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Sanjukta Paul

Nathan Tankus

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THE FIRM EXEMPTION AND THE HIERARCHY OF FINANCE IN THE GIG ECONOMY

SANJUKTA PAUL* & NATHAN TANKUS**

INTRODUCTION

Worker-owned or controlled firms face a little-studied threat from antitrust law that typifies broader problems with antitrust law today: it favors coordination through concentrated ownership and control while disfavoring coordination through democratic participation, for example, by workers.[1] The case of the ride-share sector illustrates this problem especially acutely.

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* Assistant Professor of Law, Wayne State University.

** Research Director, Modern Money Network.

1. The existing literatures in labor and antitrust law have not squarely addressed the issue of worker cooperatives and antitrust law. The antitrust literature has (most relevantly to this topic) focused on joint ventures, sports leagues, and other specialized arrangements of interest to business actors in the wake of the doctrines set out in *Copperweld* and *American Needle* but has not specifically discussed worker cooperatives. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); Am. Needle v. Nat'l Football League, 560 U.S. 183 (2010). Meanwhile, the literature on worker cooperatives has not squarely addressed antitrust issues. One forthcoming paper is an exception; it shares many concerns in common with the larger research agenda of which this essay is a part. *See* Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as Antimonopoly Strategy*, PENN. ST. L. REV. (forthcoming) (addressing cooperative associations of various kinds and proposing an antitrust exemption to promote them). This essay is the only work we know of that examines the doctrinal antitrust issues implicated by worker-run entities in detail and the first to connect these issues to our current system for provisioning finance.

It suggests that incorporation by workers, producers, or service providers is not—without structural reforms—a solution to the antitrust paradoxes created by the gig economy. It also suggests that structural, yet contingent, features of the financial system reinforce and magnify antitrust law's existing criteria for allocating coordination rights.

Antitrust law, fundamentally, allocates coordination rights, an argument that will be set out elsewhere.[2] It decides which forms of economic coordination are permitted, and which forms aren't; put another way, it decides who gets to engage in economic coordination, and who doesn't. Economic coordination may include things like joint bargaining; production itself (at least, any sort of production that involves the efforts of more than one person); geographical or other market allocation decisions; resource allocation decisions between various economic activities, like research and development, and expansion; and last but not least, price setting. Antitrust law generally holds that all these activities are permissible within business firms but subjects many of them to searching scrutiny, or bars them out of hand, when they take place beyond firm boundaries. This is antitrust law's firm exemption.[3] Moreover, both in the legal criteria that determine the extent of firm boundaries and also in the criteria that determine when economic coordination beyond firm boundaries is permissible, antitrust law evinces a preference for coordination achieved through the concentration of control and ownership, rather than through democratic cooperation. In the so-called gig economy in particular, these criteria have led to increasingly anomalous results, particularly as labor law has been presumptively suspended, further limiting countervailing coordination rights on the part of workers and individual service providers.

One informal response to this problem has been, in essence: Why not just incorporate? In this essay, we aim to answer that question in the case of the ride-share sector. The answer, in short, is that it's not that simple. Incorporation alone doesn't earn antitrust's firm exemption. And the kind of integration required by the legal test reproduces precisely the preference for concentrated ownership and control that is the larger problem with antitrust's allocation of coordination rights, and which poses particular problems in the gig economy. Moreover, the behavior of firms like Uber, in particular, illustrates how these problems are exacerbated by our existing systems for accessing finance.

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

3. *Id.*; *see also* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. (forthcoming 2019) [hereinafter Paul II].

Antitrust Law's Firm Exemption

Antitrust law's firm exemption does not simply track the criteria or the boundaries supplied by corporate law.[4] In other words, that a business entity has been duly formed under the state law of business organizations does not in itself imply that economic coordination that takes place within its boundaries, which would otherwise run afoul of federal antitrust law, is instead protected from antitrust liability. This much is well settled at the level of Supreme Court precedent.[5] It is not a particularly controversial or recently developed principle, either; indeed, if it were not true, then virtually any arrangement at risk of liability under Section 1 of the Sherman Act could use incorporation as a shield, particularly given the highly permissive nature of modern self-incorporation statutes.

What this means is that antitrust law supplies its *own* criteria to decide whether an association qualifies as a "single entity" for antitrust purposes, thus immunizing economic coordination that takes place within it. Ultimately, these criteria are circular and question begging.[6] But at the intermediate level and at the level of practical effect, they enact a preference for concentrated ownership and control. That preference generates the criteria according to which antitrust law allocates coordination rights to some associations and denies them to others. It will decide whether a particular worker or driver cooperative association passes muster under antitrust law, or not.

The Uber Antitrust Problem and the Incorporation Solution

Consider a hypothetical drivers' association whose antitrust status comes under scrutiny. The hypothetical possibility of such an association has come up in recent public debate as a response to the point that dominant firms like Uber and Lyft receive coordination rights under status quo antitrust, while drivers do not.[7] To be clear, the Uber antitrust paradox is not that Uber is a monopoly or has engaged in unfair competition, though both of those might also be the case,[8] but that its coordination of consumer prices

4. *See* Paul I, *supra* note 2.

5. *See, e.g.*, *Am. Needle*, 560 U.S. at 186.

6. *See* Paul I, *supra* note 2.

7. Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 Berkeley J. Emp. & Lab. L. 233 (2017); Paul II, *supra* note 3; Marshall Steinbaum, *Antitrust, the Gig Economy, and the Labor Market*, Law & Contemp. Probs. (forthcoming 2019) [hereinafter Steinbaum, *Antitrust, the Gig Economy, and the Labor Market*]. For discussion of this issue in the press, see, for example, Marshall Steinbaum, *Uber's Antitrust Problem*, American Prospect (May 11, 2016), https://prospect.org/article/uber's-antitrust-problem [hereinafter Steinbaum, *Uber's Antitrust Problem*]; Aaron Gordon, *The Legal Argument That Could Destroy Uber*, Jalopnik (May 20, 2019), https://jalopnik.com/the-legal-argument-that-could-destroy-uber-1834790506.

8. *See, e.g.*, Diva Limousine, Ltd. v. Uber Techs., Inc., No. 18-cv-05546-EMC, 2019 WL 2548459, at *9–10 (N.D. Cal. June 20, 2019) (denying motion to dismiss complaint arising under California Unfair Competition Law).

across drivers (whom it contends constitute independent businesses) has thus far been permitted, while drivers themselves are presumptively barred from the identical coordination as well as lesser and related forms of coordination. Uber has managed to avoid directly litigating its own antitrust problem by compelling a consumer lawsuit that raises it to be moved into arbitration.[9] Meanwhile, federal antitrust authorities have taken no action to investigate or prosecute this practice—despite their eagerness to intervene to prevent far lesser forms of coordination by ride-share *drivers* on antitrust grounds.[10]

So, one possible answer to this problem is: Why can't drivers simply form an association of their own, using an app similar to Uber's or Lyft's? Taking this response at face value, and in a manner that could be practically implemented, we may assume that this hypothetical association would operate in much the same manner as Uber or Lyft, with the material difference that drivers would keep a larger proportion of the fares earned. Specifically, we may assume (1) that the driver-run app would coordinate consumer prices of rides, in much the same way as Uber and Lyft currently do;[11] (2) that individual drivers would collect their individual fares, minus expenses necessary to maintain the app and any other activities of the association, as decided by drivers through the association; and (3) that drivers would continue to own their own vehicles, maintain required insurance, and bear other individual business costs.[12]

An Incorporated Drivers' Association Would Not Escape Antitrust Risk

Now, let's put aside for a moment the fact that even normal organizing toward bargaining agency is currently presumptively impermissible under antitrust law, which renders the possibility of the formation of such a worker-run corporation significantly more remote. Assuming such an organization was successfully formed, it still would not straightforwardly qualify for antitrust immunity under existing law. In fact, at best it would be mired in legal uncertainty and, therefore, in prohibitive expenses. The Supreme Court recently reviewed its history in this area, noting that it has "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and

9. Meyer v. Uber Techs., Inc., 868 F.3d 66, 80 (2d Cir. 2017).

10. Paul II, *supra* note 3; Steinbaum, *Antitrust, the Gig Economy, and the Labor Market*, *supra* note 7; Brief for the United States and the Fed. Trade Comm'n as Amici Curiae in Support of Appellant and in Favor of Reversal, Chamber of Com. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640), 2017 WL 5166667; Meyer v. Kalanick, 200 F. Supp. 3d 408 (S.D.N.Y. 2016) (consumer lawsuit raising Section 1 claims against Uber).

11. This argument puts aside the issue of surge pricing, which does not change the basic antitrust issues.

12. This puts aside the special case of Uber Black and other services in which drivers do not own their vehicles.

served, in essence, as a vehicle for ongoing concerted activity."[13] At issue in *American Needle* was a corporation, National Football League Properties (NFLP), with its own centralized management, which made marketing and licensing decisions as to the intellectual property separately owned by NFL teams (namely team logos to appear on clothing and merchandise). Notably, the revenue generated by NFLP was shared equally among the teams. The Court held that licensing decisions made by NFLP were not the unilateral acts of a single entity for purposes of Section 1 of the Sherman Act, but rather shielded concerted action between "independent centers of decision-making," namely the individual NFL teams, as to their individually owned intellectual property.

Drivers who start a corporation that operates an app, matches riders to drivers, and sets prices for ride services provided by drivers would be exposed to risk of antitrust liability under this decision framework. As the Supreme Court said of NFLP, "it is not dispositive . . . [to] organize[ ] and own a legally separate entity that centralizes the management" of certain functions.[14] The Court noted that giving economic coordination that runs afoul of § 1 "a name and a label," by incorporating, is not sufficient to "evade § 1 scrutiny."[15] Similarly, labeling such an enterprise a workers' cooperative and giving it a business name will not be sufficient to avoid § 1 scrutiny, particularly in an environment in which competition authorities have precisely shown a propensity to go after the cooperation of small players regardless of trade or worker traditions.[16]

This is especially likely for a drivers' association of this sort because of the third assumption we made: that drivers would continue to separately own their own vehicles, to maintain insurance and otherwise meet their own business expenses, and to separately earn revenue. Centralization of decision-making and ownership was already a criterion for permissible coordination as a single entity prior to *American Needle*, as set out in *Copperweld* and its progeny.[17] But *American Needle* especially focused on the teams' separate ownership of their intellectual property in order to reach the conclusion that NFLP did not constitute a "single entity" for antitrust purposes. One view is that *American Needle* created a new "control through asset

13. Am. Needle v. Nat'l Football League, 560 U.S. 183, 191 (2010); *see also* United States v. Sealy, Inc., 388 U.S. 350, 354–58 (1967); United States v. Topco Assocs., Inc., 405 U.S. 596, 606–12 (1972).

14. *Am. Needle*, 560 U.S. at 197.

15. *Id.*

16. California Ass'n of Legal Support Prof'ls, File No. 131-0205, Docket No. C-4447, (F.T.C. April 3, 2014); Music Teachers Nat'l Ass'n, Inc., File No. 131-0118, Docket No. C-4448, (F.T.C. April 3, 2014). *See also* Statement of the Federal Trade Commission, In the Matter of Music Teachers Nat'l Ass'n, Inc., In the Matter of Cal. Ass'n of Legal Support Prof'ls (Dec. 16, 2013), https://www.ftc.gov/sites/default/files/documents/cases/131216musicteachersstmt.pdf. *See also Am. Needle*, 560 U.S. at 192 (noting that the Court will also look past "form" in the case of "professional organizations or trade groups").

17. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 774–77 (1984).

ownership test" that is "substantially narrower" than previously extant single entity principles, requiring joint "ownership of the assets required to supply [the] functions" that are jointly coordinated in order to earn single entity status, or in other words to qualify for antitrust's firm exemption.[18] Drivers' separate ownership of their vehicles would disqualify a drivers' association from antitrust immunity as a single entity under this test. Moreover, there is additional risk for drivers under this framework that was not present for NFLP, insofar as the teams equally shared revenues generated by NFLP, while drivers would not, realistically, equally share revenues generated through a drivers' association.

Overall, it is at minimum highly possible—if not positively likely—that many courts will view drivers as "potential competitors" rather than as arms of a single firm under the test for antitrust's firm exemption set out in *American Needle.* This is especially likely because the prosecuting litigant in such a contest will have the advantage of being able to point out that members of such an association *were*, until its formation, actual competitors.[19] Now, one might respond that the drivers could instead form a fully integrated, worker-owned firm in which expenses and revenues are fully centralized in the firm, vehicles are commonly owned, and profits paid out by a commonly agreed-upon scheme (some variant on hours worked, most likely). We may all agree for the moment that such a firm would qualify for antitrust's firm exemption. But in the practical situation in which drivers currently find themselves, it is only an academic possibility. To start with, consider the impracticality of common ownership of vehicles in today's situation. The vehicles that Uber's and Lyft's operations currently draw upon as capital are also put to personal and household use by drivers. For drivers to somehow render this capital (or even, say, the percentage of this capital that reflects its use for commercial purposes) commonly owned is not feasible, for reasons of differential access to finance.[20] Meanwhile, Uber and Lyft are in a much better position to raise capital in order to either straightforwardly centralize ownership (by buying a fleet of cars) or to engineer a legal or business practice innovation that would centralize partial ownership rights on paper.

Uber Is Still an Antitrust Problem—and What This Teaches Us About the Firm Exemption

Moreover, for the most part, this centralization of vehicle ownership is not what the dominant firms in the ride-share sector currently do either. Uber and Lyft don't facilitate common ownership of the assets (personal

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18. Benjamin Klein, *Single Entity Analysis of Joint Ventures After* American Needle*: An Economic Perspective*, 78 Antitrust L.J. 669, 669 (2013).

19. Courts performing a single entity analysis frequently ask whether members of an association or joint venture are actual or potential competitors.

20. *See infra* The Firm Exception and Access to Finance.

vehicles, for the most part) that are put to use in providing ride services. Yet the "function[ ] that [is] controlled by" the firms is, precisely, ride services;[21] indeed, the firms fix the prices for those services, and joint price setting is the quintessence of anticompetitive activity.[22] Uber and Lyft do not qualify as single entities under *American Needle* and are not entitled to antitrust immunity in the manner that most firms conventionally are. It is also unlikely that they would be able to justify their price fixing and other coordination on some other basis without, in essence, expanding the current boundaries of the law.[23] Yet the existing antitrust authorities have shown no inclination to prosecute or even investigate these firms, instead often taking part in lauding their "innovation." This is not just hypocritical, however; it also evidences the deep bias that antitrust's firm exemption displays toward economic coordination achieved through centralized control based on ownership rights.

Specifically, it seems quite plausible that the deeper reason that most antitrust insiders have been relatively slow even to *see* the antitrust problem with Uber and Lyft—and once it is pointed out, relatively eager to defend it—is that our current antitrust paradigm generally favors the centralization of ownership and control at *large*. This is why Uber and Lyft are such anomalies and why they bend conventional categories so. In a traditional firm, ownership and control is centralized in two senses, not one: in the sense of ownership of the relevant assets (e.g., the intellectual property in team logos in *American Needle* or the vehicles in the case of ride services) and in the sense of financial capital, which is associated with a centralized management structure.[24] Uber and Lyft decentralize ownership of the assets on which operations actually rely, while retaining the reliance on centralized ownership and control of financial capital (and ensuring centralized control within the firm itself) associated with conventional business firms. This is likely why it is difficult to "see" even the surface doctrinal antitrust problem raised by these firms, the more so one is enculturated not only in the current antitrust paradigm but also in existing business culture. Those who have difficulty seeing this problem *aren't exactly wrong*; they are embodying a feature of the deep structure of antitrust's firm exemption.

In other words, at its root, antitrust's firm exemption has a tendency to assume the organization of a conventional business firm, including attributes of centralized control within the firm. This is evidenced in many of the casual references made in the cases explicating the single entity doctrine

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21. Klein, *supra* note 18, at 669.

22. *See* Paul, *supra* note 7; Steinbaum, *Antitrust, the Gig Economy, and the Labor Market, supra* note 7; Steinbaum, *Uber's Antitrust Problem*, *supra* note 7.

23. *See* Paul II, *supra* note 3, at Part II.B (discussing the vertical restraints doctrine and other routes by which Uber might seek to justify its price coordination activity).

24. Despite the existence of individual shareholders, control over voting shares is typically much more concentrated.

itself, which often assume and reference a traditional business firm. By contrast, federal courts do not typically refer to the internal structure of worker-owned and controlled cooperative firms when explicating antitrust's firm exemption. Therefore, antitrust is not agnostic about what goes on inside the firm, and it largely assumes the firm's conventional organization, which is typically orchestrated by institutions ultimately representing financial capital. This is not entirely surprising when one considers that hostility to worker agency or democracy *within* firms runs deep among theorists who have been highly influential upon the current antitrust paradigm.[25] This furnishes both the deeper explanation for the risk of antitrust liability a hypothetical drivers' association would face, and the reason why Uber and similar firms' apparent immunity from the same risk is cold comfort to drivers considering such a strategy.

The Firm Exemption and Access to Finance

Drivers pursuing the incorporation solution face antitrust uncertainties on less favorable terms than Uber and Lyft, immediately putting them at a competitive disadvantage. They also face differential obstacles in accessing finance, which in turn puts them at a disadvantage in terms of both normal business competition and the resolution of legal uncertainties, notably the risk of antitrust liability. The comparative difficulty drivers would face in obtaining access to equity stakes or loans in fact highlights that the firm exemption goes beyond antitrust law and suffuses our legal system.

Our financial system as it exists prioritizes the ability to end legal relationships quickly, whether in the form of the ability to sell legal title to physical assets, or in order to dispose of creditor relationships. This is commonly referred to as "liquidity."[26] The need for liquidity comes from the fact that financiers must be able to meet large financial commitments on short notice and change the mix of assets they own based on new information. As a result, the most valuable assets are those that can be sold, or borrowed against, on short notice and at or near their accounted-for monetary value. Equivalently, the debtors in the most socially advantageous position are those who can offer liquid, safe assets to their creditors. If those in need of finance can't offer liquidity and safety, they must find "patient in-

25. *See, e.g.*, Oliver E. Williamson, *The Organization of Work: A Comparative Institutional Assessment*, 1 J. ECON. BEH. & ORG. 5 (1980) (Williamson's ideas have made a lasting mark upon antitrust law through the influence of Robert Bork and others, as argued in Paul I, *supra* note 2). *See also* Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105, 114–15 (1969); Spencer Thompson, *Towards a Social Theory of the Firm: Worker Cooperatives Reconsidered*, 3 J. COOP. ORG. & MGMT. 3, 6–8 (2015) (pointing out that the disfavor toward firms organized in other ways, for example through worker ownership, was not limited to firms involving "one-worker/one-vote" styles of management, but even to "the bundling of work and wealth" itself, thus extending to worker-owned firms in general).

26. Bruce G. Carruthers & Arthur L. Stinchcombe, *The Social Structure of Liquidity: Flexibility, Markets, and States*, 28 THEORY & SOC. 353, 353–54 (1999).

vestors" and be capable of offering a lot of "upside" uncertainty. This structure for provisioning finance—which is ultimately the product of contingent legal and social choices—reinforces the firm exemption in a number of ways.

First, because financiers will only lend to legal entities vested with relevant control rights, loose associations are deprived of financing. Incorporation itself does not change this. Even if they incorporated, loose associations cannot pledge property or control rights that they themselves do not have.[27] Individuals and smaller firms can leave loose associations and are under no legal obligation to hand over physical assets to would-be creditors of loose associations.

Second, even democratic firms, vested with control rights, are limited in their access to finance. Though they may be able to access some credit on that basis, they cannot offer conditional control rights to financiers through debt covenants—which are typical and will likely be required by most lenders unless the democratic firm is somehow already dominant and wealthy.[28] To be more precise, democratic firms cannot do this without sacrificing at least a portion of their democratic character, which requires retaining control rights and dispersing them among producers in some meaningful way. Similarly, they cannot, by definition, offer equity stakes to investors who are not workers or other participants in the firm without sacrificing their character. In other words, our current financial system predates actual or potential democratic characteristics of firms even in those limited circumstances in which democratic firms can access finance to some extent.

Third, company IOUs and equity stakes become fairly safe and liquid when the company in question dominates markets and is very wealthy. The lax and solicitous attitude of today's antitrust law to dominant firms thus compounds the advantageous access to finance that successful firms already have.[29] Relatedly, equity stakes can become fairly safe and liquid even when a company is unprofitable, as long as there is a conventional belief that it will become profitable in the future. This is the advantageous situation in which Uber finds itself today.[30] And hope is not lost even in the circumstance there isn't a conventional belief that a company will become profitable in the future; some financiers may be willing to provide equity

27. For a historical example of such associations, consider the formal cartels and "pools" (often incorporated) that American industry tried as a coordination strategy prior to the innovation of the formal business trust by the Standard Oil Company. *See, e.g.*, William G. Roy, Socializing Capital: The Rise of the Large Industrial Corporation in America 181–92 (1997).

28. David J. Denis & Jing Wang, *Debt Covenant Renegotiations and Creditor Control Rights*, 113 J. Fin. Econ. 348, 349 (2014).

29. Hyman P. Minsky, *The Evolution of Financial Institutions and the Performance of the Economy*, 20 J. Econ. Issues 345, 348–49 (1986).

30. Michael J. de la Merced & Kate Conger, *Uber I.P.O. Values Ride-Hailing Giant at $82.4 Billion*, N.Y. Times (May 9, 2019), https://www.nytimes.com/2019/05/09/technology/uber-ipo-stock-price.html.

investment for long periods of time to unprofitable companies because the payoff will be extremely large if those companies were to succeed. This payoff will be based in part upon the selectively favorable coordination rights allocated by antitrust law to this hypothetically successful, hierarchical, top-down firm. In other words, the knowledge that the competitive threat from driver associations is limited by antitrust law, and that the opportunity for a young venture capital-driven firm to dominate markets is relatively unconstrained by law, creates more incentives to invest, and thus reinforces such firms' favorable access to finance.

The financial press is filled with stories about venture capitalist investments in Google, Apple, and similar entities.[31] The appetite of this category of financiers provides an enormous financial advantage for young, hierarchical firms looking to grow quickly and dominate markets. What all this amounts to is that our current financial system allocates finance to those that currently possess wealth and market dominance, while allocating additional funds to those firms that financiers are willing to gamble will become wealthy and dominate markets in the future.[32] This gamble is profitable because it forecloses the possibility that young firms will have any democratic character. Thus, it is the hierarchical access to finance which transforms the hierarchical organization of production from a quirk of our legal system into the organizing principle of our social system.

This hierarchy of finance is worsened in our era of lax antitrust enforcement policy. The potential value of equity in young firms becomes almost unbounded when the "realistic" possibility emerges that these firms can gain a "monopolistic" market share. The strong expectation that a sustained unprofitable firm like Uber would be charged with predatory pricing or attempting to monopolize a market would greatly limit their access to finance, regardless of potential antitrust liability from price fixing. But that is not the current state of antitrust law. In this sense, one way to conceive of strong enforcement of traditional antitrust rules is that they cap the financing benefits derived from the firm exemption.

Instead, companies like Uber actually benefit from legal uncertainty because their early investment in, and ability to afford, substantial amounts of professional legal services (and political relationships) cultivates the expectation that legal uncertainties will likely be resolved in their favor. Business corporations also have the benefit of limited liability, which means equity valuations don't reflect the full value of potential loss from legal uncertainties being resolved against businesses like Uber. Democratic firms

31. Arleen Jacobius, *Facebook IPO Could Be Tipping Point for Venture Capitalists: Some Venture Capitalists Reflecting on the Good Old Google Days*, 40 PENSIONS & INV. 2 (2012).

32. This point interestingly converges to the argument in Minsky, *supra* note 29. The difference is that Minsky missed antitrust's allocation of coordination rights and seemed to think price setting could be "returned" to "the market" after vigorous enough antitrust enforcement against large firms.

also benefit from limited liability, but they are unable to benefit as much from it in terms of access to finance since they can't issue equity liabilities to outside investors.

Uber's large valuation thus, in large part, reflects the possible returns from a legally victorious Uber. Consequently, its equity issuance helps fund the very outcome "priced in" to their company's valuations. This is why, to address the legal problem posed by *American Needle*, Uber could hypothetically afford reorganization to attempt to prove it is a "centralized firm" by buying the right to use Uber drivers' personal vehicles for commercial use and defend this legally untested form in court, something that's not feasible for a "bottom-up" driver association for all the reasons that have been set out.

Innovation, whether it be technological or legal, inherently requires resources now, with uncertain payoffs far into the future. A somewhat differently structured financial system might forgo the need for collateral and instead lend on an unsecured basis, intending to hold loans to maturity. Without the need to sell assets to meet financial commitments, such a financial system could focus on long-term relationship lending and allocate less credit to already dominant, hierarchical top-down firms. This change would simply be a matter of legal design. Bank charters already franchise out to private entities the public power to create money; regulations over the types of lending banks do could replace attempts to regulate banks by rationing liquidity.[33] Even in this scenario, insofar as banks would have to consider default uncertainty and direct financial returns, finance would still reinforce the firm exemption.[34] It would not do so as sharply and as brutally as it

33. *See generally* Robert Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1155–201 (2017); Rohan Grey, *Banking in a Digital Fiat Currency Regime*, *in* REGULATING BLOCKCHAIN: TECHNO-SOCIAL AND LEGAL CHALLENGES 169 (Philipp Hacker et al. eds., 2019).

34. This isn't to suggest that this is any less socially or legally contingent than any of the other processes we have discussed. For example, most "patient investment" ultimately comes from money "pools" that, by this point, are largely made up of individuals investing for retirement or pension funds. Minsky, *supra* note 29, referred to this as "Money Manager Capitalism." Under a different legal regime, these funds could instead provide grants to democratic firms and for purchasing and democratizing existing firms. The remaining money "pools," which are under the direct control of the wealthy, are themselves the result of legal changes, such as the removal of estate taxes, which allow such wealth to accumulate. Zoltan Pozsar astutely points out that "asset-liability mismatches," and the resulting financial innovations to accommodate them, could be relieved by shrinking these institutional cash pools directly. The differential access to finance is simply another aspect of this phenomenon. *See* L. Randall Wray, *Minsky's Money Manager Capitalism and the Global Financial Crisis*, 40 INT'L J. POL. ECON. 5, 16 (2011); Michael A. McCarthy, *Turning Labor into Capital: Pension Funds and the Corporate Control of Finance*, 42 POL. & SOC. 455 (2014); Zoltan Pozsar, A Macro View of Shadow Banking: Levered Betas and Wholesale Funding in the Context of Secular Stagnation 25–28 (Jan. 31, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558945 (follow "Download This Paper").

does now, but it would still do so. This points to how deeply ingrained the firm exemption is in the prevailing legal order.[35]

Corporate law could also be reformed to limit the reach of the firm exemption. Currently unprofitable companies seeking outside equity investment could be required to register with the Securities and Exchange Commission. If their business model is deemed to be based in socially undesirable forms of legal innovation, rather than genuine socially beneficial technological innovation, they could simply be barred from issuing equity liabilities.[36] Companies could also be limited in the kind of equity and debt obligations they could issue to nonbank financiers. New corporate forms could also be introduced for democratic microenterprises and to consolidate access to finance for federations of democratic microenterprises. In this way, along with an unsecured lending-based, triple-bottom-line banking system,[37] access to finance could become less hierarchical,[38] and the excesses of the firm exemption would be curbed. In the absence of such meaningful reforms, however, drivers and other producers and service providers are effectively closed off from competing with the hierarchy of finance engendered by the firm exemption.

Conclusion

We show that a drivers' cooperative would have difficulty demonstrating the integration necessary to qualify for antitrust's firm exemption under existing law. Moreover, putting the burden on such an association to test this gray area has the effect of rendering this gray area far less likely to be fairly tested. Drivers do not have the financial resources to fund a lengthy and costly defense, in contrast to dominant firms, which have relied on venture capital and now the financial markets to invest in molding the law to their desired business models. This is not only an issue of differential starting wealth endowments, however: our existing system for provisioning credit itself reinforces, at multiple levels, antitrust's criteria for allocating economic coordination rights.

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35. It is beyond the scope of this paper to articulate what a financial system that didn't reinforce the firm exemption might look like, but see *infra* note 37.

36. This could function similarly to Professor Omarova's "FDA for financial products." Saule T. Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 Wash. U. L. Rev. 63, 87–88 (2012).

37. Grey, *supra* note 33, at 172; Olaf Weber, *Social Banking: Concept, Definitions and Practice*, 14 Global Soc. Pol'y 265, 265 (2014).

38. It is also important to note that public grant funding of innovation—which already happens through public universities and administrative agencies—could be allocated to loose associations and individuals as a replacement to inherently hierarchical equity liability funding. This could fully excise our legal system's preference against democratic cooperation. *See also* Rohan Grey, *Who Owns the Intellectual Fruits of Job Guarantee Labor?*, *in* The Job Guarantee and Modern Money: Realizing Keynes's Labor Standard 207, 212–17 (Mathew Forstater et al. eds., 2017).

In addition, barring bargaining agency through a drivers' association renders it far less likely that working people will practically be in a position to work their way up to greater levels of integration.[39] In other words, permitting a looser drivers' association in which ownership and revenues are dispersed makes it far more likely that a more integrated enterprise will eventually emerge (assuming *arguendo* that the latter is a better policy outcome here). When that does happen, a successful firm accountable to the people who provide the services it sells, rather than primarily to disinterested investors, is more likely to reinvest in itself and its communities, rather than prioritizing dividends and distributions to shareholders.

In short, "let them incorporate" is a poor solution to the Uber antitrust problem. Instead, it highlights the deep level at which antitrust's existing criteria for allocating coordination rights operate, and it highlights antitrust's symbiotic relationship with our existing system for provisioning finance. Thus, the hypothetical possibility of an incorporated drivers' association heightens, rather than obviates, the reasons to reexamine antitrust law's allocation of coordination rights, which is biased in favor of concentrations of ownership and control, and against workers and democratic cooperation.

39. *See, e.g.*, Vaheesan & Schneider, *supra* note 1 (discussing this point and some of the literature supporting it).