Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology

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The popular on-demand ride service, Uber, has become the exemplar of the platform economy and inspired a new narrative about advanced information and communication technologies, and the firm. The narrative tells us that Uber facilitates a market between independent businesses and buyers by administering technology that lowers the costs of exchange. Despite borrowing the language of Coasian firm theory, however, the Uber narrative is largely nonsensical within it: Uber appears much more like a seller of transportation services than a market intermediary within a Coasian analysis. By examining disputes over whether drivers for Uber and its competitor, Lyft, are employees or independent contractors, this Article shows that the Uber narrative reveals not technology’s dissolution of the firm, but rather a disjuncture between the firm and its corporate form. While often belied in practice, major theories of the firm, like that developed by Ronald Coase, assumed the corporation would be a servant to productive enterprise. The emergence of the postindustrial corporation that pursues profit by other means, including speculative activity and regulatory arbitrage, poses another challenge to this ideal. The Uber narrative both obscures and legitimates a weakening nexus between the firm and corporation. This Article hypothesizes several reasons for the Uber narrative’s
appeal, despite its illegibility within Coasian theories of the firm, to which judges often appear committed in disputes not involving platform companies. First, the narrative has political valence—it suggests technology renders the firm obsolete, liberating individual producers. Second, the narrative conceals the incongruence between Uber’s corporate identity and organization of productive activity by appealing to the cultural exceptionalism of information and communication technologies (“ICTs”), and discourses that associate algorithmic programming with the inscrutability of the market. Third, the narrative’s appeal reflects the challenge of theorizing service work under an enduring industrial paradigm. Finally, ICTs disrupt assumptions in Coasian theory about the association of firm and market production with the legal relations of property and contract. ICTs lowered the costs of centralized coordination, or firm production, in part by enabling Uber to control production inputs without acquiring property rights over them.

I. INTRODUCTION

A new narrative about technology and the firm has become rather ubiquitous in mainstream and academic discourse about platform companies. The narrative goes something like this: Advanced ICTs lower the costs of market exchange so that buyers and sellers can realize their economic interests without integrating into a firm. Platform companies use technology to facilitate matches of supply and demand that transaction costs might otherwise impede.¹ As its paradigmatic example, the narrative often points to the on-demand ride service Uber. In fact, Uber has become almost a metonym for the platform economy.²

The narrative speaks in the idiom of transaction costs economics (“TCE”), an influential set of theories pioneered by the economist Ronald Coase that attempt to explain why some economic exchanges were carried out in markets and others in firms.³ His answer was that there were costs to market transactions, like searching for information and negotiating agreements, which would sometimes exceed the costs of

². See infra Part II.B.
organizing economic activity within a firm. It then became more efficient to organize economic activity within the firm.

Yet, what happens if we subject the “Uber narrative” to scrutiny under Coasian theories of the firm? By lowering transaction costs, does Uber’s technology make the firm obsolete? Is it, as some have proclaimed, “nothing less than an extinction-level event for the traditional firm”? Not really. From the perspective of Coasian theory, the narrative is unintelligible as a description of Uber.

If the Uber narrative does not actually apply to Uber, then how should we understand it? And what accounts for the almost taken-for-status of the narrative as a description of Uber?

This Article explores these questions in the context of disputes over the legal identity of employment. In particular, this Article focuses on two high profile class actions in California over whether drivers for Uber and another on-demand ride service, Lyft, are “employees” or “independent contractors.”

Only employees have rights under most statutes regulating work, like anti-discrimination and collective bargaining laws. Only employers have obligations under these laws, like paying unemployment insurance premiums and minimum wages. Because hiring workers as employees is usually more costly than hiring them as “independent contractors,” companies often seek to arbitrate the distinction to avoid compliance costs. Uber and Lyft’s classification of their drivers as

5. Id. at 391.
7. See infra Part III.
independent contractors has generated countless legal disputes, including at least twenty-eight class actions across the country.12

In the California class actions, the threshold question regarding the drivers’ employment status turned on the rectitude of the Uber narrative: Were Uber and Lyft only “technology” companies, as they claimed, or were they in the business of producing transportation services?13 Nearly all of the legal tests for employment status ask the alleged employer to provide some account of its business identity—what the company is about and how it does it.14 Workers in the same business as the alleged employer are more likely to be employees under the tests.15

The contest over Uber and Lyft’s business identity in the California class actions suggest that a different notion of business legitimacy is at work in the Uber narrative than that authorized by Coasian theory: Rather than articulate the dissolution of the firm, the narrative obscures and legitimates a weakening relationship between the firm and the corporation.16

Coase and his followers understood the firm to be a productive enterprise and assumed that the corporation would be its helpful servant: Its raison d’être was to help the firm maximize profits via the efficient production and sale of goods and services.17 This purpose became so taken-for-granted that scholars tended to speak of the firm and corporation interchangeably.18

History has long disappointed the ideals of economic theory


13. O’Connor, 82 F. Supp. 3d at 1141-42; Cotter, 60 F. Supp. 3d at 1078.

14. See Izvanariu, supra note 9, at 7-9, 12 (describing federal and state legal tests for determining employee status which include a factor pertaining to the nature of the employer’s “business”).

15. A factor in the common law agency test for determining employment status under many federal and state statutes is whether or not “the work is part of the regular business of the employer.” RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h (AM. LAW INST. 1957); see, e.g., Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992).

16. See infra Part IV.

17. See Reinier Kraakman, THE DURABILITY OF THE CORPORATE FORM IN THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 147, 151 (Paul DiMaggio ed., 2001) (explaining that the corporate form helps the firm in “raising capital, controlling agency costs, facilitating decision-making, and allocating risk among the participants in the firm”).

18. See infra Part IV.
regarding how capitalist production and circulation should work.¹⁹ Scholars increasingly point to evidence that corporations are operating according to different principles today than those prescribed by social scientists.²⁰ What this Article tentatively refers to as the "postindustrial" corporation still seeks to maximize profits, but not necessarily through productive enterprise.²¹ It may pursue shareholder value through asset manipulation, speculative activity, and regulatory arbitrage and evasion.²²

We usually examine this phenomenon under the rubric of financialization—the increasing salience of financial markets in shaping economic activity, or as part of the shift from "managerial capitalism" to "investor capitalism."²³ The law often expects companies to comport themselves according to the ideals of economic theory, making the firm-corporation nexus a salient issue in commercial law.²⁴ Discussions of special purpose entities, transfer pricing, and proprietary trading, for example, implicate the legitimacy of the postindustrial corporation.²⁵ This Article explores how the law addresses the slipping firm-corporation nexus in a new context—employment. Since employment is the regulatory fulcrum of many important rights and duties, it is a site where the stakes of the disjuncture are high.²⁶

This Article also examines employment status disputes, as well as an antitrust suit against Uber, to answer the next question: How does the Uber narrative work? What accounts for its almost taken-for-granted status among journalists, academics, and legal decision makers alike? Coasian understandings of the firm are not confined to the academy, but influence (and reflect) mainstream and legal discourse.²⁷ In many employment disputes, the judge’s conception of the alleged employer’s business identity reflects a normative expectation about the firm-

19. See infra Part IV.
21. See infra Part IV.
22. See infra Part IV.
23. See Ronald Dore, Financialization of the Global Economy, 17 INDUS. & CORP. CHANGE 1097, 1102 (2008); Krippner, supra note 20, at 175.
27. See Kilpi, supra note 6.
corporation relationship that was assumed in Coasian theory. This was the expectation that a company's business identity should reflect its organization of productive activity. For example, in a dispute over whether its delivery drivers were employees or independent contractors, FedEx claimed that it was not in the package delivery business, but rather in the business of operating a "sophisticated information and distribution network." The court rejected the argument, invoking the lack of congruence that would be implied between FedEx's business identity on the one hand, and its corporate persona and product markets on the other: "Without the drivers' delivery services to put FedEx's information and distribution network to use, FedEx would 'cease to operate,' at least as the type of entity the public has come to believe it to be (and which image FedEx has cultivated through its advertising and public filings)."

Acceptance of the Uber narrative does not seem to be a consequence of the ivory tower failing to communicate with the outside world. Two reasons we may be receptive to the Uber narrative involve its cultural appeal to the exceptionalism of ICTs. First, the idiom of advanced information technologies partially obscures the rift—where arbitrage can flourish—between the company's corporate identity and its direction of productive activity. Second, the narrative draws on the enigma of the algorithm, and in particular, discourses that associate algorithmic programming with inscrutability and rationality that transcends human consciousness—much like the neoclassical theory's awe of the free market.

Some of the narrative's appeal likely has little to do with bedazzlement by platform technology. It may be an artifact of the enduring challenge of theorizing services in the shadow of the industrial paradigm for how we think about the economy. As a result, we are more ready to believe that Uber intermediates a market, but a restaurant does not intermediate a market between buyers of hospitality services (diners) and sellers (waiters). Most of the features scholars point to as

28. See infra Part V.A.
30. Id. at *6 (citation omitted).
31. See infra Part V.A.1.
32. See infra Part V.A.2.
33. Cf. Veena Dubal, Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities, 105 CAL. L. REV. 23 (2017) (businesses have experimented with the obscurities surrounding employee identity causing an under-theorization of service work).
evidence of the exceptionalism of platform companies are defining characteristics of almost all service production.  

Finally, assumptions—and ambiguity—within Coasian theory about the institutional components of market and firm coordination loan the Uber narrative plausibility.  ICTs have disturbed assumptions about the role of legal relations in constituting firms and markets, in particular, property and contract. Thus, Coasian theory perhaps made itself vulnerable to a postindustrial reinterpretation of the firm that equates it with the corporation and formalities of employment.

In sum, subjecting the Uber narrative to evaluation under Coasian firm theory suggests several lessons to inform how we think about ICTs, the corporation, and platform work. Uber is where questions about the firm-corporation nexus and the use of ICTs to organize production intersect: Does Uber, as it claims, facilitate a market between independent transportation businesses and customers by creating technology that lowers the costs of exchange? In other words, does Uber redefine the firm or even deliver its epitaph? Or, on the other hand, is Uber a firm that sells transportation services and hires employees to produce its services? The Coasian analysis points to the latter. Uber’s technology (as well as its power) appears to have lowered the costs of firm coordination relative to market coordination by reducing agency costs and enabling Uber to direct production inputs without assuming the costs of formal property rights.

The Coasian exercise thus suggests we understand the Uber narrative as an attempt to legitimize the postindustrial corporation, an entity whose formal boundaries bear little relation to the organization of productive activity, an entity that has in large part abstracted itself from the parochial business of maximizing profit through the creation and sale of goods and services.

34. See infra Part V.B.
36. Id. at 391.
37. See infra Part V.C.
40. See infra Part V.
41. See infra Part IV; see also Julia Carrie Wong, Google Wants in on On-Demand: Workers Want Rights, SF WEEKLY (Aug. 5, 2015), http://www.sfweekly.com/sanfrancisco/san-francisco-news-google-teamsters-adecco-labor-uber/Content?oid=3906538 ("Many . . . highly successful
All too often we lump different business models under the rubric of the “platform,” but fail to ask whether they have much in common apart from using the internet. In its passage from IT phenomenon to social phenomenon, the definition of the platform seems also to have migrated from its technical meaning to that of a metaphorical marketplace. Certainly, many new models challenge conventional understandings of firms and markets but do not embrace the postindustrial corporation’s indifference to productive activity. However, the seductiveness of the Uber narrative suggests we exercise more caution when trying to distinguish arrangements that represent innovative ways of organizing productive activity from those that represent profit-seeking through other means, like financial speculation and legal arbitrage. Uber’s business identity has been at issue not only in employment law, but also in a myriad of regulatory disputes involving transportation, antitrust, civil rights, and consumer protection law. Legal questions about business identity will not go away anytime soon.

Uber drivers differ from industrial manufacturing employees and from FedEx drivers. The question is how do they differ in any way startups... rely on two very different types of innovation. There’s the technological wizardry that turns code into a mobile app, and there’s the legal maneuvering that turns workers and all the pesky costs associated with them—minimum wage, overtime, workers’ compensation, health care benefits, and unemployment insurance—into a loose network of independent contractors with little to no liability for the employer.

42. See Alex Moazed, What is a Platform?, APPLICO (May 1, 2016), https://www.applicoinc.com/blog/what-is-a-platform-business-model/

43. See, e.g., Reemployment Assistance App. Final Order, Raiser LLC v. Dep’t of Econ. Opportunity, Nos. 0026 2825 90-02, 0026 2834 68-02 at *19 (Dec. 3, 2015) [hereinafter Final Order] (comparing the Uber application to “a physical location” like “flea markets, art galleries, street fairs, food truck festivals, and gun shows”).

44. See Lauren Drell, 17 Business Models Shaking Up the Marketplace, MASHABLE (June 16, 2014), http://mashable.com/2014/06/16/unique-business-models/#vDWyuShncSqh (showing different business models that do not follow the traditional firm model or the Uber model); Sonali K. Shah, Motivation, Governance, and the Viability of Hybrid Forms in Open Source Software Development, 52 MGT. SCI. 1000, 2000 (2006) (citing examples of "collective innovation").


47. See Alan Hyde, What Your FedEx and Uber Drivers Have in Common, FORTUNE (June
that is or should be relevant under the law as we pursue important policy objectives? This Article begins to address this issue by examining a more focused one—how the narrative portrays Uber and Lyft drivers as exceptional by shaping norms of corporate legitimacy. This Article also highlights the important role that the normative question about the relationship between the firm and its business form plays in employment status disputes.

Uber, the fastest growing startup in the world, has “disrupted” the market for transportation services in Schumpeterian fashion, even while the company has not yet turned a profit. By giving workers more flexibility in deciding whether, when, and how long to drive for Uber, it has pushed the horizon of our imagination regarding how we organize work. Perhaps Uber is the oracle of its own obsolescence, providing technology that will one day make possible cooperative production without commodified labor.

This Article proceeds as follows. Part II introduces the Uber narrative about technology and transaction costs, primarily through its appearance in two class actions by Uber and Lyft drivers challenging their independent contractor classification. Part III summarizes Coasian theories of firms and markets and evaluates the Uber narrative from this perspective. Part IV discusses the contemporary challenge to the ideals of economic theory that the postindustrial corporation poses. By investigating the role that Uber and Lyft’s business identity played in the class action disputes, Part IV also shows that a legitimation of the
postindustrial corporation gestates within the Uber narrative.\textsuperscript{56} Part V hypothesizes why the Uber narrative is so ubiquitous, despite repudiating the very theory it mimics.\textsuperscript{57} Part V first looks at the narrative’s appeal to ICTs.\textsuperscript{58} It compares Uber and Lyft’s account of their business identities to those of companies that rely less on ICTs to coordinate service production.\textsuperscript{59} It then suggests the Uber narrative’s plausibility reflects the more general challenge of theorizing the service economy.\textsuperscript{60} Thirdly, Part V suggests that the narrative exploits fault lines within Coasian theory.\textsuperscript{61} Part VI concludes with some implications of the analysis regarding our understanding of contemporary capitalism and how we might govern work relations today.\textsuperscript{62}

II. THE TECHNOLOGY AND TRANSACTION COST NARRATIVE

The “platform economy,” shorthand for a growing host of companies that use advanced digital communications technologies to coordinate the production and circulation of goods or services, has inspired a new narrative about technology and the firm.\textsuperscript{63} To illustrate, consider the claims of Uber, the phenomenally successful startup that provides on-demand ride services through a smartphone application, and its competitor, Lyft, in two lawsuits regarding whether the companies’ drivers were their “employees” or “independent contractors,” as the companies claimed.\textsuperscript{64} For the rare reader who might be unfamiliar with the Uber application, a brief description follows.\textsuperscript{65}

A. The Uber Application

To use Uber, customers first download the application and enter their credit card information.\textsuperscript{66} To request a ride, the customer enters a

\begin{itemize}
\item \textsuperscript{56} See infra Part V.
\item \textsuperscript{57} See infra Part VI.
\item \textsuperscript{58} See id.
\item \textsuperscript{59} See id.
\item \textsuperscript{60} See id.
\item \textsuperscript{61} See id.
\item \textsuperscript{62} See infra Part VI.
\item \textsuperscript{63} See Orly Lobel, \textit{The Law of the Platform} 101 MINN. L. REV. 87, 88-89 (2016).
\item \textsuperscript{64} See O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).
\item \textsuperscript{65} Lyft is similar, but this Article notes where it differs. The description applies to the companies’ operations during the periods relevant to the class actions. Uber is a moving target, however. See infra Part II.A.
\item \textsuperscript{66} See O'Connor, 82 F. Supp. 3d at 1135.
\end{itemize}
pick-up location and selects a service tier. The application uses GPS technology to locate a driver in the vicinity and reveals some information about the driver, including a photo, license number, car model, and a passenger rating. The application estimates the number of minutes it will take the driver to arrive and shows the driver’s progress en route to the pick-up location. Following the ride, Uber charges the passenger’s credit card for the fare automatically. It pays the driver based on a portion of the fare every two weeks. After each trip, the application asks the customer to rate the ride. Drivers must supply their own vehicle to drive for Uber, although the company may assist the driver in leasing one. Uber does not cover maintenance. The company provides drivers who successfully complete the hiring process and pass the vehicle inspection with its software and, if needed, a smartphone. Drivers log into the software to indicate their present availability to accept ride requests. They set their own schedules, and Uber does not require a minimum number of hours.

Uber sets the fares and tracks a driver’s ride acceptance and cancellation rates, using these in addition to customer ratings to make disciplinary and termination decisions. Uber can terminate drivers at any time, for any or no reason. The Lyft service works in a similar manner, although initially the company did not set fares. Also, Lyft limited the number of drivers

67. See id.
68. See id. at 1136.
69. Final Order, supra note 43.
70. See O'Connor, 82 F. Supp. 3d at 1135.
71. See id. at 1136.
72. Id. at 1151; see also Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1071 (N.D. Cal. 2015).
76. See O'Connor, 82 F. Supp. 3d at 1149.
77. Id.; see also Cotter, 60 F. Supp. 3d at 1069.
78. O’Connor, 82 F. Supp. 3d at 1136, 1143, 1149.
79. Id. at 1149 (noting that Uber’s contractual agreement allows “Uber to fire its drivers for any reason and at any time”); Amended Order, supra note 75, at 22.
80. See Cotter, 60 F. Supp. 3d at 1072 (agreement allows Lyft to terminate drivers “at any time, for any or no reason, without explanation”).
who could log in simultaneously and drivers could request and reserve hours ahead of time.  

B. O’Connor, Cotter, and the Pervasiveness of the Uber Narrative

In O’Connor v. Uber and Cotter v. Lyft, drivers brought class actions against the companies in federal court in California, alleging that they were employees under state and federal wage and hour law, which therefore entitled them to reimbursement for work expenses, minimum wage, and tips.  

The threshold question in determining the drivers’ employment status was, “[d]o the alleged employees provide services for the benefit of the principal?” An affirmative answer required the alleged employer to demonstrate that it did not control the manner of service provision.

81. Id. at 1071. “Lyft uses projected demand to determine how many drivers could log onto the app in driver mode at any one time.” Id.  
82. Amended Order, supra note 75, at 1 (suing for tips and expense reimbursement); Cotter, 60 F. Supp. 3d at 1070 (suing for reimbursement for expenses and minimum wage). Uber has made it difficult to verify whether driving for Uber can be a decent-paying job. Alison Griswold, In Search of Uber’s Unicorn, SLATE (Oct. 27, 2014, 4:29 PM), http://www.slate.com/articles/business/moneybox/2014/10/uber_driver_salary_the_ride_sharing_company_says_its_drivers_make_great.html. Uber has been sued in over two dozen proceedings implicating its drivers’ employment status. See Bologna, supra note 12 (estimating about thirty class action suits in federal court against Uber); Izvanariu, supra note 9 at n.3 (listing misclassification lawsuits against Uber and Lyft). The extent to which drivers can hold Uber accountable for violations of labor and employment law through legal proceedings is uncertain, due to questions about the enforceability of Uber’s arbitration agreements. See Katherine V. W. Stone, Uber and Arbitration: A Lethal Combination, ECON. POL’Y INST. (May 24, 2016, 11:33 AM), http://www.epi.org/blog/uber-and-arbitration-a-lethal-combination/. The agreements mandate that drivers pursue claims through arbitration, and prohibit class, collective, and representative actions. Id. The agreements thereby preclude the most realistic legal means of holding Uber responsible on a wide scale. Id. If courts uphold the agreements and new drivers and drivers renewing their agreements do not opt out of them, it will be difficult for drivers effectively to vindicate their rights. Id.  
83. O’Connor, 82 F. Supp. 3d at 1138; Cotter, 60 F. Supp. 3d at 1073; see also Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010).
Uber and Lyft contended that the drivers performed no services for them. The companies argued that they were in a different line of business than the drivers: Lyft is a technology company that operates a mobile application-based platform that facilitates transactions between third parties offering rides and individuals seeking rides. “By contrast, [the plaintiffs] were drivers, an entirely different business and occupation.” Uber argued it was a “technology company” that “does not provide transportation services to passengers.” In particular, “Uber has developed a technology platform—the Uber App—that people seeking transportation can use to connect with transportation providers.” “The work Plaintiffs performed—driving passengers—is distinct from Defendant’s principal business of developing mobile lead generation and payment processing software.”

Rather than the provide Uber and Lyft with services, it was the other way around: Uber claimed, “Plaintiffs pay Defendant for access to
leads via the Uber App and to benefit from Defendant’s marketing efforts and payment processing. Like passengers, Plaintiffs and other drivers are customers who receive a service from Defendant. Furthermore, Uber stated, “[w]hat we’ve done is we’ve implemented an application that riders and drivers find attractive to utilize their vehicles where they would otherwise be unutilized. It’s a benefit to them; it’s a service to them.” The fact that we benefit from these individuals using our apps simply makes them a customer. In Lyft’s rhetoric, drivers and passengers were interchangeable members of a “ride-sharing community.” Uber was so bold as to claim:

This Court’s inquiry into Plaintiffs’ employment status may end here, because the undisputed facts show that Plaintiffs did not perform any services for Defendant. To the contrary, Defendant, by providing leads, connecting drivers to passengers, and seamlessly processing payment of fares, provides a service to drivers and receives a fee for that service in return.

To sum, the narrative of Uber and Lyft’s business identity (the “Uber narrative” or the “Narrative”) is as follows: We do not provide transportation services. We are a technology company. We use

91. Id. at 1.
92. Id. at 1, 17 (Drivers contract with Uber to “gain access” to a “lead generation platform”); Transcript of Proceedings at 17, O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d. 1133 (N.D. Cal 2015) (No. C 13-3826 EMC) [hereinafter Transcript] (“But, fundamentally, the commercial relationship between these drivers and transportation providers and Uber is one where they are our customer, where we license to them our software, and we receive a fee for doing that.”); Reply, supra note 89, at 3 (“Plaintiffs are Uber’s customers, paying Uber a fee for each successful referral, and it is simply unremarkable that a paying customer is important to a business.”).
93. Transcript, supra note 92, at 73.
94. Id. at 16. .Some companies do not receive most of their revenue from sales of the product or service it markets to the public. Newspapers earn revenue from advertisers. Uber, by contrast, depends on passenger fares. O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d. 1133, 1142 (N.D. Cal. 2015). A court found that exotic dancers/strippers were “an integral part” of the business of an upscale strip club, even though much of the club’s revenues were from alcohol sales. Sandoval v. M.J.F. Bowery Corp., No. ESCV200901835C, 2011 WL 5517331, at *5 (Mass. Super. Ct. 2011).
95. Drivers’ written agreements did not construe them as employees but rather more like customers. Summary Judgment Motion, supra note 86, at 2-3. Lyft drivers signed a user license for “accessing the platform.” Id. at 1-2. An Uber agreement provided: “In exchange for your access to and use of the Software and Service, including the right to receive the Requests, you agree to pay to the Company a fee for each Request accepted. . . .” E.g., Final Order, supra note 43.
96. Notice of Motion, supra note 87, at 18. See also id. at 1 (arguing the court’s inquiry should end with the determination that Defendant provided Plaintiffs with a service).
97. Id. at 26.
technology to facilitate a market between independent sellers and buyers. \(^98\) In particular, we use advanced information and communication technologies to lower the costs of market exchange, like payment processing and search costs, which might otherwise impede independent sellers and buyers from realizing a "match." \(^99\)

The Narrative is not confined to the companies’ strategic and situated legal characterizations of their business model. \(^100\) It has become a rather ubiquitous characterization of the platform economy in the media and academy that almost always casts Uber as its archetype. \(^101\) A recent law review article recounts, "[s]haring platforms thus facilitate exchanges that might otherwise never occur due to high transaction costs." \(^102\) "These markets allow informal participants to operate at a small scale by minimizing transaction costs." \(^103\) Another academic remarks, "[t]hose matches have always existed, but it was just too expensive to find them... But by having a digital platform, the costs get much lower so you get more of those matches." \(^104\) A blog, also discussing Uber as an example, says, "[I]lower transaction costs are what drive the evolution of the market from traditional firms to large networks." \(^105\) Another commentator, referring to Uber as a paradigmatic example, exclaims:

The existence of high transaction costs outside firms led to the emergence of the firm as we know it, and management as we still have it... [The reverse side of Coase’s argument is as important:] If the (transaction)

\(^{98}\) Summary Judgment Motion, supra note 86, at 1.

\(^{99}\) Motion to Dismiss, supra note 89, at 2; cf. Salovitz v. Uber Techs., Inc., No. A-14-CV-823, 2014 WL 5318031, at *1 (W.D. Tex. 2014) (quoting Uber’s argument that it “merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other people looking to pay for those skills and assets”).


\(^{101}\) Id.; Kilpi, supra note 6 (“The Internet, together with technological intelligence, makes it possible to create totally new forms of economic entities, such as the ‘Uber for everything’ type of platforms/service markets that we see emerging today.”).


\(^{103}\) Id. at 1107; see also Lobel, supra note 63, at 17 (taking a “Coasean transaction cost perspective”); Roberta A. Kaplan, Regulation and the Sharing Economy, N.Y. L.J. (2014) (“'Dharing apps and websites act like 'virtual matchmakers' by facilitating relationships that otherwise might be too costly or burdensome to arrange.”).

\(^{104}\) Bruner, supra note 1.

\(^{105}\) O’Reilly, supra note 39.
costs of exchanging value in the society at large go down drastically as is happening today, the form and logic of economic [and organizational] entities necessarily need to change!  

C. Transaction Costs Economics and Political Appeal

The Uber narrative speaks in the language of transaction costs economics ("TCE"), from whence it derives a certain political appeal. The narrative would seem to resolve an old debate between free market advocates and those in favor of more centralized planning to satisfaction of the former. Free market adherents extolled the "marvel" of the market as the most efficient way of organizing economic activity. The fact that most of the economy was organized instead through large command-and-control organizations posed a conundrum. The economist Ronald Coase, regarded as the forbear of firm theory and TCE, was interlocutor to this debate. His seminal 1937 article, The Nature of the Firm, sought to explain why firms existed, or why some productive activities were carried out in markets and others through centralized coordination. Coase rejected the popular answer that firms were an aberration created by foul play, like the predatory practices of robber barons. He argued that there were also costs to market transactions, like the time and resources it took to find information and negotiate contracts. Sometimes these would exceed the costs of

108. See id. at 8 (noting that around 1930, "economists in the West were engaged in a grand debate on the subject of planning," spurred in part by questions about how Russia would organize its economy).
110. See Coase, supra note 3, at 7-8. In response to the claim that "competition would provide all the coordination needed," Coase mused, "Yet we had in economics a factor of production, management, whose function was to coordinate." Id. at 7. He also noted the difficulty of reconciling claims that it would be impossible to organize Russia as "one big factory" with the existence of factories in England and the U.S. See id.; see also Oliver E. Williamson, Outsourcing: Transaction Cost Economics and Supply Chain Management, 44 J. SUPPLY CHAIN MGMT., 5, 8 (2008) [hereinafter Williamson, Outsourcing] (referring to the intellectual contest between the "marvel of the market" and the "marvel of hierarchy").
111. See Coase, supra note 3, at 8.
113. See id. at 400-01.
organizing economic activity through centralized direction. In such cases, the firm would emerge as the more efficient organizational form.

The Uber narrative suggests that ICTs have made the firm obsolete by lowering transaction costs in the market. "The [i]nternet is nothing less than an extinction-level event for the traditional firm." ICTs enable individuals to realize their interests in economic exchange without integrating into a firm. We can finally retire the firm as a means of coordinating economic activity, because "[w]e stand on the threshold of an economy where the familiar economic entities are becoming increasingly irrelevant."

What happens when we actually subject the Uber narrative to scrutiny under Coasian theory? It does not hold up. From the Coasian perspective, Uber does not write the epitaph of the firm.

III. UBER AND CLASSIC THEORIES OF FIRMS AND MARKETS

A. The Centralized Market

Coase theorized "firms" and "markets" as alternative ways of coordinating resources in production. He defined the firm as the coordination of resources by the command of the "entrepreneur-coordinator." He defined the market as the coordination of resources through the price mechanism and voluntary exchange.
Following Coase, others also conceptualized firms and markets as alternative means of allocating and directing resources. They theorized the firm as an organization that replaced the market's coordinating features of price signals, competition, and voluntary exchange with more conscious and centralized direction. Alfred Chandler, in his prodigious history of the rise of the large, vertically integrated enterprise in the United States argued: "What the new enterprises did [ was take over from the market the coordination and integration of the flow of goods and services from the production of the raw materials through the several processes of production to the sale to the ultimate consumer."

In the firm, "[t]he visible hand of management replaced the invisible hand of market forces." Oliver Williamson, the economist most associated with TCE, defined firms and markets as different governance structures for coordinating productive activity, agreeing with Coase that what distinguished the firm was its centralized direction. Oliver Hart conceptualized firms and markets as alternative sets of social relations for coordinating value-enhancing activity, associating the firm with residual control over productive assets. Steven Cheung denoted firm coordination in terms of "observations of direction by price signal versus direction by an entrepreneur," or the direction of economic activity "by a visible hand, not by the invisible hand of a price mechanism." Even Kenneth Arrow, an economist associated with the neoclassical tradition, against which Coasian theorists tended to distinguish themselves, associated the firm with the "replacement of the costs of buying and selling on the market by the costs of intrafirm transfers."


125. See Chandler, supra note 124, at 10-11; see also Williamson, Transaction-Cost Economics, supra note 124, at 252.

126. Id. at 12.

127. Id. at 12.


131. The Analysis and Evaluation of Public Expenditures: The PPB System, No. 27-877, Subcomm. on Econ. in Gov't, 91st Cong. 48 (1969) (statement of Kenneth J. Arrow, professor of
Classic theories of the firm conceptualized the firm as a productive enterprise. The central problem of firm theory became the “make or buy” question: What determines whether an entrepreneur will make an input to production or buy it on the market? Scholars developed different theories about the conditions under which firms would emerge to coordinate resources more efficiently than markets. Chandler, for example, argued that administrative coordination became cheaper than market coordination when technology, economies of scale, expanding markets, and organizational innovation improved the speed of production and distribution (“throughput”).

As noted above, Coase and TCE argued that firms existed because the price of organizing economic activity through markets was not zero. Sometimes it was cheaper to incur the costs of centralized direction, like those of directing and monitoring exchange partners, than those of market coordination, like discovering prices, finding other information, and negotiating agreements. Oliver Williamson, perhaps the foremost TCE scholar, elaborated upon Coase by theorizing that firm boundaries should best reflect how to resolve contracting challenges likely to arise from certain dimensions of the “transaction,” a step in the productive process. Two principal challenges were opportunism and cognitive limitations in the ability to plan and account for contingencies ahead of time.
Coasian theorists suggested that firm production was sometimes superior to market production, or entailed lower transaction costs, because it coordinated production using a different division of labor than the market.\(^{140}\) In the firm division of labor, some persons designed and monitored the work and others carried it out.\(^{141}\) It entailed the separation of conception and management from execution.\(^{142}\)

Economists Armen Alchian and Harold Demsetz conceive of firm production in this way.\(^{143}\) They suggested that make or buy decisions would depend on how best to realize the advantages of cooperative production.\(^{144}\) Transactions sometimes required coordination beyond what the market was capable of organizing.\(^{145}\) It was difficult to organize ongoing, multilateral cooperation through contractual relations, because contracts were designed for instances of relatively discrete and bilateral cooperation.\(^{146}\) However, complex production posed its own challenges: How do you monitor contributors to prevent shirking? How do you measure individual contributions to output? If the production is so complex that you do not know exactly how much of each input will be necessary, how do you plan ahead for compensating those who contribute? Alchian’s and Demsetz’s solution was their conception of the firm: A central coordinator would monitor the inputs and assess their productivity.\(^{147}\) Most input providers would contribute only their work effort.\(^{148}\)

Williamson’s hypotheses about “human assets” also depict firm
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governance as managing a division of labor involving the separation of conception from execution.149 He suggests that firm production was more likely when the transaction involved low human asset specificity.150 “Low” specificity meant the individual worker contributed primarily labor effort and not specialized skills or expertise that could be re-deployed to other uses, which would create less bilateral dependence.151 Firm governance was also more likely when it was relatively easy to measure and assess the individual’s contribution, which tended to coincide with low human asset specificity.152

The separation of conception from execution and management reflects the tenets of Taylorism and Fordism.153 Frederick Taylor’s theory of scientific management prescribed that enterprises should break down skilled work into unskilled work and remove discretion and improvisation.154 This was supposed to facilitate greater control over production by making it easier to command, monitor, and pace the work, and to assess individual effort.155 Under Fordism, technology would remove the functions of conceptualization and management from workers by embodying these in the machine.156

B. Uber Does Not Redefine the Firm

Coasian theory is vulnerable to many criticisms, ranging from whether it can claim to be a theory at all,157 to its ability to answer its

149. See generally Williamson, Outsourcing, supra note 110.
150. See Williamson, Economics, supra note 128, at 563.
151. Id.
152. Id. at 563; see also Chandler, supra note 124, at 281, 412-13 (He theorized that the efficiency advantages of the large enterprise derived primarily from the ability to coordinate and integrate the flow of materials through production; however, he also emphasized the importance of subdividing the work and creating managerial specialties to direct it. Along with improved technology, the development of managerial hierarchies improved the ability to coordinate labor and materials faster and in greater volumes than markets.).
153. See Chandler, supra note 124, at 275-76.
155. See Chandler, supra note 124, at 276-77 (suggesting that this division of labor became a signature feature of the productive enterprise and distinguished it from the guild of independent artisans).
156. KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 45 (2004). The appropriation by large enterprises of the work of markets in the U.S. was also a dual appropriation of another kind—the appropriation of property from skilled artisans and its concentration into the entrepreneur and eventually large stockholders, and the appropriation of knowledge and skill from artisanal work and its transfer into machines and engineers, all under the direction of a managerial hierarchy. See id. at 13-50.
157. Coasian theories often relinquish some, but not all, of the assumptions of neoclassical
central question—why some productive activities are coordinated through more centralized governance structures and others through more decentralized ones—to whether it can account for the empirical matrix of governance structures and its difficulty in theorizing the institutional components of different governance structures.

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158. Some scholarship problematizes the value of treating the transaction as an exogenous variable in trying to account for the governance structures of economic activity. E.g., HART, supra note 129, at 33 (theorizing asset specificity as endogenous); Erica Gorga & Michael Halberstam, Knowledge Resources and Their Implications for the Theory of the Firm and Corporate Governance 38 (Mar. 21, 2006) (unpublished draft manuscript), https://law.utexas.edu/wp-content/uploads/sites/25/gorga_knowledge_resources.pdf (noting that TCE tends to treat knowledge as exogenous). Williamson has himself questioned whether the transaction is the best unit of analysis for understanding supply chains. See, e.g., Williamson, Outsourcing, supra note 110, at 14. Others have maintained that TCE ignores certain transaction costs, and consequential dimensions of the transaction. E.g., Perrow, supra note 157, at 30.

159. A common critique of Coasian theories, and TCE in particular, is that the taxonomy of firms and markets, even when it allowed for hybrid, firm-like and market-like structures, could not account for the vast empirical variety of ways to organize productive activity. See Paul DiMaggio, Introduction: Making Sense of the Contemporary Firm and Prefiguring Its Future, in THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 3, 17-19 (Paul DiMaggio ed., Princeton Univ. Press 2001) [hereinafter DiMaggio, Introduction] (discussing organizational forms that challenge Chandler and Williamson's theories of firms and markets); Perrow, supra note 157, at 39 (reviewing scholarship finding that "some markets are quite hierarchically organized, and that some hierarchies have many phenomena associated with markets"). Scholars have critiqued Coasian theories for failing to account for governance structures that appropriated the market mechanisms of price and competition and yet were relatively non-hierarchical. See, e.g., Gorga & Halberstam, supra note 158, at 47 (describing many Silicon Valley companies as engaging in centralized, non-market coordination without hierarchy); see also Paul S.
Here, however, we are not interested in the explanatory value of Coasian theory and TCE, but rather, accepting it on its own terms, in what it reveals about the Uber narrative. As noted, Coase and major theorists who followed him conceptualized firms and markets as alternative ways of coordinating and allocating resources to their most valued uses.\footnote{E.g., Coase, \textit{Nature}, supra note 4, at 388 ("It is clear that these are alternative methods of co-ordinating production."); Williamson, \textit{Outsourcing}, supra note 110, at 14 ("TCE views governance as the means by which to infer order, thereby to mitigate conflict and realize mutual gains.").} Firms and markets did the same thing, but through different means. What defines the Coasian firm and distinguishes it from a market is the coordination of resources through centralized direction rather than decentralized competition, voluntary exchange, and price.\footnote{See Coase, \textit{Nature}, supra note 4, at 388.} The firm is an “unfree” market, a decentralized firm, and the firm is a centrally coordinated market.

If we take Coasian theory seriously, then, Uber does not redefine the firm or write its epitaph. The technology-and-transaction-cost narrative becomes illegible as a description of Uber and Lyft. From a Coasian perspective, the companies look much more like firms engaged in the production and sale of ride services than facilitators of a market for ride sellers and buyers.

Uber replaces the “spontaneous” “autonomous adjustments” of supply and demand from price signals with the “consciously coordinated adaptations” of centralized production.\footnote{Williamson, \textit{Outsourcing}, supra note 110, at 7; see also Alchian & Demsetz, \textit{supra} note 143, at 777.} Consider Lyft’s description of its operations in the class action. Lyft explains that after someone requests a ride through the smartphone application:

\begin{quote}
The platform then notifies one specific driver, who may choose to accept, decline, or ignore the ride request. If the driver accepts the ride, he or she is “matched” with the rider and may proceed to pick up the rider and provide the ride. . . . If the driver declines or ignores the
\end{quote}
ride request and a certain amount of time passes, the ride request is then transmitted to another driver, if one is available... and so on."\textsuperscript{163}

The first contention that the driver "may choose to accept, decline, or ignore the ride request," is only partially correct.\textsuperscript{164} As noted, the drivers' positions are at-will: the companies have the right to terminate drivers for any or no reason.\textsuperscript{165} Lyft and Uber track drivers' acceptance rates and use these to make disciplinary and termination decisions.\textsuperscript{166} Right away, we see that the market process of voluntary exchange—participant's freedom to deal or not deal with one another based on an evaluation of possible gain or other utility preferences—is missing.\textsuperscript{167} Uber and Lyft have appropriated this adaptive mechanism.\textsuperscript{168}

Continuing with the quote above, Lyft goes on to tell the court it has replaced market processes with centralized coordination—Lyft does the matching.\textsuperscript{169} The smartphone application selects "one specific driver" and directs that driver to a passenger.\textsuperscript{170} The passenger cannot choose among drivers, and the application reveals only one ride request to a driver at a time.\textsuperscript{171} Uber does not disclose the passenger's destination until after the driver has accepted the request, and penalizes

\textsuperscript{163} Summary Judgment Motion, supra note 86, at 4; see also Notice of Motion, supra note 87, at 4 (emphasis added) (citations omitted) ("When a passenger requests transportation via the Uber App, Defendant conveys the request to the nearest driver who is signed in to the Uber App and not already providing transportation booked via the application. If the driver declines the request or does not accept it within 15 seconds, the request is forwarded to the next closest driver.").

\textsuperscript{164} Summary Judgment Motion, supra note 86, at 4.

\textsuperscript{165} See O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1149 n.19 (N.D. Cal. 2015); see also Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1072 (N.D. Cal. 2015).

\textsuperscript{166} Drivers have limited discretion to decline ride assignments when they are logged into the application. While Uber and Lyft have claimed that a driver is not required to accept any particular pick-up request, they track acceptance and cancellation rates and use them to make termination decisions. O'Connor, 82 F. Supp. 3d at 1149, 1151; Cotter, 60 F. Supp. 3d at 1071. Uber might ask drivers to maintain a certain acceptance rate, but even if a driver meets it, Uber may decide later that the rate is too low and terminate the driver. Uber terminated or suspended a large group of drivers in the San Francisco Bay Area and Los Angeles without warning due to what it regarded as high cancellation rates. Christian Perea, Uber Deactivated a Bunch of Drivers as an Intimidation Tactic, THE RIDESHARE GUY (Sept. 24, 2015), http://therideshareguy.com/uber-deactivated-a-bunch-of-drivers-as-an-intimidation-tactic/. Many drivers had realized that they could not earn money on short trips due to traffic and had been cancelling short trip requests. See id. Drivers are subject to discipline, as well, including warnings, training courses, and pay penalties. See O'Connor, 82 F. Supp. 3d at 1137, 1150-51; Cotter, 60 F. Supp. 3d at 1079.


\textsuperscript{168} See id.

\textsuperscript{169} Summary Judgment Motion, supra note 86, at 3.

\textsuperscript{170} Id. at 4.

\textsuperscript{171} See id.
drivers for cancellations at its discretion.\textsuperscript{172} Lyft has also allowed passengers to wait to disclose their destination.\textsuperscript{173} Uber has also limited drivers' discretion to choose where they want to drive.\textsuperscript{174}

By design then, the application prevents drivers from competing with one another for passengers, as they would if they were sellers in a market for transportation services.\textsuperscript{175} Instead, drivers compete with one another to keep their positions with Uber and Lyft.\textsuperscript{176} The driver picks up the passenger to keep a job with Uber, not in response to price signals and other information that indicates the transaction will be a good bargain.\textsuperscript{177} The applications deter drivers from evaluating the latter.\textsuperscript{178}

The applications likewise prevent drivers from competing over price.\textsuperscript{179} Uber and Lyft set passenger fares—they appropriate the price mechanism.\textsuperscript{180} According to Coase, "[i]t can, I think, be assumed that the distinguishing mark of the firm is the supersession of the price

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\textsuperscript{173} Recently, however, Uber announced it would introduce an application feature in some cities to enable drivers to avoid being matched with passengers going in a different direction. Eric Newcomer, \textit{Uber Makes Changes to Appease Drivers Without Raising Fares}, BLOOMBERG (June 6, 2016, 9:00 AM), https://www.bloomberg.com/news/articles/2016-06-06/uber-makes-changes-to-appease-drivers-without-raising-fares.

\textsuperscript{174} See Benjamin Sachs, \textit{Do We Need an “Independent Worker” Category?}, ONLABOR (Dec. 8, 2015), http://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category/ (noting Uber has terminated drivers for limiting where they drive; i.e., sticking to just one neighborhood, or only taking airport rides).

\textsuperscript{175} See \textit{O’Connor}, 82 F. Supp. 3d at 1141.

\textsuperscript{176} \textit{Id.} at 1143, 1150. Uber and Lyft compare drivers’ performances and terminate drivers with relatively low passenger ratings or other performance metrics. \textit{Id.} (discussing Uber’s termination of drivers with relatively low ratings and when business was “slower than normal”); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1071, 1079 (N.D. Cal. 2015); Rosenblat & Stark, supra note 172, at 11 (noting Uber sends drivers weekly feedback comparing their performance to that of “top drivers”).

\textsuperscript{177} See Coase, \textit{Nature}, supra note 4, at 387 (“If a workman moves from department Y to department X, he does not go because of a change in relative prices, but because he is ordered to do so.”).

\textsuperscript{178} See \textit{id.}

\textsuperscript{179} \textit{O’Connor}, 82 F. Supp. 3d at 1142 ([T]he “fare amount [is] set by Uber without any input from the drivers.”).

\textsuperscript{180} Uber sets fares unilaterally. It prohibits drivers from negotiating for higher fares and the application prevents passengers from paying lower fares. \textit{See O’Connor}, 82 F. Supp. 3d at 1142, 1144; Meyer v. Kalanick, No. 15 Civ. 9796, 2016 WL 1266801, at *2 (S.D.N.Y. Mar. 31, 2016), reconsideration denied in part, No. 15 Civ. 9796, 2016 WL 2659591 (S.D.N.Y. May 9, 2016). Lyft initially gave passengers 24 hours following a ride to submit a voluntary donation before automatically charging the passengers’ credit card the fare. \textit{Cotter}, 60 F. Supp. 3d at 1070.
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mechanism."  

The many work rules Uber and Lyft impose on drivers to create the standardized services from which the companies derive their brand recognition also suggests their role as sellers ("makers") of ride services, not market mediators. Uber, for example, tells drivers to follow detailed rules to create a uniform ride experience. The rules, billed as "suggestions," cover matters including clothing, music, how to pick up passengers, and what they can and cannot say. Uber and Lyft, not the competitive currents of the market, "match" not only riders with drivers, but drivers' labor with their cars to create a branded service.

Compare Uber and Lyft to some other platform companies that provide goods and services. Some, including Airbnb (accommodation), Etsy (goods), Upwork (remote services), TaskRabbit (small task services), and Amazon's Mechanical Turk (computing services), do not set customer prices. The price mechanism coordinates buyers and sellers to a greater extent on some other platforms. Airbnb, Ebay, and Amazon, for example, provide potential buyers with information about all sellers that match their expressed preferences, and customers can search for and select from sellers whom they wish to purchase accommodations, services, and products. Some

182. O'Connor, 82 F. Supp. 3d at 1143, 1150-51; Cotter, 60 F. Supp. 3d at 1071.
183. O'Connor, 82 F. Supp. 3d at 1149-51; Cotter, 60 F. Supp. 3d at 1072-73, 1078.
184. O'Connor, 82 F. Supp. 3d at 1149-51 (listing examples of driver rules, including to "make sure the radio is off or on soft jazz or NPR"; and "make sure to open the door for your client").
185. See Rosenblat & Stark, supra note 172, at 8-9.
187. See About Etsy, ETSY, https://www.etsy.com/about/ (last visited Dec. 25, 2016); About Upwork, supra note 186; About Us, AIRBNB, https://www.airbnb.com/about/about-us (last visited Dec. 23, 2016); AMAZON MECHANICAL TURK, supra note 186; Somerville, supra note 186.
188. See, e.g., About Etsy, supra note 187; About Upwork, supra note 186; About Us, supra note 187; AMAZON MECHANICAL TURK, supra note 186; Somerville, supra note 186.
189. See Noam Scheiber, Uber Drivers and Others in the Gig Economy Take a Stand, N.Y. TIMES (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html (discussing differences between Uber and online markets eBay and
other service platforms likewise do not dictate product and service specifications, work rules, and production tools to the extent of Uber and Lyft.\textsuperscript{190}

Firms and markets entail trade-offs in Coasian theory: Firms allocate resources faster and with less waste and redundancy, while markets allow adaptability to changing conditions.\textsuperscript{191} Sometimes the extra "noise" in markets is where novel interests and niche desires ferment.\textsuperscript{192} In explaining its operations, Uber emphasizes that it coordinates production inputs to avoid competition among input providers and other market dynamics that might lead to redundancy or wasted time and resources.\textsuperscript{193} As Lyft explains, it notifies "one specific driver" upon receipt of a passenger request, "match[es]" the driver with the passenger, and assigns another driver if too much time passes.\textsuperscript{194}

If Uber and Lyft are in fact market facilitators, they are bad at it. Under ideal accounts of economic organization, markets work best in allocating resources to their most valued uses when participants have information about available options and alternatives.\textsuperscript{195} This is likewise where exogenous preferences can enter, contributing to dynamism in the products and services produced.\textsuperscript{196} The market Uber and Lyft claim to intermediate operates according to the opposite principle—controlling flows of information to network participants.\textsuperscript{197} The software is designed to prevent the driver and passenger it matches from seeing and bargaining with any others.\textsuperscript{198} In supposedly purchasing "access" to the Uber and Lyft "network[s]," passengers and drivers receive information incrementally (e.g., revealing the destination to the driver only after the driver accepts the assignment) and partially (e.g., revealing to the Etsy; sellers of services versus goods).

\textsuperscript{190} See id.
\textsuperscript{191} See OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 113-14 (The Free Press 1975); see also Perrow, supra note 157, at 31.
\textsuperscript{192} See, e.g., Rosenblat & Stark, supra note 172, at 10.
\textsuperscript{193} See Brishen Rogers, The Social Costs of Uber, 82 U. CHI. L. REV. 85, 86-88 [hereinafter Rogers, Social Cost] (Illustrating the messy bargaining in taxi markets and attendant uncertainty, redundancy, and waste that Uber eliminated by appropriation. Rogers discusses a "vicious cycle for phone-dispatched cabs. Riders who get tired of waiting for a dispatched cab may simply hail another on the street; drivers en route to a rider may also decide to take another fare from the street, rationally estimating that the rider who called may have already found another car.").
\textsuperscript{194} Summary Judgment Motion, supra note 86, at 4. The customer provides production inputs in services involving customer interaction. When you buy a pedicure, for example, your feet are production inputs.
\textsuperscript{195} See, e.g., Dahlman, supra note 137, at 147-48.
\textsuperscript{196} See id. at 151.
\textsuperscript{197} See, e.g., Rosenblat & Stark, supra note 172, at 4, 12.
\textsuperscript{198} See id. at 4.
passenger a driver’s star rating but not passenger comments or the number of rides the driver has performed). 199

Many of the efficiencies Uber and Lyft achieve in streamlining ride services are, within Coasian theory, a result of firm integration, of replacing the market exchange activities (or inter-firm transaction costs) that other taxi companies incur with agency costs (intra-firm activities). 200 TCE theorizes that firm production, or centralized direction, tends to entail more costs in direction and supervision than of finding information and negotiating. 201 Here, Uber and Lyft save on the transaction costs of locating and negotiating with independent companies who can offer assets, skills, or experience. 202 The companies use standardized, non-negotiable agreements. 203 The drivers are at-will, alleviating the need to negotiate the crucial parameters of performance upfront. 204 The agreements give the companies rather open-ended authority to direct and evaluate the drivers as they go along. 205 Instead, Uber and Lyft are engaged in the quintessential intra-firm activities of monitoring, providing feedback, and disciplining drivers. 206

The narrative is correct that Uber and Lyft have substantially lowered market transaction costs, particularly search costs, relative to traditional taxi companies. 207 However, from a Coasian perspective, they have lowered these costs between the companies themselves, as transportation sellers, and riders, not between driver-sellers and riders. 208

199. See id. at 4, 12.
200. See, e.g., Rogers, Social Cost, supra note 193, at 86-87; Rosenblat & Stark, supra note 172, at 10.
201. E.g., Williamson, Economics, supra note 128, at 564-65.
203. See, e.g., Cotter, 60 F. Supp. 3d at 1071-72; see generally Centronics Corp. v. Genicom Corp., 562 A.2d 187, 187 (N.H. 1989) (discussing parties’ responsibilities and intent to be bound by a contract); Sun Printing & Publ’g Ass’n v. Remington Paper & Power Co., 139 N.E. 470, 471 (N.Y. 1923) (discussing one’s duty in relation a contractual agreement).
204. Contract law generally requires that parties specify important terms upfront, to avoid ambiguity and quarrels, and so that parties to an agreement would know where they stand. See, e.g., Sun Printing, 139 N.E. at 471-72 (finding that the parties to the contract had failed to agree as to both the quantity and duration terms of the agreement for future dealings, and therefore had an unenforceable “agreement to agree”); Centronics, 562 A.2d at 191 (noting the common law requirement that parties perform contractual obligations in good faith and consistent with “the parties agreed-upon common purposes and justified expectations).
205. See Rosenblat & Stark, supra note 172, at 11.
206. Id. at 8-11.
207. Rogers, Social Cost, supra note 193, at 88.
208. Id. (explaining how Uber reduces search costs and uncertainty between transportation companies and passengers, and the problem faced by phone-dispatched cabs due to high search
An antitrust suit against Uber helps to illustrate the above insights. By disavowing its status as a firm that produced ride services, but appropriating the market's coordinating mechanism of price competition among drivers, Uber made itself vulnerable to claims of a per se illegal restraint of trade.

In Meyer v. Kalanick, an Uber passenger, on behalf of a class of Uber passengers, sued Uber's CEO, Travis Kalanick, for orchestrating a price-fixing conspiracy under the Sherman Act. The Sherman Act prohibits combinations that constitute an unreasonable restraint of trade. The Plaintiff alleged that Kalanick had organized both a vertical and horizontal combination. A vertical combination is an agreement between buyers and sellers to set resale prices, and a horizontal combination is an agreement among competitors to set prices. The more serious charge was that of a horizontal restraint, because these were "per se" illegal, whereas courts evaluate vertical restraints under a more contextual "rule of reason" standard. The basis of the horizontal allegation was that "drivers agree with Uber to charge certain fares with the clear understanding that all other Uber drivers are agreeing to charge the same fares," and therefore could not undercut one another on price. Judge Rakoff denied Kalanick's motion to dismiss, ruling that the Plaintiff had adequately pleaded both an illegal vertical and horizontal restraint.

Whether Kalanick had organized only a vertical combination, but not a horizontal, per se illegal one, pivoted on the distinction raised in the Uber narrative: Was Uber in the business of producing ride services costs); see also Lobel, supra note 63, at 18-19 (further arguing that driver information provided by the application reduces information asymmetries). In substantially reducing firm-customer transaction costs and intra-firm transaction costs, Uber has been able to offer a qualitatively new service (or new kind of transaction) on-demand rides. See id. at 19-20 (suggesting Uber represents a case of market differentiation). Gone are the days of jockeying among dozens of other patrons after the nightclub closes for a competitive position on the street from which to hail a taxi.


210. See id. at *3.
211. Id. at *1.
212. See id. at *3.
213. Id.
214. See id.
215. Id.
216. Id. at *3-4.
217. Id. at *3-5. Because Uber maintained that the drivers were not its employees, the plaintiffs easily demonstrated the threshold issue that the drivers and Kalanick, an occasional Uber driver, were "legally distinct economic entities." Id. at *3, *6.
or was it only an intermediary? Kalanick claimed that the Plaintiff had at most indicated a vertical arrangement between Uber and each driver, not a horizontal agreement among drivers. He analogized the case to one in which retailers agree with a manufacturer not to discount the resale prices of the manufacturer’s goods by more than a certain amount, an arrangement courts have found to be legal. Judge Rakoff disagreed, distinguishing the Uber arrangements from that of the retailers and manufacturer on the basis of Uber’s own characterization of itself, as pleaded in the complaint: “Uber is not selling anything to drivers that is then resold to riders.” The Uber narrative redounded to Kalanick’s detriment.

Within classic firm theory, Uber and Lyft are not, and do not depict their operations as, market facilitators that use technology to lower the transaction costs between parties residing beyond their organizational frontiers. A market mediator of such stentorian disposition is a firm within Coasian theory, which conceptualized the firm as a centrally coordinated market. Rather, Uber and Lyft more closely resemble Coase’s “entrepreneur-co-ordinators,” directing resources in the production and sale of on-demand ride services. As discussed further in Part IV.C., technology has helped Uber and Lyft lower the costs of firm production. The companies do not have to purchase or lease certain inputs to production—cars—in order to control the production of their branded ride services.

218. Id. at *4.
219. See id.
220. Id.
221. Id. at *6 (contrasting the instant matter to Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007)).
222. The plaintiff also alleged that a successful organizing effort by New York drivers to persuade Uber to raise fares was evidence of an illegal conspiracy. See id. at *2, *5. While it’s unclear what role this allegation played in the Judge’s ruling, it augurs the troubling prospect of using antitrust law to suppress workers from organizing. See Sanjukta M. Paul, The Enduring Ambiguities of Antitrust Liability for Worker Collective Action, 47 Loy. U. Chi. L.J. 969, 969 (2016) (“Such workers find themselves in the position of most workers prior to the New Deal: at once lacking labor protections, yet exposed to antitrust liability for organizing to improve their conditions.”).
223. See Rosenblat & Stark, supra note 172, at 13-14 (Uber is a company that manages “the infrastructure for ‘on-demand’ economy transactions” via “platform-based workers” whose work is indirectly monitored by user feedback.). In addition to a direct and express fiat, Uber uses indirect incentives to coordinate drivers’ work. See id. at 13.
225. See id. at 392.
IV. REJECTING THE CLASSIC FIRM-CORPORATION NEXUS

How should we understand the Uber narrative if Uber and Lyft have not, from the perspective of Coasian firm theory, used technology to displace the firm? Lurking within the narrative is a rejection of classic theory's normative relationship between the firm and corporation.

A. The Firm-Corporation Nexus

Firm theorists have assumed that the corporation was the natural business form for the firm to assume. The unified governance structure of production would have a unified legal personality. Thus, Chandler theorized that corporate boundaries should correspond to the boundaries of the industrial enterprise. He suggested that fast-developing technology, the efficiencies of the separation of conception and execution, and economies of scale in some U.S. industries in the late 19th and early 20th centuries created the need for more financing than available through a single proprietorship, prompting firms to incorporate. Other theorists, like Oliver Hart, suggested that financial structure should reflect how production was organized. Famed management theorist Peter Drucker claimed: “The representative social phenomena of the industrial system of our time are the mass-production plant and the corporation. The assembly line is the representative material environment; the corporation is the representative social institution.” The corporation was the firm’s proper manifestation as formal organization, legal individual, and financial framework.

In presupposing an efficiency relationship between the corporation and productive enterprise, these theories defined a normative relationship between them. They offer an ideal of how economic accumulation should work under capitalism: The point of the

227. Id. (arguing the corporation "possess[es] key attributes of legal personality" that explain why the "corporate form ... dominates the organization of large-scale business enterprise in every jurisdiction, from Delaware to Japan").
228. See CHANDLER, supra note 124, at 330-32.
229. See id. at 330-39.
232. See Kraakman, supra note 17, at 148-51.
233. See id. at 151.
corporation was to help the firm maximize profit through productive activity, excelling at the efficient production and sale of goods and services. This was its only legitimate basis and its raison d’être.

Thus, corporate boundaries—corporate identity—should reflect the boundaries of productive enterprise.

Theories suggesting how corporations should carry out its purpose have varied. Taylorism directed companies to focus on engineering and bureaucratization. Drucker argued that companies should pay more attention to company politics and help workers feel less like automatons. Chandler theorized that companies maximized efficiency by improving throughput. Under TCE, companies minimized agency and contracting costs. Ronald Dore’s theory of dynamic production urged companies to maintain flexible production capabilities.

While contesting the whether and how of the matter, most theories of corporate governance likewise assumed that the companies should maximize profit through productive enterprise. They posed the problem as one of disciplining and incentivizing managers to prevent them from deviating from this strategy given a separation of shareholder ownership from management control.

However, the purpose of the corporation to facilitate productive enterprise was so taken for granted the terms “corporation” and “firm” became near metonyms.

234. See id. (explaining that the corporate form helps the firm in “raising capital, controlling agency costs, facilitating decision-making, and allocating risk among participants in the firm”).
235. See, e.g., id. (discussing the importance of the corporation, its now universal use and benefit and the unlikeliness of it changing or disappearing as a going concern).
236. See FLIGSTEIN, supra note 157, at 33.
238. Id. at 22.
239. CHANDLER, supra note 124, at 241.
243. See EDWARD S. HERMAN, CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY 257-58 (1981); Henry G. Manne, Mergers and the Market for Corporate Control, 73 J. POL. ECON. 110, 113 (arguing that possibility of corporate take-over disciplines managers utilize to run the enterprise efficiently, as reflected in share price).
244. E.g., Oliver Williamson, Corporate Governance, 93 YALE L.J. 1197, 1201 (1984) (discussing “corporate” and “firm” governance interchangeably); Kraakman, supra note 17, at 147 (“The company, the corporation, the enterprise—the firm by any name . . . .”); see generally DiMaggio, Introduction, supra note 159.
B. Disappointing the Ideal

In U.S. history, the normative nexus between firm and corporation was an ideal that reality often disappointed. Companies deviated from the norms of profit seeking that major accounts of the firm prescribed.

The emergence of the large industrial corporation in the U.S. belies the ideal—large manufacturing enterprises incorporated not because the corporate form was the best way to finance efficient production, but to form holding companies when the federal government began cracking down on trusts. Most of the history of the rise of the large U.S. industrial corporation in the late 19th and early 20th centuries is a story about quashing markets through cartels, then trusts, and then holding companies, not embracing them.

As another example, under TCE, company size should reflect transaction cost savings from vertical integration. However, U.S. corporations long pursued size not to realize scale economies or to save on contracting costs, but to gain market power by which to control or undercut competitors. Size sometimes conferred political power as well, enabling companies to shape state policy to improve their competitive position. Companies for many decades grew large through conglomerate mergers or horizontal integration.

Corporate strategies defied the predictions of major economic theories of the firm—that corporations would pursue profit-maximization through the efficient production of goods and services.


246. The assumption that business organization would reflect the organization of productive activity accounts for some of the apparent explanatory weakness of TCE. See, e.g., Perrow, supra note 157, at 24, 33 (critiquing TCE for its inability to explain corporate mergers).

247. See FLIGSTEIN, supra note 157, at 38-43.

248. See Perrow, supra note 157, at 21.

249. See id.

250. HERMAN, supra note 243, at 180; see Perrow, supra note 157, at 34-35.

251. See Perrow, supra note 157, at 24 (arguing that TCE did not explain company size, because most large companies were created through mergers with companies in unrelated industries).

252. See id. To some extent, the operations of large companies in the U.S. between the 1930s and 1970s comported with the ideals of firm theory. FLIGSTEIN, supra note 157, at 27-28. Fligstein found that large companies sought to maximize profits through the efficient production and sale of goods and services, for instance, by minimizing costs and maximizing revenue through product differentiation and finding new markets. See id. However, he also found that companies often
C. The Weakening Firm-Corporation Nexus and the Postindustrial Corporation

Evidence suggests that since the 1970s we have witnessed the emergence of another challenge to the ideal of the corporation as the helpful servant of the firm—a post-firm, or what this Article will refer to as the “postindustrial” corporation.254 The postindustrial corporation seeks to maximize profit, but not necessarily through productive enterprise.255 Rather, it may create shareholder value by other means, like asset manipulation, speculative activity, and, most pertinent here, regulatory arbitrage.256

Changes in corporate governance have untethered the corporation from productive enterprise. They have disassociated corporations from certain product lines, from industries, and sometimes from productive activity altogether.257 Several developments contributed to these changes, including state policy, the relative increase of the service sector, technological change, growth in global competition and markets, and the increasing power of financial markets.258

Neil Fligstein traces the “financial conception” of corporate control to the 1960s; as firms diversified into unrelated markets, management developed and adopted financial controls to address their limited expertise.259 They evaluated each division as a profit center and began to see the corporation as a diversified “portfolio of businesses.”260 These businesses were still productive enterprises, but managing the portfolio rather than production and sales became the key to corporate

254. See, e.g., DiMaggio, Conclusion, supra note 245, at 211-12.
255. GERALD DAVIS, MANAGED BY MARKETS: HOW FINANCE RESHAPED AMERICA 239 (2009) (“The boundaries around finance as an industry became increasingly porous during the 1990s and 2000s, as many kinds of firms earned much of their profit in financial activities even if they were nominally in non-financial industries (e.g.[,] GE, GM, Enron).”) (emphasis in original).
256. See id.; see also, e.g., Bratton & Levitin, supra note 24, at 787, 788 (discussing special purpose entities as “legally distinct entities that companies use” for “arbitraging accounting rules and... regulatory capital requirements” and that “never fully coalesce as independent organizations that take actions in pursuit of business goals”).
257. Krippner, supra note 20, at 175-76, 199; FLIGSTEIN, supra note 157, at 229.
259. FLIGSTEIN, supra note 157, at 228.
260. DAVIS, supra note 255, at 78; see FLIGSTEIN, supra note 157, at 228-29.
DOES UBER REDEFINE THE FIRM?

Companies were willing to divest divisions with relatively poor performance and sought profit via mergers rather than internal development of new goods and services. In the 1980s and 1990s, many companies began to perceive flexibility as central to corporate governance. To deal with possible fluctuations in demand, both quantitative and qualitative, firms sought to maintain the ability to shift among production processes and product or service lines. Economies of flexibility became more important than scale economies. While these practices still appear consistent with maximizing profit via productive activity, at some point flexibility and the financial conception sometimes eclipsed the former as a profit seeking strategy.

Theories of financialization provide evidence that companies have reoriented their decision making to financial markets. The rising hegemony of capital markets, including the power of institutional investors and private equity funds, has pressured companies to look to shorter-term profit horizons. Capital markets not only led to the breakup of conglomerates, but also pushed firms to de-integrate, to

261. See Davis, supra note 255, at 78; Fligstein, supra note 157, at 228-29; Beverly J. Silver, Forces of Labor: Workers’ Movements and Globalization Since 1870 176 (Cambridge Univ. Press 2003) (discussing the “financial fix” as a strategy for overcoming obstacles to capitalist accumulation).

262. See Fligstein, supra note 157, at 227-29. Fligstein argues that the financial conception of profit seeking motivated disparate corporate tactics—the mergers that created multi-conglomerates in the 1960s, but also the LBOs and divestments that left companies more industrially focused in the 1980s. Id.


264. Weil, supra note 26, at 279.


266. See Castells, supra note 263, at 167-68; Davis, supra note 255, at 93; Natascha van der Zwan, Making Sense of Financialization, 12 Socio-Econ. Rev. 99, 108 (2014) (citing studies indicating that companies today are distributing financial gains through financial channels rather than reinvesting them in productive facilities).


extrude productive activities into subsidiary entities.\textsuperscript{269} This “fissuring” assumes a variety of forms: Franchising, subcontracting, independent contracting, subsidiary creation, and buyer-driven supply chains.\textsuperscript{270} While at first, firms tended to de-integrate ancillary services, like accounting, fissuring spread to activities at the core of the company’s product or service lines.\textsuperscript{271} Moreover, non-financial firms have been earning a greater share of income through portfolio activity than sales.\textsuperscript{272} “[S]ize [still] matters,” but as measured by the company’s market capitalization rather than its assets or number of employees.\textsuperscript{273}

The conventional wisdom today is that the stock market values ideational assets more than material assets.\textsuperscript{274} Companies attract investors by marketing themselves as “high tech” businesses.\textsuperscript{275} Companies with no track record, reputation, revenue, or product to sell have issued IPOs.\textsuperscript{276} Many companies became “hollowed out,” a “business specialized in intermediation between financing, production, and market sales, on the basis of an established trade mark or industrial image.”\textsuperscript{277} Yet the assets and operations of many companies are not simply more intangible and “knowledge-based,” but often more ephemeral and illusory as well.\textsuperscript{278} The CEO of Sara Lee once remarked that Wall Street seeks the most profit with the least assets.\textsuperscript{279}

In the postindustrial corporation, the norm of maximizing profits through the resourceful and innovative management of production and

\textsuperscript{269} See DAVIS, supra note 255, at 31, 93-94; WEIL, supra note 26, at 44, 51.
\textsuperscript{270} See WEIL, supra note 26, at 94, 168.
\textsuperscript{271} See id. at 160.
\textsuperscript{272} See Krippner, supra note 20, at 186; see also Donald Tomaskovic-Devey et al., Did Financialization Reduce Economic Growth?, 13 SOCIO-ECON. REV. 525, 527 (2015); see also Soener, supra note 267, at 550-51 (2015) (finding that branded marketers, companies with high levels of intangible assets, are also more likely to turn to portfolio activity as an income strategy than companies with more tangible assets, and suggesting that their focus on brand imaging better positions them to financialize in this manner).
\textsuperscript{273} DAVIS, supra note 255, at 13.
\textsuperscript{275} Lilly Irani, Difference and Dependence among Digital Workers: The Case of Amazon Mechanical Turk, 114 S. ATLANTIC Q. 225, 230 (2015).
\textsuperscript{276} See DAVIS, supra note 255, at 15.
\textsuperscript{277} CASTELLS, supra note 263, at 176 (discussing lean production in the 1990s).
\textsuperscript{278} See id. at 124; DAVIS, supra note 255, at 95 (describing the valuation of the “weightless post-industrial firm” based on its social capital as having a “certain Potemkin Village aspect”); cf. Soener, supra note 267, at 567 (finding evidence that companies focused on “design, marketing, and brand imaging” are more likely to seek growth through financial channels rather than productive activity compared to companies with greater tangible assets).
\textsuperscript{279} DAVIS, supra note 255, at 21.

http://scholarlycommons.law.hofstra.edu/hlelj/vol34/iss1/3
marketing has atrophied.\textsuperscript{280} Evidence suggests that a new system of corporate governance has flourished since the 1990s.\textsuperscript{281} This postindustrial corporation apotheosizes stock value. Its devotional votives are short-term profit horizons, accounting manipulation, and a "buy or sell," or even a "gamble" rather than "make" philosophy.\textsuperscript{282} To update Marx's pantomime of an old confrontation between the bourgeois entrepreneur and landowner, the "noble lineage" of making and selling things is becoming a "feudal souvenir."\textsuperscript{283}

This assault on the ideal account of the corporation has damaged its normative fortifications as well as its empirical ones.\textsuperscript{284} The normative ascent of the postindustrial corporation is apparent in what is arguably the most influential theory of corporate governance today, the "nexus of contracts" theory.\textsuperscript{285} While dubbing itself a theory of the firm, productive enterprise makes little appearance in this theory.\textsuperscript{286} "The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships" among consumers, managers, workers, and investors, alike, not an organization that produces goods and services for sale.\textsuperscript{287} The corporation has swallowed and digested the firm.\textsuperscript{288}

The economist David Weil addresses the relationship between the postindustrial corporation and employment.\textsuperscript{289} He explains the disassociation between the boundaries of the formal business entity and boundaries of productive units since the 1960s as a theory of "fissured employment."\textsuperscript{290} Companies "shed" productive activity into formally

\begin{thebibliography}{99}
\bibitem{280} See id.
\bibitem{281} See id. at 22.
\bibitem{282} See id. at 21-22; Ronald Dore, \textit{Financialization of the Global Economy}, 17 \textit{INDUS. \\& CORP. CHANGE} 1097, 1099-100, 1103-04 (2008); Doug Henwood, \textit{WALL STREET 171} (Verso 1998) (1997); see also Bratton \\& Levitin, \textit{supra} note 24, at 865 (discussing the proliferation of Special Purpose Entities that enable companies to game accounting rules).
\bibitem{284} See Davis, \textit{supra} note 255, at 99.
\bibitem{285} Jensen \\& Meckling, \textit{supra} note 242, at 310-11; see also Davis, \textit{supra} note 255, at 82-83, 87, 91-92.
\bibitem{286} Jensen \\& Meckling, \textit{supra} note 242, at 310.
\bibitem{287} Id. at 311 (emphasis added) (suggesting organizations lack a social and economic existence apart from their legal form); Davis, \textit{supra} note 255, at 94-95.
\bibitem{288} See Jensen \\& Meckling, \textit{supra} note 242, at 310-11.
\bibitem{289} See Weil, \textit{supra} note 26, at 7.
\bibitem{290} Id. at 7-25; see also Hugh Collins, \textit{Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration}, 53 \textit{MOD. L. REV.} 731, 732, 736-37, 740 (1990) (discussing the disjuncture between formal business boundaries and the boundaries of integrated

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separate entities, like subcontractors and franchises, and then disclaimed their role as the employer of workers in these entities. Weil’s nomenclature—that companies are “shedding employment”—reflects a weakening nexus between productive enterprise and business form. If the company sheds employment, can we call what crawls out of the crumpled skein that remains a “firm”? What then is the social warrant of the corporation? This is the conundrum the courts confronted in O’Connor and Cotter in contending with the Uber narrative.

D. Contending with the Uber Narrative

In Cotter and O’Connor, the judges engaged competing notions of corporate legitimacy when they addressed Uber and Lyft’s claims about their business identity. Recall that the companies claimed that they were in the business of “technology,” not transportation services. They administered technology that lowered the costs of market exchange between independent sellers and buyers. Therefore, the drivers resided outside the bounds of their enterprises. The courts refused to grant summary judgment to Uber and Lyft, finding that the drivers performed services for them and the companies could not demonstrate as a matter of law that they did so as independent contractors.

If the only legitimate role of the corporate form was as a helpful servant to the firm, it followed that a company’s business identity should be based on the fruits of its centralized coordination, namely, its product markets. The fruits of centralized coordination were their license to use enterprises).

291. See Weil, supra note 26, at 56-57.
292. Id. at 43-44, 57.
293. See O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1141-43 (N.D. Cal. 2015); see also Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1079 (N.D. Cal. 2015).
294. See O’Connor, 82 F. Supp. 3d at 1141-43; see also Cotter, 60 F. Supp. 3d at 1078-79.
295. O’Connor, 82 F. Supp. 3d at 1137, 1141; Cotter, 60 F. Supp. 3d at 1078.
296. See O’Connor, 82 F. Supp. 3d at 1141; see also Cotter, 60 F. Supp. 3d at 1070-71.
297. See O’Connor, 82 F. Supp. 3d at 1137-38; Cotter, 60 F. Supp. 3d at 1078.
299. See supra section IV.A.; Coase, Nature, supra note 4, at 389-91; Williamson,
The judges’ understanding of business identity in *O’Connor* and *Cotter* reflects the notion of corporate legitimacy assumed in Coasian theory. In *O’Connor*, the judge termed Uber’s argument that it was only a technology company “fatally flawed in numerous respects.” He argued:

Uber does not simply sell software; it sells rides. Uber is no more a “technology company” than Yellow Cab is a “technology company” because it uses CB radios to dispatch taxi cabs, John Deere is a “technology company” because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a “technology company” because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products.

Uber acknowledged that its revenue depended on selling rides and that it advertised itself as a transportation service. Uber argued: “We make our money from licensing software. That’s what we do. And we happen to have a compensation model that, when they use it successfully, we get compensated.”

The judge rejected this argument, finding that what Uber produced and sold were transportation services: “Uber does not sell its software in

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*Transaction-Cost Economics, supra* note 124, at 247-53 (arguing that different governance structures should reflect different types of productive exchanges).


302. *O’Connor*, 82 F. Supp. 3d at 1141; see also Nat’l Fed’n of the Blind of Cal. v. Uber Techs., Inc., 103 F. Supp. 3d 1073, 1082-83 (N.D. Cal. 2015) (rejecting argument that Uber was not subject to the ADA because it was a “technology” company rather than a “public accommodation”); Reardon v. Uber Techs., Inc., 115 F. Supp. 3d 1090, 1096 (N.D. Cal. 2015) (finding that Uber sells transportation services and is not primarily a technology company); Bureau of Labor & Industries, Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon on The Employment Status of Uber Drivers (Oct. 14, 2015), http://uberlawsuit.com/Oregon.pdf (advisory opinion by Commissioner Brad Avakian arguing that driving was “integral” to Uber’s business and ultimately finding that the drivers were employees).

303. *O’Connor*, 82 F. Supp. 3d at 1141.

304. *Transcript, supra* note 92, at 16 (“[T]he fact that we benefit from these individuals using our apps simply makes them a customer.”).

305. *Id.*
the manner of a typical distributor. Rather, Uber is deeply involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or terminating) those who fail to meet standards, and setting prices.”

Technology was simply the means by which Uber coordinated this production: “Uber’s self-definition as a mere ‘technology company’ focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides).”

The judge also rejected Uber’s attempt to uncouple its business identity from its marketing. Uber disagreed that marketing itself as a transportation company meant it was a transportation company. The judge noted, however, “Uber could not be ‘Everyone’s Private Driver’ without the drivers.”

The judge suggests that a company’s business identity, its corporate form, should reflect the organization of productive activity: “Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers.”

Similarly, the Cotter judge perceived Lyft’s argument about its business identity as being “obviously wrong” and rejected the narrative of transaction costs and technology:

Lyft concerns itself with far more than simply connecting random users of its platform. It markets itself to customers as an on-demand ride service, and it actively seeks out those customers. It gives drivers detailed instructions about how to conduct themselves. Notably, Lyft’s own drivers’ guide and FAQs state that drivers are “driving for Lyft.” Therefore, the argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one.

306. O’Connor, 82 F. Supp. 3d at 1137, 1142 (“Uber’s revenues do not depend on the distribution of its software, but on the generation of rides by its drivers.”).
307. Id. at 1141.
308. Id. at 1141-43.
309. See Transcript, supra note 92, at 21-22.
310. O’Connor, 82 F. Supp. 3d at 1144.
311. Id. at 1142.
313. Id. (citations omitted).
The *O'Connor* judge expressed dubiety regarding whether the company's price setting and its monitoring and evaluation of driver performance were consistent with Uber's claim that it mediated a transportation market but did not sell transportation services (i.e., that it did not "make" ride services):

So if they're only providing software, why would they be concerned with who's buying it, whether they're qualified, how they're doing on the job? And why would they have control over the pricing... Why are they setting the rates by which drivers are getting compensated? Why do they have a right to terminate drivers under certain circumstances?\(^{314}\)

The judge suggests that Lyft had relinquished little control to the market's decentralized and competitive currents.\(^ {315}\)

The California Labor Commissioner has also rejected the Uber narrative: "Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation. The reality, however, is that Defendants are involved in every aspect of the operation."\(^ {316}\) The Commissioner also invoked a Taylorist division of labor, the separation of management and execution, to suggest that Uber cannot define its business—its grounds for using the corporate form—as pure management lacking any execution: "Plaintiff's work was integral to Defendants' business. Defendants are in business to provide transportation services to passengers. Plaintiff did the actual transporting of those passengers. Without drivers such as Plaintiff, Defendants' business would not exist."\(^ {317}\)

In the above cases, decision makers rejected the Uber narrative and found instead that the companies produced, marketed, and sold ride services, and that these activities defined their business identities.\(^ {318}\) Uber and Lyft were not legitimate—"viable"—if their business identities were based on the activity of coordination alone, and abjured the fruits

\(^{314}\) *Transcript, supra* note 92, at 17, 19.

\(^{315}\) See *id.* at 19-100.


\(^{317}\) *Id.* at 8.

\(^{318}\) O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1141-42, 1145 (N.D. Cal. 2015); Cotter, 60 F. Supp. 3d at 1078.
of that coordination.\textsuperscript{319} Gestating within the Uber narrative is a different conception of the corporation than that prescribed by classic firm theory.\textsuperscript{320} The Uber narrative betrays the weakening normative nexus between the firm and corporation rather than the disintegration of the firm.\textsuperscript{321} As illustrated in Cotter and O'Conner, it attempts to both obscure and legitimize a tenuous connection between business organization and the organization of productive activity.\textsuperscript{322}

V. WHAT MAKES THE UBER NARRATIVE SEEM PLAUSIBLE?

Some decision makers have been responsive to Uber's definition of its business as "technology," despite its estrangement from Uber's product markets.\textsuperscript{323} In denying unemployment benefits to drivers, a Florida agency found, "Uber is a technology platform that, for a fee, connects transportation providers with customers seeking transportation," and it made a version of the technology-and-transaction cost argument: "Modern technology is enabling a rapidly evolving and expanding network of willing buyers and sellers to open once-restricted markets and efficiently allocate resources."\textsuperscript{324} The California Labor Commission found that "Uber's 'business was engaged in technology and not in the transportation industry,' and thus the 'services Plaintiff [the driver] provided were not part of the business operated by the Defendant.'\textsuperscript{325}

Why are decision makers, academics, and others prepared to accept Uber's tender of a new social rationale for the corporation, one that unmoors it from productive enterprise? Some are inspired (or distracted)

\textsuperscript{319} Transcript, supra note 92, at 67 ("Uber has done so many things to make sure that the transportation that people are partaking in, purchasing, is a good one, a responsive one, a quality one, which transcend the mere sale of a piece of software.").


\textsuperscript{321} See id.

\textsuperscript{322} See O'Connor, 82 F. Supp. 3d at 1141-42, 1145; see also Cotter, 60 F. Supp. 3d at 1078.

\textsuperscript{323} See Tomassetti, It's None of Our Business, supra note 320.

\textsuperscript{324} Final Order, supra note 43, at 1-2.

\textsuperscript{325} O'Connor, 82 F. Supp. 3d at 1144 n.14. Also, agencies in some eleven states have found Uber drivers to be independent contractors. Celia Ampel, Florida: Uber Drivers Are Contractors, Not Employees, DAILY BUS. REV. (Dec. 4, 2015), http://www.dailybusinessreview.com/id=1202743938454/Florida-Uber-Drivers-Are-Contractors-Not-Employees ("Arizona, California, Colorado, Georgia, Illinois, Indiana, New York, Pennsylvania, Texas, Utah and Virginia").
by the political promise of the “end of the firm” prophecy, discussed in Part II.C. One decision includes a long encomium to Uber-like technology’s liberation of individual “entrepreneurs” from the firm, including that “[t]hese platforms are helping people pursue what has always been an important part of the American dream: to be one’s own boss.”

This Article hypothesizes other reasons, however, for why the narrative appears plausible even to those who may be skeptical of its ecclesiastical politics and reject the legitimacy of the postindustrial corporation.

A. The Exceptional Qualities of ICTs

Part of the answer has to do with Uber’s use of ICTs and the narrative’s appeal to this technology. First, for the Uber narrative to be viable it must enable the company to don the guise of the legitimate corporation of firm theory—an organization engaged in the coordination of resources in the production of goods or services for sale—even without the drivers’ services. Second, it must disguise its centralized coordination as decentralized market production with respect to the company’s relationship to its drivers. To accomplish these objectives, the narrative draws on discourses about the exceptional, almost mystical, qualities of ICTs.

1. Concretizing Coordination: Assuming the Guise of the Classic Firm

The Uber narrative appears more legible within Coasian accounts of the firm than the business identities asserted by companies which do not rely to the same extent on ICTs to coordinate production. Uber and Lyft claim that they produce and sell “technology,” which helps the companies assume the guise of a Coasian firm, even without the drivers. To see how, consider several disputes over employment status under the Massachusetts Independent Contractor Law.

327. See Tomassetti, It’s None of Our Business, supra note 320.
328. Id.
329. Id.
330. See id.
331. See id.
332. See Mass. Delivery Ass’n v. Coakley, 769 F.3d 11, 14, 17-18 (1st Cir. 2014) (holding that
Coverall sold commercial cleaning services and characterized the janitors it hired as “franchisees” rather than employees. Unlike other franchise models, like those in the fast food and auto dealerships, Coverall negotiated and maintained client relationships. Franchisees could not solicit or bid for clients. Coverall assigned janitors to clean areas of its clients’ commercial space, and janitors paid Coverall upfront for the assignments and for use of Coverall’s proprietary cleaning system. Coverall provided training, often leased equipment to janitors, and paid them directly, deducting fees and royalties from monthly checks.

This franchise system is common among mid-sized janitorial firms, which dominate the commercial cleaning industry and account for the majority of industry employment. The business model has generated rampant violations of basic workplace standards, however.

For years, the franchise model for commercial cleaning operated more or less without legal disturbance. Recently, however, janitors sued Coverall and a similar company, Jani-King, in Massachusetts, alleging that they were employees of the companies and had paid them thousands of dollars for the opportunity to work a menial job.

the FAAAA preempts the second “prong of the Massachusetts Independent Contractor Statute, Mass. Gen. Laws ch. 149, [section] 148B(a)(2), which requires that workers perform a service ‘outside the usual course of the business of the employer’ to be classified as independent contractors”). Workers cannot be classified as employees just because they “perform delivery services within the usual course of business for the delivery companies.” Id. at 15; see also Memorandum and Order on Defendant’s Motion to Dismiss at *3-5, Remington v. J.B. Hunt Transport, Inc. No. 15-10010-RGS (D. Mass. Feb. 5, 2015) (demonstrating that the entire statute must be treated as preempted, and “the FAAAA preempts section 148B as applied to motor carriers”).

334. See id. at 82-84; Weil, supra note 26, at 134-35.
335. Awuah, 707 F. Supp. 2d at 82, 84; Weil, supra note 26, at 134-35.
336. Awuah, 707 F. Supp. 2d at 82, 84; Weil, supra note 26, at 134-35.
337. Awuah, 707 F. Supp. 2d at 84.
338. See Weil, supra note 26, at 133.
339. See id. at 157.
340. Id. at 2, 140.
To prevail on its claims that the janitors were indeed small business owners and not employees, Coverall and Jani-King had to prove that the janitors provided services “outside the usual course of [its] business.”

The judge summarized Coverall’s argument:

In its attempt to establish that Coverall and its franchisees are in distinct businesses, Coverall argues that it is not in the commercial cleaning business, but rather it is in the franchising business. [...] Coverall argues that it sells franchises and trains and supports the franchises, but it does not clean any establishments, nor does it employ anyone who cleans.

The judge then quotes from a scholarly reference Coverall cites in its motion, which defines franchising “‘[i]n its broadest sense’ as ‘a product or service distribution system.’” The judge comments:

These quotes suggest that franchising is not in itself a business, rather a company is in the business of selling goods or services and uses the franchise model as a means of distributing the goods or services to the final end user without acquiring significant distribution costs. Describing franchising as a business in itself, as Coverall seeks to do, sounds vaguely like a description for a modified Ponzi scheme—a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to previous franchisees.
Then the judge notes that Coverall is not actually a Ponzi scheme, however, because it did create and sell something—a cleaning system and cleaning services.\textsuperscript{347} The court concludes, "[t]hese undisputed facts establish that Coverall sells cleaning services, the same services provided by these plaintiffs."\textsuperscript{348}

Here, Coverall argued that its business was managing the janitors, but not actually cleaning.\textsuperscript{349} The judge rejected this argument.\textsuperscript{350} In essence, it tells Coverall, either you are a productive enterprise in the business of commercial cleaning, making the janitors a part of your enterprise, or you are a Ponzi scheme, a discredited kind of business.\textsuperscript{351} You cannot simply be in the business of business—"franchising."\textsuperscript{352} Your business identity should reflect your product markets, the fruits of your coordination.\textsuperscript{353}

In the \textit{Jani-King} suit, the company argued that the janitors performed services outside its usual course of business because, "Jani-King develops a cleaning system and builds and enforces the Jani-King brand. It does not perform cleaning services. That is what franchise owners do. They deliver commercial cleaning services to [Jani-King's] clients, and their businesses center around how to do that efficiently and effectively."\textsuperscript{354}

The court rejected Jani-King's argument:

[Jani-King] attempts to create a distinction between different levels in the distribution of the service arguing that the function it performs is not cleaning but developing a cleaning system and promoting the brand. To this end, the defendants [Jani-King] point out that franchise owners do not perform the same tasks that they perform because they do not sell franchises, bill

\textsuperscript{347} Id.
\textsuperscript{348} Id.
\textsuperscript{349} Id. at 82.
\textsuperscript{350} Id. at 83.
\textsuperscript{351} See id. at 83-85.
\textsuperscript{352} See id. at 83-84.
\textsuperscript{353} See id.
\textsuperscript{354} Defendants' Memorandum of Law in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 2-3, De Giovanni v. Jani-King Int'l, Inc., 968 F. Supp. 2d 447 (D. Mass. 2013) (No. 07-10066 MLW) [hereinafter Defendants' Memorandum]. The central argument was that "Jani-King develops a cleaning system and promotes and maintains the Jani-King brand. Jani-King franchise owners provide cleaning services to the market. These are distinct courses of business, conducted at different levels of a system for distributing a service." Id. at 17.
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clients, or develop proprietary materials. However, this contention is inconsistent with the statutory test’s focus on the nature of the service provided by the business.\textsuperscript{355}

Jani-King described an allocation of specialized tasks undertaken by the company and janitors to demonstrate it was engaged in market exchange with the janitors.\textsuperscript{356} The court, however, suggests the company has described not a market division of labor, but a firm division of labor: Some Jani-King members undertook the work of designing and selling cleaning services—conceiving and managing; others, the janitors, executed the services. To the court, this described the complementary tasks required to constitute a productive enterprise: Coordination and realizing the fruits of coordination. What Jani-King claimed was its business identity, “developing a cleaning system and promoting the brand,”\textsuperscript{357} described only management and conception, not execution. The judge remarked, “[i]f the separation of executive and managerial functions were sufficient to take the service provided by workers outside the course of a business,” it would be easy for companies to evade the law.\textsuperscript{358}

The court likewise rejects Jani-King’s attempt to define its business as “building and enforcing a brand,”\textsuperscript{359} without reference to the services it marketed and sold under that brand—“the nature of the service provided by the business.”\textsuperscript{360} This disregarded that the company “holds itself out as a leader in commercial cleaning, and contracts directly with customers to provide commercial cleaning services.”\textsuperscript{361}

FedEx delivery drivers also brought a class action alleging that

\textsuperscript{355} Transcript of Hearing, supra note 342, at 99. The judge referenced another case in which workers sued a company that detailed and reconditioned cars, alleging the company had misclassified them as independent contractors. See Rainbow Dev., LLC v. Commonwealth, No. SUCV2005-00435, 2005 WL 3543770, at *1-4 (Mass. Super. Nov. 17, 2005) (order granting plaintiff’s motion for judgment on the pleadings). The company claimed the workers performed services outside its usual course of business. The hearing officer disagreed: “[t]he only ‘business’ Auto Shine does is to provide its customers with the services that these employees perform.” The reviewing court agreed: “The workers are engaged in the exact business Auto Shine is engaged in; Auto Shine merely provides the administration. [W]ithout the services of the workers, Auto Shine would cease to operate.” Id.

\textsuperscript{356} Defendants’ Memorandum, supra note 354, at 17.

\textsuperscript{357} Transcript of Hearing, supra note 342, at 99; Defendants’ Memorandum, supra note 354, at 2-3.

\textsuperscript{358} Transcript of Hearing, supra note 342, at 99.

\textsuperscript{359} Defendants’ Memorandum, supra note 354, at 3.

\textsuperscript{360} Transcript of Hearing, supra note 342, at 99.

\textsuperscript{361} Id.

FedEx had misclassified them as independent contractors. Again, FedEx had to show that the drivers performed services outside the usual course of its business.

FedEx claimed that its business was operating “a sophisticated information and distribution network for the pick-up and delivery of small packages.” It emphasized this distinction: Its business was not “providing package delivery services,” but “to provide for package pick-up and delivery services.” FedEx “contracted with a network of independent owner-operators” to actually provide the services. The company claimed that its real employees were not the drivers, but engineers, managers, and IT specialists it hired “to operate, develop, maintain, and improve its distribution and information network.” FedEx emphasized, however, “None of these employees pick-up and deliver packages.” In fact, “there is zero overlap between the work regularly performed by the contractors [drivers] and that regularly performed by [FedEx’s] employees.” FedEx suggested its business model was creating a network and giving drivers access to it.

The judge rejected FedEx’s argument:

The core of FedEx’s argument is that although it operates a ‘sophisticated information and distribution network,’ it does not itself provide any delivery


363. Id. at *4 (citing MASS. GEN. L., ch. 149, tit. 11, § 148B(a)(2)).


366. Defendant’s Opposition, supra note 364, at 8.


368. Defendant’s Opposition, supra note 364, at 11 (emphasis in original).

369. Id. at 2 n.1, 11 (FedEx has over 40,000 employees “operating, developing and maintaining that network, none of whom pick-up or deliver packages.”).

services. To support this claim, FedEx states that out of the 43,000 persons it deems to be employees, none pick-up or deliver packages. But this argument is premised on a tautology. FedEx cannot assert that it does not provide delivery services by simply refusing to recognize its delivery drivers as employees.371

The judge suggests that FedEx has not described a market division of labor, but has rather described the separation of direction and conception from execution, which defined a firm division of labor, while trying to disavow responsibility for the execution.372 The judge quotes a case in which a home furniture delivery company charged with misclassifying its delivery drivers as independent contractors argued “it did not provide delivery services because it only managed the delivery of the retailers’ furniture to customers, while the drivers carried out the actual deliveries.”373 There, the court rebuffed the company’s attempt to distinguish:

[T]he manag[ing] and perform[ing] functions of the furniture delivery,[]374 finding that “the managing and performing functions of furniture delivery result in a symbiotic relationship. Without providing physical delivery of furniture, which is essential to its business, [the delivery company’s] business would not exist.”375

The court makes an idealistic and then a normative argument about the relationship between the corporation and firm.376 It first suggests that capitalism values profit seeking through productive activity: “Without the drivers, there would be no one to pick up or deliver packages and FedEx’s ‘distribution network,’ while it would likely attract a buyer, would be of so diminished a value that the prospect of

372. See id. at *5-6.
374. Id.
375. Id. at *5 (citing Oliveira, 2010 WL 4071360, at *6).
376. See id. at *5-6.
shareholder approval of the sale would be next to zero." The court then makes a more normative statement: "Without the drivers’ delivery services to put FedEx’s information and distribution network to use, FedEx would ‘cease to operate,’ at least as the type of entity the public has come to believe it to be (and which image FedEx has cultivated through its advertising and public filings)." FedEx is not a true productive enterprise without the drivers’ execution to put its network “to use”—to realize fruits of its coordination. The business identity it claims should be congruent with the persona it projects to investors and customers.

The judge sensed something askew in FedEx’s definition of its “real business” as “logistics” rather than delivery services:

The distinction is a creative one and requires serious analysis, although at first glance, as the court observed at the hearing, it is akin to the U.S. Army arguing that its business is weapons development and logistical planning, while it leaves the delivery of warfare to soldiers functioning as independent contractors.

Within Coasian theories of the firm, what firms do and what distinguishes them from markets is “logistics.” They direct resources instead of deferring to the play of competition and price (one might say they even create and run networks—structured systems of nodes and bridges—in lieu of leaving resource allocation to the unfixed channels of markets).

Above, the courts did not look favorably upon a company that suggested its business was to do something other than create and sell a good or service, like “operat[ing]... a network” or “developing” stuff and “promoting the brand.” While the network and brand are catchphrases of modern business, the courts suggest that these are not, in themselves, productive activities, and therefore, could not be the basis of a company’s claim to the legitimate use of the corporate form. A

377. Id. at *5.
378. Id. at *6 (citations omitted).
379. Id. at *6.
380. See id. at *5-6.
381. See id. at *4 n.5.
382. Id.
383. Id. at *5.
productive enterprise did not sit around and come up with ideas or practice “logistics.” In their vision of the firm, conceptualizing and managing production alone, without actually carrying it out, did not constitute a productive enterprise. It made the company a kind of “Ponzi scheme.”

In the janitor and FedEx cases, the courts rejected arguments that a company could be in the business of coordinating the production of stuff (e.g., “providing for” delivery services), but not be in the business of that stuff: That stuff—the fruits of the company’s coordination—is what gave it the right to use the corporate form. The court thus rejected the asserted business identity when it did not reflect the company’s product markets, for instance, when Coverall advertised itself as a commercial cleaning business, but claimed it was not one. The court rebuffed Coverall’s suggestion that it was in the business of managing the distribution of its services, but not be in the business of those services. The court rejected FedEx’s argument that it coordinated the production of delivery services (by running a “network”) but did not produce them, and that such coordination without production could establish a legitimate corporate entity. The Coasian firm is a centrally run “information and distribution network.”

These companies failed to convince the courts that they could be productive enterprises—and thus claim legitimate use of the corporate form—without the workers whose services generated their brand recognition and value in the eyes of investors and consumers. Either the workers provided services to the companies in the course of their usual business—because the workers were the executors—or else their business models depended on legal arbitrage rather than the resourceful

Sept. 21, 2009) (rejecting the argument of a delivery company, which classified its drivers as independent contractors and argued that it was not a delivery business but “only a marketing logistics corporation which outsources transportation needs for customers”); see also Sebago v. Bos. Cab Dispatch, Inc., 28 N.E.3d 1139, 1148 (Mass. 2015) (“This is also not a case of owners creating a false dichotomy between the administrative and operational aspects of their business.”) “[C]ouriers deliver packages for delivery companies. There can be no dispute that they act in the course of business for the delivery companies, even if one performs the deliveries and the other arranges the deliveries.” Id. (citations omitted).

387. Id. at 82-83.
388. See id.
389. See Defendant’s Opposition, supra note 364, at 1-4.
391. See id. at *5-6; see also Awuah, 707 F. Supp. 2d at 83-85.
production and sale of innovative services to remain competitive, in this case, misclassifying workers as independent contractors. The courts envision the firm to be a productive enterprise, an organization engaged in the production and sale of goods or services. The courts would confer social legitimacy on a corporate entity only if its identity reflected an underlying productive enterprise.

Contrast the companies' above with Uber. Rather than claim their business is coordination itself, they claim to sell technology services. The idiom of technology transforms coordination into a saleable commodity, because technology concretizes the coordination of production. The activity of managing production, or directing a division of labor, re-emerges from its immersion in the Uber narrative as the freestanding commodity of software maintenance and licensing. This makes Uber a simulacrum of a productive enterprise even without the drivers' services. Those who execute production, the drivers, then re-emerge as independent businesses. The narrative lends the appearance of integrity to what looked in the other cases like a business identity that would acknowledge (and thus accept the legal consequences of) only the management appendage of a cannibalized productive enterprise.

2. The Invisible Hand of the Algorithm

The Uber narrative invokes the automation of production through algorithmic programming to suggest that TNCs have not displaced market mechanisms, but rather given them free reign. The Uber narrative draws on discourses that present the algorithm as an inscrutable, but inimitably rational and trans-human provider of order, much like Hayek's "marvel of the market."

392. See Awuah, 707 F. Supp. 2d at 82-83.
394. See Arzate v. Bridge Terminal Transp., Inc., 121 Cal. Rptr. 3d 400, 406 (Cal. Ct. App. 2011) (Asserting one company's argument that its regular business was as a kind of intermediary, "mak[ing] arrangements between customers and the owner-operators of trucks for the movement of containers," and therefore its truck drivers "did not perform work that was part of [defendant's] regular business." The court rejected the argument.
396. See id. at 6-7 ("[T]he drama of the powerful yet inscrutable algorithm bears some resemblance to long-standing mythologies, such as Adam Smith's 'invisible hand' or Charles Darwin's 'natural selection.' Algorithms, it seems, fit in seamlessly with this line of stubbornly
The algorithm seems to transcend human consciousness and therefore negate human agency. In the antitrust suit against Uber’s CEO, Kalanick argues that the alleged price-fixing conspiracy was “wildly implausible” and “physically impossible,” because “it involve[d] agreement among hundreds of thousands of independent transportation providers all across the United States.”\textsuperscript{397} The incomprehensible scale at which the technology worked meant Uber, like the market, could not be a product of human conspiracy. The smartphone technology interposed itself as an autonomous but indifferent agent between Uber and the drivers.\textsuperscript{398} However, the judge rejected the argument, including the appeal to the platform and algorithm’s exceptionalism:

\begin{quote}
[T]he capacity to orchestrate such an agreement is the ‘genius’ of Mr. Kalanick and his company, which, through the magic of smartphone technology, can invite hundreds of thousands of drivers in far-flung locations to agree to Uber’s terms. The advancement of technological means for the orchestration of large-scale price-fixing conspiracies need not leave antitrust law behind.\textsuperscript{399}
\end{quote}

The insentience of the algorithm did not mean its users were unaccountable to antitrust law.\textsuperscript{400} The judge argued, “[t]he fact that Uber goes to such lengths to portray itself—one might even say disguise itself—as the mere purveyor of an ‘app’ cannot shield it from the consequences of its operating as much more.”\textsuperscript{401}

The judge also rejects Kalanick’s intimation that the application’s automated processes were the equivalent of the market’s decentralized processes: “In the instant case, Uber’s digitally decentralized nature does not prevent the App from constituting a ‘marketplace’ through which Mr. Kalanick organized a horizontal conspiracy among drivers.”\textsuperscript{402} The judge cites a prior case reminding us that, “[a]utomation is effected through a human design.”\textsuperscript{403}

\textsuperscript{397} Meyer, 2016 WL 1266801, at *5.
\textsuperscript{398} Id.
\textsuperscript{399} Id. (citations omitted).
\textsuperscript{400} See, e.g., id. at *5-6.
\textsuperscript{401} Id. at *5.
\textsuperscript{402} Id.
\textsuperscript{403} Id. (citing United States v. Ulbricht, 31 F. Supp. 3d 540, 559 (S.D.N.Y. 2014)).
3. The Idiom of Technology

Uber and Lyft sublimate their agency in the production of ride services into algorithms, programming, and technology management. The metaphor of the “platform” transforms Uber and Lyft from subjects into spaces. It evokes a passive space to be inhabited by active agents—drivers and passengers. For example, Lyft argues that drivers’ “low ratings [are] given by passengers, not Lyft.” Uber argued that passengers, and not Uber, controlled drivers’ work. The companies ventriloquize a disinterested machine.

The coordination of resources by algorithm and digital signals is relatively invisible. Recall the iconic scene from the film *Modern Times*, where Charlie Chaplin is churned through the giant gears of the factory where he worked. The “visible hand” is indeed visible here. Uber and Lyft, however, direct and monitor drivers’ work through ICTs—the machinery and foreman are digital. Lyft thus ventured, “[h]ere, there was no supervision from Lyft. Plaintiffs each attended only one brief in-person meeting with Lyft personnel, which Cotter himself described as ‘superficial’...” Drivers have “virtually no contact with Lyft personnel once they were granted access to the Lyft platform...” Uber states: “Defendant’s only insight into the quality of service provided by drivers comes from passengers, in the form of star ratings or comments.” Uber claimed it “did not require drivers to

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405. See, e.g., Summary Judgment Motion, supra note 86, at 4 (describing the “platform” as a neutral medium); Final Order, supra note 43, at 19 (“Sometimes middlemen even provide specific platforms for that service, such as a physical location. Everyday examples include flea markets, art galleries, street fairs, food truck festivals, and gun shows... Technological advances like the Internet and smartphones have provided new platforms for middlemen.”).


407. Transcript, supra note 92, at 67-68.

408. See *MODERN TIMES* (Charles Chaplin Productions 1936).

409. CHANDLER, supra note 124, at 12 (arguing that the visible hand of the business enterprise replaced the “invisible hand” of the market when the former could coordinate productive tasks more efficiently); Don Matthews, *The Visible Hand? The Economics of Alfred Chandler*, 18 Econ. & Bus. Hist. Soc’y 163, 163 (2000) (“[T]he theme of the Visible Hand is that ‘modern business enterprise took the place of market mechanisms in coordinating the activities of the economy and allocating its resources. In many sectors of the economy the visible hand of management replaced what Adam Smith referred to as the invisible hand of market forces.’”).

410. See infra notes 411-22 and accompanying text.


412. Id. at 2.

413. Notice of Motion, supra note 87, at 4 n.6.
report to anyone on a regular basis."\textsuperscript{414} Drivers worked “without supervision,”\textsuperscript{415} with “minimal” interaction with Uber.\textsuperscript{416} Customer-delegated monitoring and digital commands relayed over distances by an algorithm are less obvious than more material indicators of organizational boundaries and coordination—like working in a “brick and mortar” restaurant under the eye of a manager.\textsuperscript{417} The Uber “network” claims to be but a resume of the market’s diffuse sorting processes.

Uber and Lyft also translate agency costs they incur in monitoring, directing, and disciplining workers into the idiom of technology production.\textsuperscript{418} Activities that look much like traditional employer control in other cases here look like the management of technology, not labor. According to Lyft, it does not direct and supervise drivers—it monitors drivers’ compliance with a user license and “maintain[s] an online platform.”\textsuperscript{419} Lyft prevents interference with software.\textsuperscript{420} The components of employee evaluations—“passenger rating, acceptance rate and reliability rating”—become “metrics” or “tools for ensuring that drivers and riders have the best experience possible and limit instances where individuals improperly interfere with the efficient functioning of the Lyft platform in violation of the [Terms of Service].”\textsuperscript{421} Uber rationalized its use of employee warnings and discipline to ensure drivers accepted ride assignments in terms of its need to ensure a seamless market.\textsuperscript{422}

The judge in \textit{O’Connor} fortunately resisted this interpretation.\textsuperscript{423} Quoting Foucault, he suggests that power in work relations can be

\textsuperscript{414} Id. at 21.
\textsuperscript{415} Id. at 24.
\textsuperscript{416} Id. at 2.
\textsuperscript{417} See Rosenblat & Stark, supra note 172, at 8-14 (discussing management by algorithm).
\textsuperscript{418} See infra Part V.A.3.
\textsuperscript{419} See \textit{Summary Judgment Motion}, supra note 86, at 1.
\textsuperscript{420} Id. at 7.
\textsuperscript{421} Id. at 7 (contending it disciplined drivers to prevent them from “interfering or disrupting the ridesharing services”). Homejoy, a company that developed a software application to sell on-demand house cleaning also depicted itself as a market mediator. Christina Farr, \textit{Homejoy at the Unicorn Glue Factory: Will the Home-Cleaning Revolution Be Uberfied? How One Company Tried and Spectacularly Failed}, BACKCHANNEL (Oct. 26, 2015), https://medium.com/backchannel/why-homejoy-failed-bb0ab39d901a?imm_mid=0dbb46&cmp=em-na-na-newsdr_econ_20151106#.w3szquanu7. It referred to the practice of firing cleaners as “disintermediation.” \textit{Id.}
\textsuperscript{422} \textit{Notice of Motion}, supra note 87, at 4 (“The more drivers who decline a request, the longer the passenger waits. . . .”). Uber “reserve[d] the right to deactivate the accounts of drivers who [fell] below [Uber’s] quality standards.” \textit{Id.}
\textsuperscript{423} See \textit{O’Connor} v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1151-52 (N.D. Cal. 2015).
automated and depersonalized, and further, that ICTs can amplify this power:

Uber drivers . . . are monitored by Uber customers (for Uber’s benefit, as Uber uses the customer rankings to make decisions regarding which drivers to fire) during each and every ride they give, and Uber’s application data can similarly be used to constantly monitor certain aspects of a driver’s behavior. This level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the ‘manner and means’ of its drivers’ performance. 424

B. Conceptualizing Service Work and Spatially Dispersed Work

The appeal of the Uber narrative may also be an artifact of the under-theorization of service work within a stubborn and overbearing industrial paradigm that governs how we think about labor and the economy. 425 Uber and Lyft’s production of ride services is also less visible because the companies are coordinating spatially dispersed service work. This makes Uber’s claim to be a market-mediator more convincing. The simultaneity of production and individualized consumption in most service work involving customer interaction obscures the collective nature of production, and thus, the company’s centralized coordination. Take the example of a restaurant with table service. The restaurant coordinates a division of labor in time and space when organizing table service. It tries to allocate waiters and other staff so that every table receives timely and non-redundant service. The division of labor and its relationship to consumption in the restaurant appears different than that of a manufacturing facility, where many workers may cooperate to make a single automobile, and the automobile is clearly a collective product. While each table consumes the restaurant’s service individually, the orderly servicing of many restaurant patrons is also the outcome of collective production. Uber likewise coordinates a complex division of labor in space and time in the production of ride services, as described in

424. Id. at 1151-52 (citation omitted).
425. Workers outside the brick-and-mortar workplace, particularly in the transportation sector, have long been the subjects of legal disputes over employment classification, with judges frequently ruling that they are independent contractors. See Dubal, supra note 33, at 23.
Part III.B. The cooperative nature of production is more difficult to see when workers are not assembled in a single workplace and a customer receives service from one worker at a time. The drivers’ production—the collective output of many rides across a geographic expanse and through time—takes on the guise of individualized output by each driver.

The illusion that the service is the product of an individual worker also tends to create the appearance that the worker provides most of the means of production. Thus, the Uber narrative acquires a patina of plausibility because the drivers own or lease the cars.426 According to the narrative, the Uber ride is not cooperatively produced, and from an individual customer’s perspective, this might seem like a viable claim. In reality Uber supplies the most valuable instruments of production, the technology.427 The legerdemain is more obvious in the case of a restaurant. Take the example of a hostess at a fine dining restaurant who must wear cocktail attire to greet and seat guests. We could say she owns all the means of production. If what she produces is hospitality, then she owns all of the means of production—her fancy attire. Most would say, however, that her job is to produce dining services, a cooperative effort, and thus she owns little of the means of production.

The on-demand structure of the service also mystifies Uber’s operations. What Uber characterizes as facilitating a “match” between supply and demand in product markets is at the same time making a match in the labor market.428 Drivers in the labor market report their availability to work by logging into the application, and Uber responds to customer demand for rides in the product market by assigning drivers to passengers.429 Likewise, a restaurant sets a host and wait-staff into motion when customers enter, an uptick in demand for dining services. Most would not accept that the restaurant is facilitating a market “match” between sellers of hospitality services (host and wait-staff) and buyers (diners), or that the waiters are independent businesses responding to the restaurant’s provision of market information about

426. See Hart, supra note 129, at 1765.
427. See Notice of Motion, supra note 87, at 26; Summary Judgment Motion, supra note 86, at 1.
428. See Noah D. Zatz, Does Work Law Have a Future If the Labor Market Does Not?, 91 CHI.-KENT L. REV. 1088-90 (2016) (also discussing the possibility of a future where legal regulation does not attempt to distinguish between labor and product markets, or labor and other fields of activity).
429. See supra Part III.B.; see also O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015); Summary Judgment Motion, supra note 86, at 4; Notice of Motion, supra note 87, at 4.
dining demand. In the Uber and Lyft relationships, drivers respond to the prospect of work and earnings, and Uber responds to passenger demand by supervising and directing drivers reporting for work. The price mechanism is not coordinating resources in production; it is, however, mobilizing labor supply. However, "factor" and "product" markets overlap far more in on-demand services like Uber than they do in the restaurant example. It is more difficult to distinguish the mobilization of labor from the mobilization of production to meet demand.

During surge pricing, the mobilization can be simultaneous. Consider Uber and the judge's disagreement in O'Connor about the interpretation of surge pricing. During surge pricing, Uber temporarily raises fares in an area based on an increase or projected increase in demand. According to Uber, the point is to attract drivers to busy areas (i.e., to incentivize drivers to join the market as transportation seller). Uber thus interprets surge pricing as consistent with the price mechanism—Uber is just relaying information about increased demand to drivers to encourage supply in the product market. The judge rejected this interpretation, replying, "every producer is subject to the laws of supply and demand," viewing Uber's surge pricing as bargaining in labor or input markets in response to an increase in demand, not in markets for the sale of commodities.

C. Fault Lines in Coasian Firm Theory

1. Assumptions about Legal Relations

The narrative also appears plausible because it draws on assumptions, perhaps ambiguities, in Coasian theories of the firm about legal relations. When ICTs disrupted these assumptions, Coasian theory became somewhat vulnerable to a postindustrial reinterpretation of the firm.

Like the tendency to equate corporate identity with the firm, there is
also a tendency to equate property rights with the firm, and contracts with markets. Since Uber does not own or lease the cars outright, we might be inclined to assume that Uber must be vertically de-integrated. On the one hand, this is an impoverished reading of Coasian theory. Coase and Williamson did not reduce their definition of the firm as the coordination of resources via property rights and definition of the market as coordination through formal contract. They conceptualized the firm, and distinguished it from the market, as the centralized coordination of resources, or the appropriation of the market processes of competition and price. At the same time, however, their work has been somewhat ambiguous about the institutional components of centralized and price coordination, particularly the role of legal relations.

Several theorists, Coase and Williamson included, assumed that the centralized coordination of resources that constituted the firm would be accomplished through property rights and employment, and that the

436. See Coase, Nature, supra note 4, at 389 ("It can, I think, be assumed that the distinguishing mark of the firm is the supersession of the price mechanism."). Oliver Hart comes closest to defining the firm as property ownership. He also, however, theorizes property as a means of centralized coordination—property ownership is important because it gives an owner "residual" control. Hart, supra note 129, at 1765.

437. E.g., Williamson, Outsourcing, supra note 110, at 8-9 (defining the firm as both a "hierarchy" and "syndrome" of attributes that includes "unified ownership of successive stages" of production). See Rajan & Zingales, supra note 131, at 39 (critiquing their interpretation of the Coasian firm as a "legal definition" based on property ownership).

438. Major Coasian theories, however, have suggested that employment is less a formal relation and means by which centralized coordination is carried out, and more the absence of a formal relation and constitutive of centralized coordination: The firm is the alternative to contract, and the firm is employment. Coase and Williamson have depicted the firm as an absence of legal limits on one party’s ongoing discretion, the essence of employment. Coase, Nature, supra note 4, at 391-92, 403 ("We can best approach the question of what constitutes a firm in practice by considering the legal relationship normally called that of ‘master and servant’ or ‘employer and employee.’"). Given the contractual requirements of consideration and definiteness, Coase describes employment and the firm as a virtual anti-contract; he also suggests that it is difficult to exchange labor through contract—outside a firm:

The details of what the supplier is expected to do is not stated in the contract but is decided later by the purchaser. When the direction of resources (within the limits of the contract) becomes dependent on the buyer in this way, that relationship which I term a 'firm' may be obtained. ... It is obviously of more importance in the case of services-labour than it is in the case of ... commodities. In the case of commodities, the main items can be stated in advance and the details which will be decided later will be of minor significance.

Id. at 392; see also Oliver E. Williamson, The Theory of the Firm as Governance Structure: From Choice to Contract, 16 J. ECON. PERSP. 171, 178 (2002) ("In effect, the contract law of internal organization is that of forbearance, according to which a firm becomes its own court of ultimate appeal. Firms for this reason are able to exercise fiat that the markets cannot."). From the
This notion that property ownership was needed for firm coordination was based on some perceived limits of contract, as a legal template for ordering certain transactions. Some transactions posed certain coordination challenges and hazards that the contract could not resolve, or could not resolve as cheaply as centralized direction. Theorists suggested, for instance, that firm coordination was often cheaper than market coordination when transactions were complex, involved ongoing cooperation among several parties, and were hard to specify upfront. Contract was designed for bilateral relations, making it rather unsuitable for ordering multilateral relations. Also, contracts required parties to specify important terms upfront, not make them up as they went along. Contracts allow each party only limited authority over labor services and non-labor inputs. Thus, contracts seemed unsuited to handle the contingencies that tended to arise in complex transactions requiring the ongoing cooperation of parties. They do not allow one party to control how the other party performs its contractual obligations, thus limiting its use as a tool for carrying out centralized coordination. The strictures of the contract could also leave a party's transaction-specific investments, or investments that would be less valuable outside the relationship and difficult to redeploy to other uses, too vulnerable to the other party's opportunistic behavior.

Property rights and formal employment seemed more suited for

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440. Williamson, Outsourcing, supra note 110, at 8-9 (arguing that market coordination, via contract, was "well suited to implement autonomous adaptations but poorly suited to effect cooperative adaptations").

441. See id.

442. See Williamson, Transaction-Cost Economics, supra note 124, at 237.


444. See id.; Transaction-Cost Economics, supra note 124, at 237.

445. See Williamson, Outsourcing, supra note 110, at 10; Williamson, Transaction-Cost Economics, supra note 124, at 241-42 (noting contract law does not prevent opportunistic behavior between contracting parties).
DOES UBER REDEFINE THE FIRM?

Carrying out centralized coordination, or constituting the firm. In comparison to the contract, property rights and formal employment provide relatively plenary and open-ended authority over resources,\textsuperscript{446} which often made firm coordination cheaper than market coordination when dealing with complex transactions. Using property rights to direct production relieved one of worrying about the inability to predict contingencies or adjust relationships: Property rights gave the owner "residual" control over whatever is not specified in agreements with other parties to the transaction.\textsuperscript{447}

2. Critiques of the Assumptions

Many critiques of Coasian theory appear to derive from dissatisfaction with its assumptions about the institutional makeup of firms and markets, and the limited kinds of relationships this authorizes.\textsuperscript{448} Given their composition of property and employment, Coasian theories tended to conceptualize firm coordination as multilateral, open-ended, hierarchical and often indirect.\textsuperscript{449} They tended to understand market relationships formed through contracts as bilateral, discrete, equal, and direct.\textsuperscript{450} The association of firms and markets with these syndromes of relational features and legal templates has struck many as too limiting.

Commercial arrangements seemed to defy Coasian taxonomies of firms and markets. Collaboration among entities in the biotech sector might be multilateral and somewhat ongoing, but not hierarchical or open-ended.\textsuperscript{451} Many contractual relations do not look like the market relations of classic firm theory—discrete, arms-length exchanges. "Relational contracts" between suppliers and customers may be long-

\textsuperscript{446} Williamson, Transaction-Cost Economics, supra note 124, at 237; see also Coase, Nature, supra note 4, at 391-92.

\textsuperscript{447} Hart, supra note 129, at 1765.

\textsuperscript{448} Scholars have suggested that legal templates sometimes limit the ability of coordinating productive activity in new ways. E.g., Ian R. Macneil, Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law, 72 NW. U. L. REV. 854, 883 (1978) (suggesting courts should recognize longer term, more flexible relationships as enforceable "relational" contracts). Others have shown that commercial actors may construct and conduct business relations with little regard to the legal relations they might be creating. E.g., Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55, 55-58 (1963).

\textsuperscript{449} Tomassetti, From Hierarchies to Markets, supra note 438, at 1128.

\textsuperscript{450} Id.

term, but bilateral and somewhat equal. Scholars have suggested that contract law has been changing, for better and worse, to accommodate parties in creating more open-ended and flexible relations through contract. On the other hand, companies today often insert extremely detailed, explicit standards and sanctions into contracts, creating an ongoing, hierarchical organization—a firm-like organization—with other entities. Relations that resemble a firm in their substantive features—ongoing, multilateral, and hierarchical—are often construed through contract, rather than property and employment. For instance, the business relations between buyers and sellers in buyer-driven supply chains are often hierarchical and ongoing.

Further, several scholars have critiqued Coasian theories of the firm for under-theorizing non-market, multilateral coordination that is not accomplished through hierarchy and centralized property rights. “Collaborative-community” firms are multilateral, long-term associations, like firms, but not hierarchical.

Scholars have examined the role of a variety of different institutional means for creating and sustaining governance structures, including: reputation, norms, intellectual property rights, and innovative contractual provisions. Williamson, in a more recent article, attributes the sometimes effectiveness of “credible contracting,” which he describes as a hybrid governance structure, to a non-legal institutional means—reputation. And, social institutions less defined by legal template or commercial practice, like professionalization, also coordinate resources in production through different means than those envisioned by Coasian firm theory.

452. See, e.g., MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 150-53 (Princeton Univ. Press, 2013) (discussing changes in contract law increasing the authority of the more powerful party); see also Macneil, supra note 448, at 879-80 (discussing the UCC’s accommodation of longer term and less discrete business relations).

453. See WEIL, supra note 26, at 71.

454. See Tomassetti, From Hierarchies to Markets, supra note 438, at 1094.

455. See, e.g., Gorga & Halberstram, supra note 158, at 10-14, 23-24 (discussing different scholar’s opinions in contrast with Coase’s theory of the firm).

456. See Adler & Heckscher, supra note 159, at 20-21.

457. E.g., Robert Gibbons, Firms (and Other Relationships), in THE TWENTY-FIRST-CENTURY FIRM 187 (promise and reputation); Rajan & Zingales, supra note 131, at 7 (control over access to resources); see also Brian Uzzi, The Sources and Consequences of Embeddedness for the Economic Performance of Organizations: The Network Effect, 61 AM. SOC. REV. 674, 675, 693 (1996); Powell, supra note 451, at 1140-48.


3. Disturbing the Assumptions with ICTs

ICTs have disturbed assumptions that property rights are the basis of firm production (to coordinate resources through non-market, centralized processes) and that contracts are unsuitable for firm production.460

ICTs can make firm production cheaper than market production by increasing the central coordinator’s power to direct and monitor the activity of others (labor and other inputs to production) while lowering the costs of direction and monitoring.461 The technology can facilitate a higher-resolution, more penetrating control. Barcode, GPS, and scanning technology make it possible for FedEx to monitor the location and time of every package pickup or delivery a driver makes.462 McDonald’s uses scheduling software that monitors the ratio of sales volume to staff in almost real time, enabling it to control the schedules of workers who are not official McDonald’s employees, but the employees of McDonald’s franchisees.463 Weil observes that the greater the lead company’s power to direct other entities, the less resources it needs to expend on supervision.464

Second, ICTs can lower the costs of firm production by enabling companies to exercise “residual” control even without property rights.465 Technology has enabled companies to allocate and direct resources across formal business boundaries, or to act like a firm without acquiring and exercising formal property rights.466 Weil notes that when lead companies “fissured,” or transferred responsibility for certain activities to formally separate entities, the lead companies were generally unwilling to relinquish control over the extruded activities.467 They developed several mechanisms to manage principal-agent challenges.

461. See id. at 392. Coase further surmised that communication technologies (the telegraph and telephone) might increase firm size, because “they reduce[d] the cost of organising [sic] spatially.” Id. at 397.
462. Tomassetti, From Hierarchies to Markets, supra note 438, at 1120, 1136.
463. See John Herzfeld, Sides Clash at McDonald’s Joint Employer Hearing, BNA DAILY LAB. REP. (Mar. 11, 2016), https://www.bna.com/sides-clash-mcdonalds-n57982068447/; see, e.g., David J. Kaufmann et al., A Franchisor is Not the Employer of Its Franchisees or Their Employees, 34 FRANCHISE L.J. 439, 449-50 (2015) (discussing the control franchisors have over franchisees and the way they operate their business).
464. See WEIL, supra note 26, at 189.
465. See Hart, supra note 129, at 1766 n.35.
466. See WEIL, supra note 26, at 62.
467. Id. at 63-64.
One mechanism is the use of ICTs. ICTs have improved the capabilities of lead companies not only to gather information for selection processes, but also to monitor formally separate entities, and to coordinate and direct multiple other entities. Shippers gained control over so-called independent truck drivers through onboard computing.

Uber is a great illustration of how ICTs can make firm production cheaper than market production by lowering the transaction costs of centralized coordination. Technology (and Uber’s bargaining power) settled the “make or buy” calculus in favor of a “make” decision. First, Uber’s smartphone technology lowered the costs of firm production by reducing the agency costs of directing, monitoring, and correcting drivers. The technology (in tandem with Uber’s bargaining power) helps Uber direct production inputs—cars—across formal business boundaries. Uber does not have to assume the usual firm transaction costs of property rights over the cars to exercise a property-like control over them; it can instead use its bargaining power and the coordination capabilities of technology.

ICTs can place companies in a win-win situation, where they avoid the trade-off between adaptability and control theorized in major economic theories of the firm. By controlling resources without owning them, companies can keep as few assets and employees as possible to better adapt to downturns in the market and meet fast-shifting demands for different products and services. Walmart exerts momentous control over its suppliers. It achieves this control through bargaining power and ICTs, however, and not through formal property rights over the equity or assets of suppliers. While eschewing property rights over inputs—Walmart does not have to relinquish control to the market and assume arms-length relationships with other entities.

By improving information, coordination, and automation capabilities, ICTs also increase predictive capabilities. To the extent ICTs enable the central coordinator to better specify transactions upfront (or at least simulate the appearance of ex ante specification), ICTs may

468. Id. at 61-64.
469. Id.
470. Id. at 61-62.
471. This was one of Coase’s predictions. See Coase, supra note 3 and accompanying text. Uber is one example of affirming evidence.
472. See Rogers, Social Cost, supra note 193, at 89-90. Uber’s vertical integration and market share should also enable more efficient compliance with regulations. Id. at 90.
473. See Weil, supra note 26, at 163, 167.
474. See id. at 163-64.
render a more suitable legal mechanism of centralized coordination, including for complex and ongoing transactions.\textsuperscript{475} The agreements between McDonald’s and its franchisees set out in extreme detail pricing to customers, technical methods, and quality standards; for instance, how many seconds it should take to place an order, how many seconds it should take to create the order.\textsuperscript{476} By obliging parties to use and follow certain ICTs that remain under the control of the lead company, however, the contract need not in practice limit the lead company’s discretion to deprive the other party of the benefit of the deal.

VI. \textbf{IMPLICATIONS}

\textit{A. Liberated Capital and the Law}

We should be troubled by the Uber narrative’s impersonation of Coasian theory. By prescribing a normative relationship between the firm and corporation—by requiring that corporate identity bear more than an attenuated relation to the organization of productive activity—Coasian theories subjected the corporate form to some social discipline. In trying to free the corporation from the firm, its mortal coil of productive activity, the Uber narrative tends to release capital from social accountability. In Karl Polanyi’s terms, it works to “disembed” the economic from the social.\textsuperscript{477}

The Uber narrative has not only permeated journalistic and academic accounts of Uber. Its credibility has manifested as a legal issue in several disputes involving Uber in multiple fields of regulation.\textsuperscript{478}

The lack of intelligibility of the Uber narrative within Coasian theory urges us to be more careful in distinguishing between innovative ways of organizing productive activity and arrangements that represent profit-seeking through other means, like speculative activity and legal arbitrage. The success of the Uber narrative would confirm Marx’s prediction that “the form of monopoly, craft, guild, corporation, etc.,” is

\begin{itemize}
\item \textsuperscript{475} See id. at 126.
\item \textsuperscript{476} See Sarah Fister Gale, \textit{McDonald’s USA: A Golden Arch of Supply Chain Food Safety}, FOOD SAFETY MAGAZINE (Feb./Mar. 2006), http://www.foodsafetymagazine.com/magazine-archivel/februarymarch-2006/mcdonalds-usa-a-golden-arch-of-supply-chain-food-safety/ (explaining the rigorous quality and safety guidelines McDonald’s forces their franchisees to follow).
\item \textsuperscript{478} See, e.g., Lobel, supra note 63, at 40-41.
\end{itemize}
capital that "has not yet reached the stage of indifference to its content, of complete being-for-self, i.e., of abstraction from all other being, and hence has not yet become liberated capital." 479

The problem is not limited to employment law or to companies that use ICTs to coordinate the provision of goods and services. Levitin identifies a parallel form of arbitrage in the securities context. 480 He shows that companies responsible for several major financial scandals and episodes of systemic destabilization issued the exotic securities at the root of the turmoil through Special Purpose Entities ("SPEs"). 481 The lead companies did not own the SPEs, but rather controlled them through detailed contracts. 482 The companies disavowed their responsibility for the SPEs, and the law failed to hold them responsible, since they did not hold equity control over the SPEs. 483 As in the case of decision makers who accept the Uber narrative, and here as well, the law failed to recognize the party with substantive control as the legally accountable actor, because it exercised this control through contract rather than property. 484

If we want to achieve policy traction, whether in employment, tax, securities, or other fields, we should reject a reductionist understanding that reduces the meaning of firms, markets, or networks to formal relations amenable to manipulation and arbitrage, like the distinction between debt and equity, 485 or employment and independent contracting. 486 We need to stop conflating the productive enterprise with its business form. 487 We can no longer treat the firm and corporation as metonyms.

B. The Exceptionalism of ICTs and Work Law

The Uber narrative appeals to the ineffable exceptionalism of new

479. Marx, supra note 283, at 37.
480. Bratton & Levitin, supra note 24, at 793.
481. Id. at 787-93.
482. See id.
483. See id.
484. Id. at 794.
485. See Riles, supra note 45, at 68-69.
486. Authors Bratton & Levitin, have looked to accounting principles to develop a "functional" theory of the firm that does not define firm boundaries by equity ownership. Bratton & Levitin, supra note 24, at 788, 794.
technology. Like a talisman, Uber and Lyft would have ICTs transform everything they touch into a different substrate of reality. During oral argument in Cotter, the judge chastised Lyft’s attorney for failing to cite California cases involving the employee status of drivers who could decline assignments, and, like Lyft drivers, could decide if and when they wanted to work.\textsuperscript{488} The attorney’s response was that these were cases “predating the internet,”\textsuperscript{489} or “traditional” cases; now we are dealing with “different technologies.”\textsuperscript{490} He was likewise unable to offer a distinction between Lyft and someone who hires day laborers from a corner.\textsuperscript{491}

The sophistic appeal of the Uber narrative suggests that we need to interrogate the coherence of the “platform economy” as an empirical phenomenon relevant to policy making. Terms often reserved for platform work, like the “peer-to-peer economy”\textsuperscript{492} and the “human-to-human economy”\textsuperscript{493} would seem to describe almost all service work involving customer interaction.\textsuperscript{494} For instance, hair salons match “intermediate markets” between buyers of haircuts and sellers (salon staff), and cafes match diners to sellers of hospitality services (waiters).

Gig economy companies tend to be in industries where contests over employment status have been common for over half a century.\textsuperscript{495} These include delivery services, transportation, and commercial and domestic cleaning. Much of the work in these industries has changed little over the decades. We still clean floors with mops and brooms, and deliver hardcopy newspapers by foot or a form of transport with wheels. If it is the flexible scheduling that makes Uber and other platform companies “different,” we need to be clear about this and provide a convincing rationale for why this should warrant a new regulatory framework.


\textsuperscript{489} Id. at 19.

\textsuperscript{490} Id. at 18.

\textsuperscript{491} Id. at 42-46.


\textsuperscript{494} See Lobel, supra note 63, at 15 (comparing the platform economy to the preindustrial economy because both involve “direct individual-to-individual monetized exchanges”).

\textsuperscript{495} But see Katz, supra note 102, at 1098 (noting that while many platform companies “provide an old service through a new channel,” some provide new offerings, like auctions for parking spaces).
category.\textsuperscript{496} If is the fact that many platform workers use personal resources to create goods or services, then we likewise need to articulate a better rationale for why this makes platform companies “intermediaries” rather than employers that have transferred certain costs of production to their employees (something that is often illegal).

Uber and Lyft took legal positions in \textit{O’Connor} and \textit{Cotter} that are exceptional for employment status disputes. The disputes are noteworthy for shifting the discursive frontier of the argument in disputes over employment misclassification. Companies rarely contest that the putative independent contractors are selling them some service. Both employees and independent contractors perform services for a client. The distinction lies in the conditions under which they perform the services, namely the extent to which the alleged employer has a right to control the manner of service provision.\textsuperscript{497} Most employment status disputes are waged over the control issue. Rarely does the threshold question become an issue. This is true of other California disputes involving taxi and delivery drivers, and of cases in which the workers, like Uber drivers, can choose whether and when to work.\textsuperscript{498} One California case involved airport couriers working in the 1980s and 1990s (before smartphone technology).\textsuperscript{499} According to the company, couriers could choose when and whether to work, and could decline dispatches without risking discipline or termination.\textsuperscript{500} The company contested its right to control the drivers, but not that the drivers performed services for it, nor did it contest that the drivers’ work was integral to its

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\textsuperscript{497} Glynn, supra note 487, at 209; \textit{RESTATEMENT (THIRD) OF EMPLOYMENT LAW} § 1.01, at 14 (Proposed Final Draft 2014) (suggesting there is little difference in practice between the right-to-control test and another test based on “economic realities”).

\textsuperscript{498} \textit{E.g.}, Ali v. U.S.A. Cab Ltd., 98 Cal. Rptr. 3d 568, 579-80 (Cal. Ct. App. 2009). \textit{But see} Yellow Cab Coop., Inc. v. Workers’ Comp. Appeals Bd., 277 Cal. Rptr. 434, 436-37 (Cal. Ct. App. 1991) (rejecting the taxi company’s claim that drivers did not provide it any service, noting “[t]he drivers, as active instruments of that enterprise, provide an indispensable ‘service’ to [the taxi company]”). In a Massachusetts employment status dispute involving taxi drivers, the court found that the alleged employer, a taxi association, provided services to the drivers, rather than the other way around. Kubinec v. Top Cab Dispatch, Inc., No. SUCV201203082BLSI, 2014 WL 3817016, at *10 (Mass. Super. June 25, 2014). It also agreed with the company that it was in a different line of business than the drivers, the “business of radio dispatch and communication services for passengers for hire.” \textit{Id.} at 12. However, the court based its reasoning in large part on the fact that the taxi association received a flat fee from drivers each week, not a share of revenue from each ride. \textit{Id.}

\textsuperscript{499} See Air Couriers Int’l v. Emp’t Dev. Dep’t, 59 Cal. Rptr. 3d 37, 40 (Cal. Ct. App. 2007).

\textsuperscript{500} \textit{Id.} at 38.
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In the Uber class action, however, while the judge ultimately rejected the argument, the threshold question of service provision consumes almost all of the oral argument.\(^{502}\)

**C. Entrepreneurialism?**

We also need to interrogate the notion of entrepreneurialism implied in the Uber narrative. To what extent does it redefine servitude as autonomy and relatively unskilled work as entrepreneurialism? The transaction-cost narrative resembles human capital theory. Human capital theory proposed that jobs reflected the available technology and efficient allocation of inputs to production.\(^{503}\) The labor market assortment process was that of finding the right “fit” between a job and worker. Generally, the relationship between the origin of jobs and the labor market sorting process has been the obverse: Labor market sorting begins with the employer’s organization of production that creates the “jobs.”\(^{504}\) Human capital theory treats the existence of jobs as market outcomes that are exogenous to the employment relationship.\(^{505}\)

The Uber narrative goes one step further in appealing to the market as a mechanism for sorting and matching pre-constituted entities; it proposes that Uber does not design and fill jobs, but “matches” businesses with customers.\(^{506}\) Consider this comment by a management professor who lumps Uber in an omnium gatherum of companies, including Airbnb: “Those matches have always existed, but it was just too expensive to find them.... But by having a digital platform, the costs get much lower so you get more of those matches.”\(^{507}\) The narrative interpellates everyone with a car in the driveway as a business entity, an independent “transportation provider”\(^{508}\) that the market has constituted prior to any encounter with Uber. Consider also this

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501. See Opening Brief for Air Couriers International at *3-13, Air Couriers Int'l v. Emp't Dev. Dept', 59 Cal. Rptr. 3d 37 (Cal. Ct. App. 2006) (No. C050978). The court upheld the lower court's finding that the couriers were employees. See Air Couriers, 59 Cal. Rptr. 3d at 46-47.

502. See Transcript, supra note 92 (while the judge summarily rejected the company's argument in his decision, much of the oral argument was devoted to arguing this question).


504. Id.

505. Id. at 287.

506. See Bruner, supra note 1.

507. Id. (emphasis added).

508. See Notice of Motion, supra note 87, at 3.
exchange between the professor from above and an interviewer:

Question: Perhaps you were an employee of a car service and now you’re a self-employed entrepreneur who markets your driving services through Uber. So far, does the evidence suggest that labor is doing better or worse under the new system?
Answer: Ultimately, what employees will make is less a function of the system per se and more a matter of the market’s overall demand for that set of skills. 509

Taylors’ defense of the “specialist” manual laborer replacing the skilled artisan has a more palatable veneer in the “platform economy” of “entrepreneurs.” 510 According to Uber, all of its unilateral actions, including lowering fares, “benefit” the drivers; 511 they protect the platform, the ecology of a shared economic habitat. As in Talcott Parsons’ translation of Max Weber: Herrshaft, domination, becomes “imperative coordination.” 512

The fact that drivers put personal resources in addition to their energies at the boss’ disposal does not make them into independent businesses. Uber gets control of the car, but need not purchase it outright, pay for its maintenance, or account to its owner for the return on this asset or its depreciation. 513 The car becomes capital to Uber. Uber and Lyft designed a productive process in which execution of the work has been reduced primarily to the application of labor effort, work that requires no special assets and little in the way of experience or expertise. 514

510. See id.
513. See Frazier, supra note 74, at 1.
514. See Keith Cunningham-Parmeter, From Amazon to Uber: Defining Employment in the Modern Economy, 96 B. U. L. REV. 1673, 1684-85 (2016). Moreover, the narrative is likely Janus-faced. Uber and Lyft may appear more valuable to investors by showing that the drivers are a large pool of unskilled workers—not independent entrepreneurs. See Irani, supra note 275, at 226-27. Discussing companies that hire workers through Amazon’s Mechanical Turk to complete digital tasks, Irani argues:

The agency of workers... threatens the valuation of microwork-based ‘software’ companies in two primary ways. First, the more visible the workers in human computation become, the less the ‘software’ companies
In the ideological gloaming of this story, workers may vanish. The physiological individual is becoming an independent business, an "entrepreneur of the self," by virtue of being resourceful in the management of metabolic, affective, cognitive, and other unalienable capacities. The rationalization of one’s labor in order to live is becoming "entrepreneurial."

D. Business Identity and Employment Classification

The Coasian analysis of the Uber narrative has more concrete implications for employment status disputes. Virtually all of the legal tests for employment status ask the alleged employer for some account of its business identity—what the company is about and how it does it.516

As illustrated in O’Connor and Cotter—the disputes over janitorial services and the FedEx lawsuit—the issue of business identity forces decision makers to confront competing notions of the firm, and to construct legitimating accounts of the firm-corporation relationship. Decision makers should make these conceptions more explicit.

Further, the cases examined in Parts IV and V suggest that a Coasian theory of firms and markets, and the firm-corporation nexus it idealized, is more consistent with a "purposive approach"517 to work law than one that equates the firm with the alleged employer’s chosen corporate identity. Judges harboring more Coasian notions of the firm queried how the workers fit within a Coasian (or Taylorist) division of labor. As discussed in Part III, several firm theorists presumed that much of the transaction cost savings that firm production afforded were from using a division of labor that differed from a market division of labor. Both firms and markets coordinated a complex division of labor. The specialization of tasks among individuals was a basic reason for market exchange. However, the firm division of labor entailed a

516. See Izvanariu, *supra* note 9, at 7-8.
separation of conception and management from execution.\textsuperscript{518} The executors—those who carried out production rather than managing it or conceptualizing it—contributed to production primarily in their ability to work, or labor effort, rather than other ideational or material assets.\textsuperscript{519} The firm division of labor tended to reflect the relative property contributions of participants.\textsuperscript{520}

Companies “shedding” employment tend to acknowledge as part of their organization only what they perceive as the high-valued added work of conceptualization and management.\textsuperscript{521} In other words, they shed execution, or refuse to acknowledge the workers executing production as part of their enterprise. As explained in Part IV, within the firm–corporation nexus authorized by Coasian theory, the social warrant of the corporation was to facilitate the firm’s centralized coordination and thus business identity was to reflect the fruits of this coordination—what was executed.\textsuperscript{522} When the alleged employers asserted business identities that acknowledged only management and conceptualization, but not execution—none of the fruits realized from their appropriation of market processes—this often struck judges as inappropriate.\textsuperscript{523} Without the execution, the companies could not be productive enterprises. Thus, “the managing and performing functions of furniture delivery result in a symbiotic relationship. Without providing physical delivery of furniture, which is essential to its business, [the delivery company’s] business would not exist.”\textsuperscript{524} And

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{518} Coase, \textit{Nature}, supra note 4, at 400.
\item \textsuperscript{519} See id. at 400, 403-04.
\item \textsuperscript{520} Coase suggests the distinction between the firm and market division of labor, and he intimates that the firm division of labor is derivative of a division of property. See id. at 403-04. He describes the firm’s authority to direct resources as an employment relationship. See id. In a footnote, he tenders that firm production \textit{could} involve control over another person’s property as well, rather than just their labor. See id. at 403 n.3. He then returns to employment as his central illustration that his theory of the firm best resembles the “real world.” \textit{Id.} at 404. This suggests employees do not control their own productive resources.
\item \textsuperscript{521} Not only is this a strategy of avoiding the costs of complying with work law, but it also signals Wall Street that the company is “high tech” or “knowledge-based.” See Irani, \textit{supra} note 275, at 228.
\item \textsuperscript{522} See \textit{supra} Part IV.
\item \textsuperscript{523} See, \textit{e.g.}, Prime Time Shuttle Int’l, Inc., 314 N.L.R.B. 838, 840 (Aug. 24, 1994) (“The drivers clearly perform an essential part of Respondent’s business. The business of the Respondent is providing shared rides to the public and its vans and drivers perform that function. Driving is not merely an essential part of Respondent’s business it is Respondent’s business.”).
\end{itemize}
\end{footnotesize}
courts will reject "a false dichotomy between the administrative and operational aspects of their business."\textsuperscript{525} FedEx’s business would "cease to exist" without the delivery drivers to put its delivery network "to use."

The consonance of the Coasian understanding of corporate legitimacy and the policy purposes of work law is that judges who expect business identity to bear a strong relationship to the organization of productive activity tend to focus on two features—the parties’ relative capital contributions (as opposed to whether the workers own any inputs to production, however minimal) and on the level of skill required in the work.\textsuperscript{526} These factors—skill and relative capital contributions—help to identify individuals within the intended policy scope of many labor and employment statutes.\textsuperscript{527} They help to identify a fount of unequal power within the particular work arrangement and beyond that—unequal ownership and control over productive property. This inequality is the warrant for most statutory interventions into work relations, including collective bargaining and minimum wage law.\textsuperscript{528} The pattern of property relations within the enterprise generally extends beyond it to the individual’s class position.\textsuperscript{529} While some Uber drivers assume the undertaking for reasons other than necessity, one with more than labor effort to sell generally does not enter an employment relationship but instead negotiates a contract.\textsuperscript{530}

The focus on execution also tends to identify the "democratic deficit," a policy concern of collective bargaining law and apparent in several classic theories. In Alchian’s and Demsetz’s theory of team production, for example, productive exchange takes place through multilateral cooperation; but a central authority sets rules for input providers, and the main contribution of most input providers is labor effort.\textsuperscript{531} The executors generally lack the right to participate in


\textsuperscript{526} See Stone, supra note 156, at 2, 5.


\textsuperscript{528} Id.

\textsuperscript{529} This is the basis of Hart’s argument that employees stay with a firm even if it changes ownership—the employees lack the firm’s productive resources. See Hart, supra note 129, at 57-58.

\textsuperscript{530} See Gibbons, supra note 457, at 187-89 (Gibbons is referring to the “make or buy” distinction as the distinction between employment and independent contracting: “making” an input to production means purchasing labor effort and non-labor inputs from different parties, whereas “buying” an input means purchasing both from the same party. He suggests that one who has control over resources that could be useful in production processes does not generally sell only labor effort.).

\textsuperscript{531} See Alchian & Demsetz, supra note 143, at 778-81.
determining the identity of manager or in other decisions about the design of the productive process.532

This Article is not recommending that we adopt a Coasian definition of employment, however.533 Scholars have critiqued the traditional foci of tests for employment status "control," "economic dependency," and "entrepreneurial opportunity"—for being unwieldy, anachronistic, and disconnected from the policy and fairness objectives prompting the inquiries in the first instance.534 Coasian firm theory may offer a compass to assist in navigating these tests and redirecting them to their policy purposes. Given the near identity of the firm and employment in several Coasian theories,535 defining employment in this way would lead decision makers in circles: What is employment? It is a firm. What is the firm? It is employment.536 Since Coase and other major theorists defined the firm in opposition to contract—not merely an incomplete contract, but a kind of anti-contract537—Coasian theory's most important contribution to debates over the legal identity of employment is perhaps to highlight the awkward political status of employment in a liberal legal order that claims to have successfully transitioned from "status to contract."

Further, not all that is troubling about Uber is a consequence of its legal arbitrage of the firm-corporation distinction and the Uber narrative's spurious use of TCE. Some have observed that Uber's
perfunctory and unilateral deactivation of drivers based on its quantitative star rating system may be thwarting anti-discrimination law.\(^{538}\) Uber may be discriminating against drivers on the basis of race, sex, religion, and other protected categories by acting on the discriminatory ratings of passengers; for instance, if passengers tend to give black drivers lower ratings.\(^{539}\) The problem here is not that Uber is pretending to be a market mediator when it is a firm, but that in this case it is acting more like a transparent intermediary. It is allowing exogenous demand preferences to shape supply. Contrast this to a scenario in which Uber did not allow harmful customer preferences to shape its supply of drivers, for instance, if Uber deactivated drivers only for their noncompliance with Uber’s work rules (vehicle cleanliness, music, etc.). The concern is that by using a crude rating system to make termination decisions, Uber is enabling markets for discrimination to flourish.

### E. The Algorithm

While Uber does not render the firm obsolete, more complex algorithms expose the fragility of the entire Coasian foundation, also suggesting that it is not one on which to build legal distinctions.

Sophisticated platform algorithms undermine the distinction between centralized and decentralized coordination. In order to allocate resources to their most valued uses, well-working markets are supposed to have neutral, transparent, means of communication so that people can make decisions about how to realize their preferences. Platforms using sophisticated algorithms (e.g., Amazon’s book reviews) purport to act upon “raw” data, and to objectively order the vast amounts of this data that whirls through a complex, modern world.\(^{540}\) They are “trusted information tool[s].”\(^{541}\) Yet, they necessarily curate, censor, modulate, and even create information, and do so according to their particular logics.\(^{542}\) Thus, when algorithms compute what we might like to buy,

\(^{538}\) See Rosenblat & Stark, supra note 172, at 11-14.  
\(^{540}\) See Gillespie, supra note 404, at 169-70, 190.  
\(^{541}\) Id. at 191.  
\(^{542}\) See Kate Crawford, Can an Algorithm be Agnostic? Ten Scenes from Life in Calculated Publics, 41 SCI., TECH., & HUM. VALUES 77, 85 (2016) (“Algorithms may be rule-based mechanisms that fulfill requests, but they are also governing agents that are choosing between competing, and sometimes conflicting, data objects.”). Platforms make choices regarding what
read, see, etc.; algorithms poke and prod resources in certain directions. The algorithm’s nudging of resources blurs the distinction between centralized and decentralized coordination.⁵⁴³ They challenge the ideal of neutral information channels.

The deeper challenge that algorithms pose to Coasian theory, however, is to challenge the assumption of exogenous preferences and thereby deflate Coasian theory’s claims about efficiency. The notion that markets and firms can allocate resources to their most valued uses implies exogenous preferences—preferences that are not determined through interaction with, or participation in, firms, markets, or other governance structures of economic activity. Exogenous preferences, in theory, provide an outside reference point by which to evaluate whether markets and firms allocate resources to their most valued uses.

Sophisticated algorithms, like those behind Google’s search engine, illustrate the endogeneity of preferences.⁵⁴⁴ Language and algorithms are both communication mediums. The algorithm is a formula, but this does not distinguish it from other mediums. Every communication medium has a logic by which it structures and creates categories for thoughts, desires, subjectivities, and knowledge production.⁵⁴⁵ All communication mediums take inputs and process them through formulas to produce outputs.⁵⁴⁶ We orient our expression to be legible within them by standardizing our expressive capabilities so they can be transmitted through these mediums. Thus, communication mediums shape our subjectivities and preferences—our preferences are not formed independently of these mediums. The fact that the algorithm is a communication medium and communication mediums shape our preferences need not in itself be fatal to the proposition that they provide information enabling people to act on preferences formed outside the market. What is rather fatal is the nature of the algorithm as a medium: The algorithm is more “computational” than other means of communication, such as the English language.⁵⁴⁷ Speaking through algorithms—for instance, using TaskRabbit’s interface or clicking

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⁵⁴³ See Crawford, supra note 542, at 80-82 (discussing Amazon’s bestseller ratings for books).
⁵⁴⁴ See Gillespie, supra note 404, at 182.
⁵⁴⁵ See id. at 178.
⁵⁴⁶ Id. at 167-169.
⁵⁴⁷ Id.
through Amazon book ratings—imposes a different kind of logic on our expressions than speaking with a friend on the phone. It is the logic of the platform provider; it redounds upon our subjectivities when we speak its computational language and it speaks back in this language. Platforms may suggest that they are merely good at anticipating our wants but do not shape them; however, algorithmic logic makes it difficult to maintain that platforms simply transmit information enabling individuals to act upon preferences formed outside of those platforms. Until we recognize preferences are endogenous to these interactions, it is difficult to find a vantage point from which to say markets are allocating resources to their most valued uses.

VII. CONCLUSION

All too often we lump different business models under the rubric of the “platform” or digital marketplace without asking whether they have anything in common apart from using the internet. Why are we willing to believe that Uber facilitates a market just like Ebay? Why do we more readily accept that Uber intermediates between buyers and sellers, but that a restaurant does not intermediate a market between buyers of hospitality services (diners) and sellers (waiters)?

The Uber narrative speaks in the argot of Coasian firm theory, and yet is largely nonsensical within it. Rather than reduce the costs of market exchange between drivers and passengers, a Coasian analysis suggests that Uber has lowered market costs between Uber, as a seller of transportation services, and passengers. It suggests that ICTs can reduce intra-firm transaction costs to the point of making firm production cheaper than market production. Thus Uber may be a poor avatar of the platform economy. And ICTs may not be the solvent that dissolves the firm into independent producers. Uber and Lyft’s use of ICTs gives workers more flexibility over scheduling their time. It also enables the companies to subject workers to intensive supervision and

548. See id. at 172-73 (Gillespie argues that the platform creates the user as a “shadow bod[y]” and an “algorithmic identity,” and notes that, “such sites are comfortable catering to these user caricatures,” and “appear to sort us most sufficiently, particularly around our consumer preferences.... And to some degree, we are invited to formalize ourselves into these knowable categories. When we encounter these providers, we are encouraged to choose from the menus they offer, so as to be correctly anticipated by the system and provided the right information, the right recommendations, the right people.”).

549. See, e.g., Bruner, supra note 1.

550. See supra Part III.

551. See supra Part III.
authority. Within the Coasian perspective, Uber drivers look much more like day laborers on digital street corners than independent businesses or even other platform workers, like Upwork workers or Airbnb hosts.

In many cases, judges reject the business identities that companies assert as incompatible with their conceptions of the legitimate corporation, conceptions that closely resemble the ideals of Coasian theory. However, the institutions of capitalist accumulation are changing in ways that defy ideal conceptions of the corporation and test decision makers’ commitment to them. And claims about technological sophistication and the knowledge economy can be euphemisms for profit seeking not through productive enterprise, but through regulatory arbitrage, speculation, and other forms of asset manipulation. Subjecting the Uber narrative to scrutiny under the lens of classic firm theory reveals another face of a phenomenon often critiqued under the rubric of financialization: Gestating within Uber’s story about technology and transaction costs is the “postindustrial corporation,” a corporation that seeks profit through means other than the efficient production and sale of goods and services.\(^{552}\) The idiom of advanced information technologies can obscure the disjuncture between the theoretical ideal of how firms and markets should work, and how they operate in practice.

Uber has not rendered the firm obsolete. The Uber narrative offers ideological sustenance for another leg of capital’s journey, towards purification, liberation, and abstraction. Marx predicted one era in which “agricultural capital” and “industrial capital” became simply “capital.” The Uber narrative heralds another, in which productive enterprise appears as capital still “afflicted with local and political prejudices; it is capital which has not yet extricated itself from its entanglement with the world and found the form proper to itself—capital not yet fully developed. “It must achieve its abstract, that is, it’s pure, expression in the course of its cosmogony.”\(^{553}\)

\(^{552}\) See Tomassetti, It’s None of Our Business, supra note 320.

\(^{553}\) MARX, supra note 283, at 39.