re-sale justifying vertical restraints under existing case-law.<sup>31</sup> *GTE Sylvania* involved the re-sale of TV's, where the TV market was the subject of the restraint at issue. *State Oil Co. v. Khan* involved the re-sale of gas and oil, where the prices of those commodities were the subject of the restraint at issue. *Leegin* involved the re-sale of clothing, whose prices were the subject of the restraint at issue. None involved price restraints on commodities (here, ride services) that were themselves unrelated to the commodity (here, use of the app) sold by the restraining firm (Uber) to the purchaser-firm (drivers). It is true that both maximum and minimum price restraints can now relate to an intangible product, like the app, but that does not change the structure of the transactions and relationships at issue: drivers are not re-selling the use of the app to riders.<sup>32</sup> Nor can it be plausibly argued that what they are selling to riders is a "product incorporating the licensed technology."<sup>33</sup> And indeed, the few law review articles that do consider the Section 1 implications of Uber's pricing practices in any detail do not take seriously the possibility that Uber's price coordination constitutes a permissible vertical restraint, although they may advocate other legal reforms that would permit it.<sup>34</sup>

The problem here is that the many efficiencies claimed for Uber are not legally salient unless Uber shows that its pricing practices fall within the existing law of vertical restraints. Putting that problem aside for the moment, the efficiencies claimed for Uber fall roughly into two categories: (1) the app works well, reducing transaction costs of driver-rider bargains; or, less frequently articulated, (2) Uber avoids the responsibilities of employment and the business risks of vehicle ownership, thereby reducing costs.<sup>35</sup> The second of these contentions is transparently question-begging.

As to (1), let's indeed assume that the app works very well in achieving the functional goal of matching drivers and riders in time and space, which is the essence of the claim. The problem is that this is neither here nor there with respect to the legal question. The issue is not whether the app is a great invention. There have been a great many great inventions; and while there may at times be something *specific* about a particular invention that forms the basis for a particular legal right, the greatness of an invention does not itself create a generic entitlement to selectively preferential legal treatment. The claim would have to

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31. See Ord. on Motion to Dismiss, Meyer, 174 F. Supp. 3d 817.

32. Note that this argument does not necessarily imply acceptance of the "hub and spoke theory" endorsed by Judge Rakoff in his order denying Uber's motion to dismiss. The hub and spoke theory is an exception to the applicability of the rule of reason for vertical restraints, but a) implies that the vertical arrangement comes within the existing principles justifying the rule of reason in the first place, and b) requires agreement among the "spokes" (here, drivers), which is unlikely to be met.

33. ANTITRUST GUIDELINES, *supra* note 24.

34. Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?*, 2017 COLUM. BUS. L. REV. 859 (2017).

35. Anderson & Huffman, *supra* note 34.

be that the price coordination activity *itself* generates operational efficiencies. But there is no argument for that. The app could match riders in space and time without setting prices, and that would exhaust all the efficiencies have been claimed for it.<sup>36</sup>

The price coordination activity performed by the apps might be valuable for a completely different reason, namely that it performs a market stabilization function. Market stabilization largely isn't recognized as a good in the current antitrust framework, at least not officially. And of course, a drivers' union would perform market stabilization functions as well, as indeed unions, trade associations, and other organizations can do more generally.<sup>37</sup> But again, this can't be the reason to permit Uber's price coordination without also justifying Uber drivers' collective bargaining, or for that matter, without also justifying a cartel of drivers who own their own vehicles and simply share an app that performs a price coordination function. This is a basic and deep tension in the law and in antitrust thinking, because on some level antitrust actors do seem to acknowledge the need for market stabilization when thinking about some specific cases, but the official principles do not. This leads then to the selective application of antitrust rules in favor of large, powerful actors' coordination and against small players'. It creeps in even to Anderson and Huffman's argument, as they acknowledge that price coordination is not relevant to the official efficiency defenses, but that drivers are unlikely to participate without it.<sup>38</sup>

Related to the market stabilization issue, Anderson and Huffman at times describe the resultant efficiencies in terms of Uber's enhanced business revenue, which in turn passes benefits on to consumers.<sup>39</sup> Not only is there no good principle, however, to define enhanced business revenue as a social benefit to be weighed in favor of coordination, while refusing to consider the benefits of reasonable wages in the same manner, but also the firms foreclose the use of that argument by also defining drivers as themselves businesses. By this logic, anything that drivers do to enhance *their* business revenue is also an efficiency to be weighed against any losses from coordination.

Finally, Uber has a better chance of avoiding *per se* treatment under the principles articulated in a minor strain of Section 1 case law that is more tolerant to horizontal coordination beyond firm boundaries—but it has a better chance precisely to the extent that drivers' own coordination would *also* not be subject to the *per se* rule under them. For example, *Appalachian Coals* would directly militate in favor of permitting drivers' coordination because it straightforwardly acknowledges market stabilization in the face of destructive competition as a legitimate criterion for antitrust decision-making.<sup>40</sup>

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36. To their credit, Anderson and Huffman acknowledge this point.

37. See, e.g., FREDERIC S. LEE, MICROECONOMICS: A HETERODOX APPROACH (2017).

38. Anderson & Huffman, *supra* note 34.

39. *Id.*

40. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

However, if the DOJ's position in the pending franchising no-poach cases succeeds in expanding the law of vertical restraints to become even more permissive, this would have favorable implications for Uber's ability to argue that the price restraints it places on drivers are in fact permissible vertical restraints. It would also even further crystallize the preference for economic coordination imposed by a large, powerful actor—even when functionally indistinguishable from voluntary coordination by many smaller actors—on the part of the current antitrust paradigm.

### C. Independent Contractor Firms

Finally, these anomalies in antitrust treatment of various forms of coordination extend to an older form of business fissuring: namely firms that rely principally upon independent contractors, and which then sell a commodity that in substantial part comprises those services. These firms' right to engage in price coordination has not been seriously questioned under antitrust, though their structure departs from the conventional justification for the firm exemption.

Antitrust's firm exemption relies ultimately upon an internal organization based on command rather than contract.<sup>41</sup> This command is derived from the relationship of agency—in other words, employment. And indeed, under the positive law, the very thing that defined an independent contractor is that she's not an agent of the firm.<sup>42</sup> But without her agency, what “firm-ness” is left? Even after recasting almost all of its prior employment relationships as commercial contracts, such a firm retains the privileges of the firm exemption.

To take an example, many trucking firms in the United States today fit the template I just gave: they buy truck-driving services from individuals whom they characterize as independent contractors, and they sell trucking services to their customers. They typically have a few administrative employees, but their core product is not only made by independent contractors, it *is* the very service performed by those individuals. Other than obtaining contracts with customers and bargaining those contracts, such a firm usually does not do much else. It has no other production facilities, and according to its own self-characterization, it does not extensively monitor drivers' provision of services.

Now consider the antitrust treatment of such a firm. The trucking firm gets to set the prices it charges its customers for trucking services. That seems natural enough. But is it? Functionally, this is a form of price coordination: the firm is setting the prices for the services performed by all, say, twenty drivers. Imagine that in this particular market for trucking services, there are four other firms of twenty drivers each. Now suppose that instead of working for the first firm, these same twenty drivers begin working directly for customers, but form a bargaining unit for the purpose of negotiating their contracts with customers. They agree internally upon rates and they do not deviate from rates set by their designated

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41. See Paul, *supra* note 2.

42. See, e.g., *FedEx Home Delivery v. Nat'l Labor Relations Bd.*, 563 F.3d 492 (D.C. Cir. 2009).

bargaining agent. Without changing much, if anything at all, about the tangible economic activity that is taking place, we have moved from a situation in which the right to coordinate prices is uncontested for antitrust purposes, to one that courts and federal competition authorities would undoubtedly label a “garden variety price-fixing ring.”<sup>43</sup> Note that between these examples, there is no difference in effects on third parties, whether they are customers, suppliers or rival firms or associations. Indeed, Bork himself acknowledged that there is no such difference in market effects between firms and cartels, until one brings in the putative efficiencies and thus consumer benefits of the firm’s internal agency relationships.<sup>44</sup> Having removed those agency relationships from the organization of the production or service in question by transforming them into contracts, however, the justification for favorable antitrust treatment also disappears.

Two responses are possible: (1) that the trucking firm contributes benefits from integration that are not sufficient for the employment relationship, but that are sufficient to justify preferential antitrust treatment; and (2) that the truck drivers, if they wish to avail themselves of that preferential treatment, have the same legal right to achieve this beneficial integration as the owner of the trucking firm does. As to objection (1), it is not at all clear that this needle can be threaded. Many trucking firms in fact contribute very little functional integration other than bargaining customer contracts. To the extent they do more, they very likely are misclassifying drivers as contractors. There is also no basis not to consider the many other benefits that the truck drivers might claim for their economic arrangement, not least of them the ability to earn a reasonable rate and stabilize the market, which would tend to have effects upon operations as well. The binary distinction between bargaining integration and productive integration is moreover both false and self-fulfilling: if drivers were able to form a bargaining unit, they very well might use the increased revenue to make upgrades and investments, just as the firm would—perhaps even in a way that was integrated across the group.

As to objection (2), simple incorporation will not protect the truck drivers. An incorporated firm of truck drivers who own their own trucks—just as they do in the independent contractor-based trucking firm—and who rotate bargaining responsibilities with customers would not be immunized from Section 1 liability the way that the trucking firm automatically is.<sup>45</sup> A decision-maker is likely to find that this arrangement is simply an incorporated cartel. In that event, the drivers might not even have the opportunity to prove up benefits from coordination, because the *per se* rule would likely apply. Yet if the same drivers subordinate themselves to an owner and a manager, precisely the same price coordination in precisely the same market is automatically immunized. This

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43. ROBERT BORK, *THE ANTITRUST PARADOX* 108 (1978).

44. *See, e.g., id.* at 264 (“Both internal growth and horizontal merger eliminate rivalry, and they do so more permanently than do cartel arrangements. Prices are fixed and markets allocated within firms.”).

45. *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 191–92, 200-01 (2010).

simple example makes the point stark, because it is very unlikely that a court would ever look for *more* functional integration in the case where there is a separate owner and a manager—even if they are not doing anything particularly useful or socially productive. Thanks to the firm exemption, together with the *per se* rule against horizontal coordination beyond firm boundaries, our system paradoxically rewards an arrangement in which there is a boss to profit from the drivers' labor, while denying the individuals who perform the work the privilege to coordinate prices.

### III

#### THE CONTRACTION OF COORDINATION RIGHTS IN FISSURED ARRANGEMENTS

In each of the fissured business arrangements discussed above, the expansion of coordination rights beyond the traditional boundaries of the firm exemption for the more powerful actor is accompanied by a contraction of coordination rights for the less powerful ones in its orbit. Antitrust denies to franchisees any rights to engage in economic coordination, either as to their own price-setting or as to their bargains with the powerful franchisor firms. Franchisors' control over franchisees is thus underwritten by not one but two antitrust rules: the allocation of coordination rights to franchisors, and the denial of coordination rights to franchisees. Uber and similar firms, meanwhile, insist that their drivers have no right to coordinate under antitrust; and thus far, the law has denied them that right. Indeed, Uber has argued that the *per se* rule bars drivers' coordination and that a local ordinance authorizing collective bargaining among drivers is therefore subject to federal preemption by the Sherman Act.<sup>46</sup> And independent contractor truck drivers have been sued by trucking firms when they engaged in concerted action to improve their positions; the law has also largely assumed that they lack coordination rights.<sup>47</sup>

If franchisees were able to bring countervailing power to bear in their bargains with franchisors, the result might not only be an ability to bargain more meaningfully with their own employees,<sup>48</sup> but also bargaining over joint responsibility for those employment relationships themselves. Uber drivers who formed a union and bargained their contracts with Uber might, building on these connections, put themselves in a position to launch an app of their own. Assuming it could pass muster under an unreformed firm exemption in the first place,<sup>49</sup> this possibility has little practical chance of coming organically into fruition without, at a minimum, the initial integration created by a bargaining

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46. Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).

47. Paul, *supra* note 1.

48. See, e.g., Lydia DePillis, *McDonald's Franchisee Says the Company Just Told her "Just Pay Your Employees Less,"* WASH. POST (Aug. 4, 2014), [https://www.washingtonpost.com/news/storyline/wp/2014/08/04/first-person-kathryn-slater-carter-the-franchise-owner-taking-on-mcdonalds/?noredirect=on&utm\\_term=.85a5d857adca](https://www.washingtonpost.com/news/storyline/wp/2014/08/04/first-person-kathryn-slater-carter-the-franchise-owner-taking-on-mcdonalds/?noredirect=on&utm_term=.85a5d857adca) [https://outline.com/UBtDhH].

49. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191–92, 200-01 (2010). See also Paul, *supra* note 2.

agency or a union.<sup>50</sup> This would be the case even putting aside the structural disadvantages a driver-owned business would continue to face in competition with the platforms, given the latter's relationships to the financial markets.<sup>51</sup> Similar possibilities attend organizing by independent contractor workers.

*Fed Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n* is the Court's strongest articulation of the rule against horizontal coordination beyond firm boundaries, and it clearly articulates antitrust's current preferred and disfavored forms of coordination. In particular, the opinion shows that the antitrust norms that the Court applied internalize deference to coordination within firms, singling out coordination among individual or small service-providers' coordination for censure while ignoring other forms of coordination. Like the current antitrust paradigm more generally, the Court *selectively* applied a putatively general norm in favor of competition and against coordination. The Court also then *extended* antitrust's conventional allocation of coordination rights—privileging large, powerful business firms as the primary mechanism of market coordination—into the First Amendment law of expressive boycotts itself, relying upon that particular antitrust logic in order to decide the boycotts that are and are not protected by the First Amendment.

#### A. The Court's Antitrust Analysis

*Trial Lawyers* applied the per se rule against horizontal price coordination beyond firm boundaries to concerted action by individual service-providers and micro-enterprises.<sup>52</sup> Section 1 of the Sherman Act prohibits contracts and conspiracies “in restraint of trade.”<sup>53</sup> Judicial construction of Section 1 prohibits agreements that *unreasonably* restrain trade, and pronounces certain sorts of agreements unreasonable per se. Once so categorized, such agreements need not, indeed cannot, be re-examined for reasonability by future courts. Horizontal price coordination beyond firm boundaries, otherwise known as price-fixing, is currently considered per se unreasonable. Each of the decision-makers in the *Trial Lawyers* case, from the ALJ to the Supreme Court, agreed that the lawyers' boycott was a “classic restraint of trade within the meaning of Section 1 of the Sherman Act.”<sup>54</sup> Upon the finding of such coordination, a fact-finder is neither required nor permitted to consider any other factors—for example, whether the

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50. See, e.g., Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, PENN STATE L. REV. (forthcoming 2019) (making this point).

51. Uber and similar firms have relied massively on venture capital funding. A producers' cooperative by its nature would not seek such funding—and would likely not be able to borrow on favorable terms either, as a result. This in turn would affect its ability to compete with a firm like Uber, which consistently loses money, apparently in service of a future operational pay-off (and in service of a payoff in terms of share value once it goes public, in the meanwhile).

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

53. Sherman Act, 15 U.S.C. § 1 (1890).

54. *Id.*

resultant prices were reasonable or whether countervailing benefits flowed from the coordination.<sup>55</sup>

The Court also noted that concerted reduction or stoppage in the sale of a commodity, which the lawyers' strike constituted, is similarly prohibited *per se*.<sup>56</sup> More generally, concerted withholding of supply—of labor or services—is of course the very essence of a labor strike, and relatedly is one of the few forms of economic leverage available to those who own little or no capital.<sup>57</sup> While antitrust would thus condemn a labor strike absent the labor exemption, and does condemn strikes beyond the bounds of the exemption, it is worth noting that the antitrust notion of harm from “reduced output” fails to accurately capture the mechanism by which a strike or boycott in fact works. According to current conventional antitrust theory, reduced output is an antitrust harm in itself (because it is by definition economically inefficient, which also usually means that it automatically results in increased prices), not because it increases the bargaining power of the seller to extract desired changes to the contract/relationship in question (such as a higher price or wage).

But the latter, not the former, is how a strike or boycott actually works. Wages are not increased following a strike because workers reduced their labor supply, which automatically increased the price of labor. Instead, wages go up after a successful strike because the business is economically harmed by the work stoppage in specific ways, which in turn gives workers bargaining power to effect desired changes to the contract. These two mechanisms—the real one, and the theoretical one—are far apart. Strikes work because of specific business harms that result from reduced operations. They are mediated through human volition at the bargaining table, not through the supposedly impersonal workings of market price.<sup>58</sup>

In applying the *per se* rule against the lawyers' strike, the Court adopted the antitrust vision in which markets are coordinated mainly through the mechanism of the firm, while other forms of coordination are prohibited or disfavored.<sup>59</sup> The fact that the coordinating mechanism in this case is a public entity rather than a putatively profit-maximizing business firm simply highlights the depth at which these underlying assumptions are rooted, as further discussed below. To support the centrality of the blanket prohibition upon horizontal coordination beyond firm boundaries to the overall allocation of coordination rights under antitrust, the Court approvingly quoted Robert Bork's statement that permission to prove

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55. *Id.* at 435. See also *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978).

56. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423 (“This constriction of supply is the essence of price-fixing, whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.”) (quoting the Court of Appeals).

57. Of course, this point is limited by the lack of protection for economic strikes under the NLRA. Still, an economic strike is *permitted* under labor law, if not protected.

58. For an alternate view, see LEE *supra* note 37; NEIL FLIGSTEIN, *THE ARCHITECTURE OF MARKETS* (2001).

59. Paul, *supra* note 2.



lack of economic power in cases of horizontal price coordination would be administratively unworkable, introducing complexities of market definition into such cases.<sup>60</sup>

The Court also characterized the per se rule against horizontal price coordination as something more fundamental, from a normative standpoint, than a mere rule of administrative simplicity or convenience. In so doing, the Court made a conceptual error. Analogizing horizontal price coordination to inherently dangerous activities like stunt flying in congested areas, each instance of which poses some threat to physical safety, it reasoned that each instance of price coordination poses “some threat to the free market.”<sup>61</sup> To support this assertion, the Court again cited Bork, this time for the proposition that no one will engage in price coordination unless it has the power to affect market prices.

The Court of Appeals had taken the position that the First Amendment ought to protect the strike (as discussed in the next section) absent a showing that the lawyers had market power. But the deeper problem is not that price coordination is not anti-competitive—a basically question-begging term absent further specification of the inevitable limits upon competition—or that the price coordination of small actors will not affect market prices. In fact, the lawyers did collectively have market power in the narrow sense: their coordination had the ability to affect prices. As we can see from the record, absent intervention by the competition authorities, it was poised to do just that. The problem is not that the lawyers did not have an opportunity to prove a lack of market power, but that market power, in the narrow sense recognized by the antitrust paradigm of Bork and *Trial Lawyers*, is an insufficient criterion of permitting coordination.

The actual problem is that affecting prices always assumes a normative baseline that the conventional antitrust paradigm leaves obscure but that is fundamentally influenced by intra-firm coordination. Here that baseline was set by the District’s own coordination of the market for legal services for indigent criminal defendants. The Court described the normative base-line effectively in temporal terms: the state of affairs “[p]rior to the boycott.”<sup>62</sup> That description holds constant everything other than the lawyers’ own coordination, as a matter of the legally relevant possible worlds, when there is no good reason to do so. To wit, the market might have been organized in any number of other ways: there may have been, say, a few large law firms bargaining with the District, or there may have been more than one buyer for the lawyers’ services. The particular normative baseline adopted by the Court amounts to a preference for determining prices through coordination that takes place within firm or enterprise boundaries, while frowning upon effects upon prices by means of coordination by smaller actors acting outside firm boundaries. This is a policy choice about structuring markets in a particular way. Moving reality away from that baseline, as the lawyers’ boycott almost did, does not pose an inherent

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60. Superior Court Trial Lawyers Ass’n, 493 U.S. at 430–31.

61. *Id.* at 434.

62. *Id.* at 422.

economic harm or threat, in the manner that, for example, stunt flying in congested areas poses an inherent threat to physical safety. It simply moves toward a different market order, and a different allocation of coordination rights.

In the market at issue, the Court assumed that the coordination that was *already* occurring was an appropriate part of the normative baseline against which any other scenario would be compared. The District, as the sole buyer of legal services for indigent criminal defendants, directly coordinated the market for those services, setting the hourly rates by legislation and coordinating the market along various other dimensions as well. Yet the Court chose to entirely disregard this coordination activity by the only buyer, while singling out the economic coordination of the individual providers of legal services for censure. Patterns of market coordination arise for all sorts of reasons,<sup>63</sup> buyer power being one species.<sup>64</sup> In all of them, public power is present to some degree or other, whether through background law or in some more active form. In short, there is no good reason to privilege the pre-strike rates paid to the lawyers as the normative or “competitive” ideal. Why, then, did the Court reach this conclusion?

At the deepest level, the market order presupposed by the Court’s analytic framework does not privilege competition as such; rather, it privileges *firms*, and by extension enterprises, as the locus for the coordination of markets. The Court’s opinion extends to the District the same immunity for intra-enterprise economic coordination that it has long done for business entities. And it does so because it assumes the District is acting as an ordinary firm, not because it assumes it is acting as a government would. Indeed, the Court must assume the District is acting as a firm, because otherwise the primary premise of its argument—that the economically and socially appropriate rates must be set by competition, which it further glosses as requiring policing from interference of sellers’ collective action—would become incoherent.

Firms are primary in the consensus analytic framework generally adopted by the courts for evaluating economic policy, and their halo sometimes extends to governmental entities when those entities are seen to behave sufficiently like business firms. This is evident in the various market participant doctrines that pepper the landscape of American law, including antitrust law itself. Often, governmental entities are permitted to engage in market coordination only if they can show that they are market actors: i.e., that they are sufficiently firm-like in that market.<sup>65</sup> Assuming for the moment that it coherently delineates some set of attributes, this sort of criterion of course privileges firm-based economic coordination over, for example, direct public coordination of a market. While the

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63. See LEE, *supra* note 37; FLIGSTEIN, *supra* note 58.

64. For one account of buyer power, see Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014*, 83 AM. SOC. REV. 213, 213 2018.

65. Market participant exception to federal preemption under the FAAAA; market actor exemption to federal preemption in case of federal deregulation legislation; market participant exception to the dormant commerce clause doctrine.

Court was not expressly evaluating the applicability of a market participant exception in *Trial Lawyers*, it effectively assumed that the District was acting as a firm would, and that therefore the lawyers' rates ought to be set by competition. The court could have assumed that the District was acting in a public capacity by coordinating a market or engaging in economic policy-making, and that that policy should be given deference for that reason. However, the Court gave *carte blanche* to the District's coordination while censuring individual sellers' based on an assumption that the District was acting as a firm would. Again, to say otherwise would contradict the Court's repeated invocation of competitive rates.

#### B. Extending Antitrust's Allocation of Coordination Rights to the First Amendment

The Court then incorporated its preferred allocation of economic coordination rights, determined under antitrust, into its construction of the First Amendment law of expressive boycotts. The Court was principally concerned with the applicability of *NAACP v. Claiborne Hardware*,<sup>66</sup> which also involved a boycott. The Court's rejection of the application of *Claiborne Hardware* to the lawyers' boycott revolved around the fundamental distinction it drew between the aims of the two boycotts: "special" advantage in the market (sought by the lawyers' boycott), and "equality and freedom" that the Court agreed were "preconditions of the free market" (sought by the *Claiborne Hardware* boycott).<sup>67</sup> Many have queried and pointed out the problem with putting "labor subordination" in a different constitutional category than "racial subordination."<sup>68</sup> Additionally, the characterization of the lawyers' boycott as special market advantage—in contrast to a precondition of the free market—relies upon the particular allocation of coordination rights that antitrust has chosen to espouse. As discussed in the preceding section, collective action among the lawyers would be no more a "special" market advantage than other forms of coordination that the Court permits.

Thus, the purpose of the boycott was also defined as a *private* advantage from the outset.<sup>69</sup> This is in contrast to the Court's placement of consumer welfare in its normative framework as, effectively, a *public* value. But after all, consumer benefit is also simply a benefit to a particular set of actors in the market, yet the Court emphasized only the absence of public value in benefits to producers.<sup>70</sup> Whether one considers the situation specifically in terms of labor subordination

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66. *NAACP v. Claiborne Hardware*, 458 U.S. 558 (1982).

67. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 426. *See NAACP v. Claiborne Hardware*, 458 U.S. 558 (1982).

68. Catherine L. Fisk, *A Progressive Labor Vision of The First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2088 (2018); *see also* Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. UNIV. CHIC. L. J. 969 (2016).

69. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 427 (focusing on the fact that the objective of the boycott was to create an economic benefit to the lawyers, the sellers/producers in this market, to distinguish it from the public purposes implicated by *Claiborne Hardware*).

70. *Id.* at 424.

or not, it is plausible to consider a producer-oriented norm like making a reasonable living, fair competition, or fair rates as a public value to be considered along with others, including consumer welfare.<sup>71</sup> However one ultimately decides to value these considerations, the evaluation should not begin by placing one consideration in the category of public value and the other in the category of private value. In this and other ways, the *Trial Lawyers* opinion epitomizes the antitrust reasoning that dominates today, so far as ordering producers' and workers' interests are concerned.

Importantly, this ordering is a judgment the Court imported into its construction of the First Amendment. Both the majority and the dissent in *Trial Lawyers* limited the First Amendment's reach in the case of boycotts to the *political* rather than the economic, while reaching different conclusions regarding which side the lawyers' boycott fell on.<sup>72</sup> The majority's application of this distinction relied upon reading Chicago School antitrust's allocation of coordination rights into the First Amendment law of expressive boycotts, in that an unprotected economic boycott was defined in terms of "special" market advantage. In other words, the Court held that economic boycotts for reasonable rates by service-providers or small producers were unprotected by the First Amendment specifically because they seek "special advantage," a concept that requires the normative framework of Chicago School antitrust and the firm exemption.<sup>73</sup> Special market advantage is defined by a normative benchmark constituted by antitrust's preferred and disfavored coordination mechanisms (firm-based and horizontal, respectively). The holding thus incorporates the conventional antitrust understanding that coordination outside business firms is special and usually disfavored—but it is now also a holding about what the First Amendment protects, not only about what is not permitted under antitrust. Thus, *Trial Lawyers*, the purest expression of the Court's rule against horizontal coordination beyond firm boundaries, is itself an object lesson in the firm exemption, and it also extends this allocation of coordination rights to the First Amendment.<sup>74</sup>

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71. Indeed, such an idea of fairness, including the idea of fair price, has its own antitrust tradition, even if it has been largely submerged.

72. *Id.* at 428 ("Only after recognizing the well-settled validity of prohibitions against various economic boycotts did we conclude in *Claiborne Hardware* that 'peaceful, political activity such as that found in the [Mississippi] boycott' are entitled to constitutional protection.") The dissent, while reaching a different conclusion, largely accepted this framework as well. *Id.* at 437 (referring to the lawyers' action as an "expressive political boycott"); *Id.* at 446 ("the facts at the very least do not exclude the possibility that the SCTLTA succeeded due to political rather than economic power.").

73. *Id.* at 426.

74. The Court also rejected the Court of Appeals' holding, applying *O'Brien*, that antitrust rules be applied "prudently and with sensitivity" to First Amendment interests. The Court of Appeals had held that in the context of an expressive boycott such as the lawyers' action, this requirement entailed express consideration of market power and barred application of the per se rule. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 233-34 (D.C. Cir.). The Court rejected this approach, holding that the integrity of the per se rule against horizontal coordination beyond firm boundaries was a more important thing to protect than the expressive content of the boycott. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 430. In this instance, the Court essentially abrogated First Amendment interests in favor of (its

## IV

## TOWARD A RE-ALLOCATION OF COORDINATION RIGHTS

Contemporary fissured business arrangements distill the preference for top-down, hierarchical control of smaller players by more powerful firms that is already present in today's antitrust framework, while often pushing beyond the boundaries set by the current expression of that framework in the surface structure of the law. They call out for a re-allocation of coordination rights under antitrust law. What criteria are available to effect this re-allocation, and on what basis should it be achieved?

Our current framework recognizes one other relevant source of coordination rights, beyond the firm, and that of course is based in labor law. The labor exemption to antitrust essentially permits economic coordination that antitrust would otherwise condemn where individuals engaged in the performance of labor or services are sufficiently subject to the power and control of a firm, and lack significant power and control—including relevant ownership rights—of their own.<sup>75</sup> From this perspective, the labor exemption has always—or at least, long—been a limited qualification of the firm exemption, and it has been in a basic way dependent upon it. The limited qualification represented by the labor exemption is underlined by the fact that the collective power of labor—even if it were fully realized—cannot legally be brought to bear to contest basic *firm* or capital decisions, an outcome that Karl Klare and others have shown was not intrinsic to the Wagner Act itself, but was instead imposed by a contingent turn in the decisional law.<sup>76</sup> Given this basic derivative relationship of the labor exemption to the firm exemption, it is then no wonder that the superficial undoing of the firm has further undone the labor exemption.

How might we conceive of a new allocation of economic coordination rights that would avoid some of these problems, which have undermined the New Deal order almost beyond recognition? Attempts to broaden the labor exemption or to create new worker exemptions while retaining or copying its basic structure are unlikely to be sufficient. Fissured business structures show that the firm, which was never a platonic ideal to start with, will continue to change and mutate—partly of course in response to the law's own allocation of coordination rights. Imagine if all workers or individual service-providers currently classified as independent contractors gained coordination rights. What would stop many firms who currently use independent contractors from moving to a system of contracting with, say, two to three person “firms” of workers—firms that are conveniently incorporated by signing ready-made forms in the company's office upon hiring? These groups of workers would of course lack coordination rights in their bargaining with the firm that retains their services, and their intra-firm

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interpretation of) antitrust, rather than overtly rewriting the First Amendment in the image of Chicago School's antitrust allocation of coordination rights.

75. This is true whether “independent contractors” are covered by the labor exemption or not.

76. Karl Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

coordination rights would be negligible. The law should not allocate coordination rights to working people on the condition of particular business structuring decisions made by others. But such decisions are the inevitable response to small-bore redefinitions of the labor exemption, as fissuring itself teaches us.

Instead, we might consider allocating coordination rights on the basis of *power* and *social benefit*. Importantly, to guide the application of these concepts, we must first discard the ideal-state competitive order as the default normative framework for antitrust and for economic regulation more generally. This is not to say that *competition* as a social process, referring to healthy business rivalry, is not important to antitrust law: it is, and ought to be balanced with appropriate and socially beneficial coordination. However, once we realize that the ideal-state concept of competition that is currently presumed to form the basis for antitrust law is contributing very little—except as a smokescreen for other normative choices—then we need no longer view economic coordination as a special exception to the order of things. Thus, we need not look for conditions of deprivation, or powerlessness, as constituting the sole basis—aside from the firm exemption—for the appropriate exercise of coordination rights because they are an exception to an otherwise perfect order. That is what our current framework does, and it is also the assumption on which even the most ambitious reform proposals proceed.<sup>77</sup>

Instead, once coordination is no longer a special exception to the ideal-state competitive order, we may think of allocating coordination rights not only in order to contest existing power over someone—in other words, to contest conditions of domination—but more broadly and positively, to allocate coordination rights *in order to* confer a social benefit and *so long as* the coordination does not result in power over someone else. In this vision, power would be a *constraint* upon coordination rather than the criterion of its permission. So, truck drivers would be able to engage in direct price coordination among each other, so long as that coordination did not result in the undue exercise of power over some other group of people: other truck drivers or customers, for example.<sup>78</sup> They would not have to show that someone *else* has power over them—whether through prices, or something else—in order to engage in coordination. Indeed, within such a framework, each of the groups discussed in Part II—franchisees, Uber drivers, and independent contractors—would quite plainly be allocated coordination rights. The precise scope of those rights should be determined in order to ensure that undue power over other groups does not result. Moreover, the availability of those rights would largely not depend upon unilateral decisions made by the lead firms in any of these arrangements in defining their relationships with workers, franchisees, or others

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77. See Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics*, in VOICES AT WORK (Tonia Novitz & Alan Bogg, eds. 2014).

78. Such determinations ought to be informed by empirical study of the particular market or sector in which the coordination takes place, including any relevant power dynamics and including the effects of the coordination in question upon workers, consumers, and the broader community.

in their orbit. Thus, small players' coordination rights would be more secure than those allocated by a broadened labor exemption or other new exemption.

Conversely, on this alternative approach to the allocation of coordination rights, antitrust law would not permit powerful firms like Uber and McDonald's to exert control over small, less-powerful players like drivers and franchisees. However, rather than prohibiting this coordination on the ground that it facilitates horizontal coordination that is presumptively bad, antitrust law ought to take the view that it is impermissible because it unduly exacerbates power imbalances and domination, and confers no social benefit that would not be better realized through more democratic forms of coordination.

In both directions, a conscious re-allocation of coordination rights would work toward balancing undue asymmetries of power rather than exacerbating them, as the current antitrust framework does, particularly in the context of fissured business arrangements. In order to do so, it would also recognize that the current framework makes normative choices about allocating coordination rights that cannot be derived from putatively neutral principles supplied by the competitive ideal.