

PANEL 1 DISCUSSION- THE IMPACT OF THE GIG ECONOMY ON WORK AND WORKERS

ROBERT RUBIN: Good morning and welcome. I'm Bob Rubin, on behalf of my colleagues at The Hamilton Project, delighted that you joined us for today's event, Modernizing Labor Laws in the Online Gig Economy. From the time that we started The Hamilton Project, which is now ten years ago, we've been guided by a bedrock belief. And our bedrock belief is that economic policies should be about growth, broad-based sharing and the benefits of growth and economic security.

And we have viewed these objectives as mutually reinforcing, rather than as being in opposition to each other, as is often argued. Sustained and widely shared income gains require economic growth, both to have a larger pie, and also to have tight labor markets, as we had in the '90s, that then drive up wages. And growth in turn requires broad-based sharing in its benefits, to increase demand, to increase the availability of resources to workers so that they can access education, healthcare and other factors that are involved in productivity, and to create broad-based public support for growth generating policies.

If you view policy through this lens of mutual reinforcement, policies that are intended to promote growth or policies that are intended to promote widespread increases in income, in fact contribute to both. There's two examples, early intervention as a policy to deal with poverty and combat poverty, and enabling workers to freely decide whether to organized for collective bargaining, are aimed at increasing incomes. But, by promoting broad-based participation and the benefits of growth, they also promote growth itself.

Through commissioning papers and organizing panels and events such as the one we're having today, The Hamilton Project has provided a platform for leading thinkers and policy experts from around the country, to address a wide range of issues that relate to these three objectives. And the point of today's event is, to again, focus on these issues and the purposes to present

ideas and proposals and to have robust discussion on these issues that are so critical to American workers and to our economy.

Rapid technological development and, to a lesser extent globalization, as we all know, are having a profound effect on our economy, on the availability of traditional middle income jobs, and on the way that work is organized, structured, and compensated. The broad question that today's discussion addresses is how can we protect workers in this new environment, while, at the same time, reaping the benefits of change and innovation?

That's made more complex because wages are very importantly about work, but they're also about a lot more. They're about sense of self worth, they're about dignity, they are about sense of self. And work is often the basis for many of our social relationships. That's why President Clinton captured this idea by saying that the best social program is a job.

Today's discussion hones in on one specific area of the future of work. And that is something that we are all familiar with, which is that many sectors of the economy, employer-employee relationships are being increasingly displaced by work arrangements that, as we all know, are referred to as "the gig economy." The rapid rise of the gig economy raises complex challenges with respect to wages, working conditions, benefits, and other aspects of employment. And again, the question is how to protect workers while, at the same time, garnering and reaping the benefits of change and innovation.

All of these issues, both these broad issues about the future of work and the more specific issues about the gig economy, are complex and daunting in a world of rapid technological development that is often labor-displacing. And I believe they're going to become increasingly prominent as time goes on.

To address these issues, we must have effective policy. And that is just one more reason why, at least in my judgment, the future of our economy depends on reestablishing the willingness to

engage in principled compromise, and the commitment to governance in our Congress. And arguably, at least, that is, we are far from that in today's environment.

Let me conclude by briefly describing today's program. We have two outstanding panels, with each having one of the co-authors of our paper. The first panel explores the wide-ranging implications of the gig economy on work and on workers. And the second panel will discuss a proposal to specifically modernize the labor laws for the 21st century.

The authors will be joined by two panels of extraordinarily distinguished panelists. And I'd like, at this point, to thank the authors and the panelists for joining us today at this Hamilton Project event. In accordance with our practice at The Hamilton Project, I won't recite to you from the participants and the authors' résumés, but they are truly distinguished. And they're in your materials.

I'll just add one more personal comment, and I've made this observation already. I think we are in an extremely challenging time for our country. We have enormous comparative advantages and comparative strengths, but we also face hugely consequential policy challenges, some of which we'll be discussing today. And I do believe that the absolute key to the future of our economy is not economic, it is political, and it is, once again, having a political system in which there is the commitment to governance and, as I said a moment ago, the willingness to engage and the political compromise across policy and political divides, without which our system cannot work.

With that, I would like to thank the extraordinarily capable staff or leadership of The Hamilton Project, Dan Schanzenbach, our Director, Kristen McIntosh, our Managing Director, and Jane Dokko our Policy Director, and their colleagues on the staff for having framed the electoral construct for this event and putting in place the logistics, and for all that they do to make The Hamilton Project work.

With that, I will turn the podium over to Greg Ip, who we are delighted to have as moderator for the first panel. Greg, the program is yours.

[applause]

GREG IP: Well thanks very much, Bob. You know, you write about policy, you go to conferences about policy a lot in this town and in my job. And one of the biggest challenges always is actually trying to tackle a subject that people are going to be intrinsically interested in, so that they'll read your column, that they'll actually come to your conference. I'm actually—We don't have that problem today, because the sharing economy is something almost everybody here has had some personal experience with.

In fact, I'd actually like to start this by just doing a quick show of hands. Anybody who's ever taken a ride in an Uber car, please raise your hand. Okay. Anybody here who's ever driven an Uber car, please raise your hand. So I think that's kind of interesting, because on a daily basis, we are consumers and beneficiaries of the remarkable business models and innovations that the sharing economy is bringing about.

But not many of us think or know what goes on on the backend. What is it like for the people who are there providing those services, not just the technologists and the software designers and the entrepreneurs, but the people who are driving the cars, delivering the food, arranging the pickups and so forth, cleaning the rooms for your AirBnB.

Now, in the case of Uber, a lot of us have probably had a conversation with an Uber driver at some point. So we probably have some sort of sense about that. In fact, anybody who travels a lot for their job has probably formed a lot of their impressions of the places they go by chatting with the taxi driver. So in some sense, Uber is a perfect kind of microcosm of this question because a lot of people who both benefit from the sharing economy have had their chance to interact with the people who produce for the sharing economy.

But I think that we as policymakers and journalists haven't thought a lot, yet, about the framework of laws and institutions that govern how those services are provided and the challenges that they produce for the status quo. And that's why I think this is a really timely and important panel discussion to be having. And I also think we're really fortunate to have a group of people who are extremely well suited to talk about these issues, because they've all, at some level, delved into these sort of tough, nitty-gritty questions about how do we, as a society, accommodate the new business models and work arrangements that the sharing economy brings about.

So most of you have detailed bios of the panelists in your packages already, so I'll just go briefly through them. To my left, Edith Ramirez, who is Chairwoman of the Federal Trade Commission. To her left, Senator Mark Warner of Virginia. Gene Sperling, head of Sperling Strategies and a former Director of the National Economic Council for Barack Obama. Far left, Alan Krueger, who teaches at Princeton University and is a former Chairman of the Council of Economic Advisors.

And we're going to start with a presentation by Alan, where he'll briefly summarize one of the proposals. Then we're going to hear from the rest of the panelists who will talk, not so much about the nitty-gritty of the proposal, but more broadly about some of the issues they see arising from the sharing economy. So we'll start with you, Alan.

ALAN KRUEGER: Thank you, Greg. And let me thank The Hamilton Project for arranging for Seth Harris and me to prepare our paper and organizing this event. What I'd like to do is quickly describe what our proposal is meant to address, describe a little bit about an emerging sector of the labor market, which is still small, and then give you a taste for our proposal, which the second panel will dig into in more detail.

So we focus on independent workers, a category that we define as workers who are engaged in a triangular relationship. They're working through an intermediary—it could be Uber, Lyft, there are many, many other intermediaries. Many of the intermediaries have very different business models. And the intermediary connects the independent worker with the final customer. The relationship with the final customer is typically fleeting.

This is an important part of the gig economy. I don't think it's the entire gig economy, if you like to use that term. What makes this relationship fundamentally different from an employment relationship or an independent contractor relationship is that it has some elements of an independent business type relationship, and some elements of an employee relationship. The independent worker has tremendous discretion over when to work, whether to work at all, how many hours to work.

The intermediary does not control the workers' work hours. The intermediary, however, exerts some control. For example, could set the fee. In some of the models, the intermediary doesn't set the fee, in some of the models, the fee is always five dollars. The model can vary, but the intermediary exerts some control and can, in some sense, fire the worker from using the platform.

Now most importantly, and I think this will underlie our proposal, the flexibility to choose one's own hours is something that many workers value. Not all workers, of course, but many workers value that tremendously. Also, the independent worker can work for simultaneous intermediaries at the same time and can also conduct personal tasks while waiting to do work for an intermediary.

In this sense, it's conceptually very difficult and often impossible to assign the work hours of the independent worker to a particular employer. Technologically you can measure aspects of the work hours, but conceptually, the worker has the freedom to turn off the app and do whatever he or she wants, or to use two apps at the same time for different intermediaries, there is a

fundamental difficulty when it comes to determining whether this individual is working for a particular employer, which makes it, we think, conceptually impossible to apply parts of the labor law to this type of the relationship if it were treated as an employment relationship.

We should also emphasize that independent workers can work online or offline. It's not the technology, per se, that creates an independent worker relationship, it's this triangular relationship which has some aspects of an independent contractor relationship and some aspects of an employment relationship.

Our system is not well set up for this type of work arrangement. We have just two classifications: independent contractors and employees. The law is often vague as to how to classify the workers, unclear about what weight to give to different factors, like the control that the employer has over the employee, or the freedom that the employee has to use his own equipment. And these relationships fall into this gray area.

And that's creating a tremendous amount of legal uncertainty, inefficiency and costs in our system today, not only us who say this, Judge Vince Chhabria in a case involving Lyft in California said that the jury is being asked to figure out which of two round holes to place a square peg. And he further said, the law provides nothing remotely close to an answer in this case.

So we propose a new legal category, and we do this with the idea of extending the social compact to protect independent workers while maintaining the efficiency that innovation can bring about. We have three principles, one we want to have benefits for workers that are appropriate for workers who have the flexibility to choose their own hours, and where fundamentally it's difficult, if not impossible, to assign their hours to a particular employer. We want our benefits and proposal to be economically efficient. And we also want it to be neutral, with respect to choosing the employment relationship. We don't want companies to take their

relationships with employees and turn them into independent workers to avoid paying certain benefits.

So let me just say a little bit about the growth of this sector. This shows you, this hockey stick pattern here shows you the growth of Uber drivers in the U.S. up to 400,000 as of last month. Uber has been more than doubling the number of drivers every six months. The purple line shows the number of searches for Google drivers, or number of Google searches for Uber. And the reason why I show you that those align very well, shortly we're going to use this to try to scale the entire sector.

The drivers have tremendous flexibility. They vary their hours from day to day, from week to week. Forty-three percent work 50 percent more or 50 percent less from one week to the next. Almost two-thirds of the drivers have another job. Half work under 15 hours a week. And the drivers' characteristics are very different than taxi drivers. They're much more highly educated, for example, much more likely to be women.

This shows you the number of Google searches for Uber on the left scale, that's the purple line, and then for the other main intermediaries that we could identify, they're on the right scale. It's hard to read, but the scale is five times wider on the left scale than the right scale. What that says is that Uber dominates this market. Everything else is pretty small. If you add up everything else, it's only about 50 percent as large, in terms of search activity, compared to Uber. So if we take the 400,000 workers for Uber and scale that, that makes about 600,000 workers in the online sector. Offline, there are probably many more who would fall into our independent worker classification.

So on to our proposal. What we would like to do is to maintain and protect the social compact, tailor it for independent workers. And I mentioned our principles of being efficient and neutral, with respect to employment status. So that leads us to go benefit by benefit and say, which benefits make sense in the context of independent workers? And which ones don't make sense?

That leads us to recommend requiring that independent workers have the right to organize and collectively bargaining. We propose waiving the Sherman Antitrust Act in this instance, although there are other ways of doing this. For example, independent workers could be covered by the National Labor Relations Act. Civil Rights protections, which independent contractors, by and large, don't have today, tax withholding. The intermediary would contribute half of the Social Security payroll tax, FICA.

To an economist, that may sound a little bit strange because of economics. We think that tax incidence doesn't depend on who openly, legally is writing the check. On the other hand, I think there are two advantages here of this kind of requirement. One is, it would be much easier to compare compensation between independent workers and employees because their tax treatment would be similar. And also, in a bilateral bargaining arrangement, the legal taxes incidents can actually affect the ultimate economic tax incidents.

Then finally, some benefits that are based on hours would not be required, like overtime, because workers can choose whether they want to work more than 40 hours a week. And, as I said, it's impossible to attribute their hours to a particular employer, if they can work for simultaneous employers at once or personal tasks. Workers comp is a difficult issue that I'll leave to Seth Harris to discuss.

Then lastly, in the sake—for the sake of efficiency, and also making both workers and firms better off, we would permit intermediaries to pool their resources, take advantage of their scale, to provide benefits to workers without the relationship being deemed an employment relationship. Right now, intermediaries are reluctant to provide things like life insurance, because they don't want to be deemed an employer. That's inefficient. They could also use a third party to provide such benefits.

So let me just conclude by saying we propose this in the spirit of trying to make the labor market work better, to protect the social compact. We think there's relatively little risk that employers will take their current employment relationship and convert it to an independent worker relationship, because they would have to give up a tremendous amount of the control that they currently have. They'd have to say to the employees, "Come whenever you want, work whenever you want," because you have complete control over your work hours.

So we would like to see innovation thrive, but we don't want it to come at the expense of the existing social compact. We don't want new intermediaries to develop and succeed because of regulatory arbitrage, because their business model enables them to convert employment relationships into independent contractor relationships. We want them to thrive because they have better technology. And we think that our proposal is at least a starting point for trying to achieve that. Thank you.

GREG IP: Senator Warner, I know that you have been thinking a lot about some of the policy and legislative challenges that a sharing economy poses. In fact you and I think Governor Mitch Daniels from Indiana are about to chair an Aspen Institute Commission on this question. Perhaps you could talk for a few minutes about what you think some of the challenges are that this raises.

MARK WARNER: Well, thank you Greg. And let me also thank Bob Rubin and The Hamilton Project. Although I can't imagine you thinking that my day job is not where principled, civilized compromise is taking place on a regular basis. [laughter] And, you know, I'm really glad to be here, because this is the worst of the sausage making week around.

You know, I have spent a lot of time over the last year talking to a lot of folks who are engaged in this part of the economy. Let me step back for a moment. I think we need to recognize that we have seen a dramatic transformation of work that didn't start with this gig on demand economy. It really goes back, in many ways, the '80s and '90s, when more and more firms started to, in effect, outsource or offload work. I love the notion of so many places, where firms would take

their janitorial staff and say, “Voila, you are now independent contractors.” And frankly, it was simply a way to offload benefits. And workers got the short end of the stick on a consistent basis.

What really has kind of caught people’s imagination is the fact that you know, what is transformative about the gig around demand economy is the fact that we’ve suddenly, because of GPS technology and cell phone technology, been able to suddenly monetize your time, your car, your apartment, your bike space, in ways that before were never possible. And we’re still at the very beginnings.

Bob called this the gig economy. Greg, you said the sharing economy. I mean these are fighting words in parts of the Bay Area or New York. What we even describe this moment, is it gig? Is it on demand? Is it sharing? Is it 1099? Is it, as Sarah called, the freelancers? You know, so we’re at a good stage when we don’t even know how to define what we’re talking about.

We also know, and from Alan’s comments here, we’d have only the very beginnings of the sizing of this. You know, is it hundreds of thousands to a million? Or, as Sarah has pointed out, are we talking about 50 million workers that are all part of at least a broader category around the contingent workforce? We do know that work—and this, I think, we have to be—I don’t want to be a Luddite, I’m somebody who used to be in technology. But you know, there’s a big, big question here. As work gets broken into more component discrete parts, and the market in effect markets out these discrete parts, what that means to the folks who are doing the work, and what that means to the—what I think has been one of the most important parts of America’s overall social contract, and that is a social contract between a worker and their employer.

I do think, you know, what has guided me as I’ve thought through this, is a couple of goals. One, we do not want to squash the innovation that’s taking place. People love the innovation from people who use these services to many of the folks who are working in this area. We also need to recognize, and I think as a policymaker I haven’t appreciated this, because I have spent a lot of time doing roundtables around Virginia and around the country with folks who are working in

this sector of the economy, I don't think as a policymaker we've ever put enough full value on flexibility. And increasingly complicated time, flexibility is something that workers really value in a way that has never really been factored in before in traditional economy.

I also think we need to recognize, not just for this sector of the economy, I would be as bold as to say in the bigger part of the contingent workforce that Sarah talks about with the freelancers, is that we need a social contract. We need a social contract because it's the right thing to do. But also because, as we have a growing component of our workforce in this contingent workforce, if there is no social contract, there's a huge free rider problem. So the people who are doing extraordinarily well, if there's no social insurance at all, when this stuff hits the fan, as it always does, people will go from doing very well back down to the most basic government assistance programs. And, in effect, the taxpayer picks up all the costs.

So, you know, where do we head? And I want to commend Alan and Seth for, I think, their very good work. As Alan has already mentioned, they've managed to piss off both sides with their project already, which is a pretty good starting place to be. And I think they've got some very good initial thoughts about the transportability, and trying to think about this in a third classification.

I'm not sure where this is going to end up. I do know that the binary choice that we have between 1099 and traditional employee is not where we're going to end up. And particularly when we think traditional employee with the Cliff Effect, with ACA, and with the ability of algorithmic scheduling, it's not like traditional employee is the nirvana state, for many folks particularly working in low and moderate income jobs anyway.

So where do we go from here? A couple last points. One is, I think we ought to—and I think Alan and Seth's work has viewed this through a lot of the traditional lenses. I do think this is a really incredible opportunity to us policymakers, think tanks and others, to think broader. You

know, where does training fit in this category, for example, as part of a social contract? You know, is there—the whole notion, we think about unemployment.

But if you are a on-demand worker, and you've got four different revenue sources, you know, is there ever going to be a notion of unemployment? Yet, if there's a blizzard that comes, and you can't work for a week, you're up the creek. So, you know, should we think about not unemployment, but should we think about income insurance as what the new social contract ought to include?

So this really, we need to be, I think, broader in our thinking. I also think we need to recognize that there could be other models. I mean we've thought about kind of a traditional joint contribution model. I definitely believe the platform companies need to contribute something. Or could this actually be driven by consumer-driven? Could a consumer who's happy with that AirBnB host or that Uber driver or that handy worker, you know, make a contribution that might be matched by the platform company, that again could be run by an independent third party? And I think, you know, and in some of Alan's work, he's talked about buying into some of the traditional state-run systems, I think we need to think about independent third party runners of some of these benefits.

Finally, I guess, two comments. One is, as someone Greg mentioned as he was coming on, you know, Senator, do you have some legislation ready? You know, ten months ago I thought, gosh, you know, get in here, put a bill marker down, get ahead of the curve. This is an extraordinarily complicated. And this maybe a newsmaking—If we legislate too quickly, we're going to screw it up. And what we have not allowed, because of litigation threats and regulation threats, we have not allowed enough pilots, the same kind of innovation that created a whole series of platforms, that most of us from traditional business couldn't even imagine a decade ago. We need that same innovation in terms of what social benefits and what the social contract could look like.

And how do we give some safe space to create some of these pilots, perhaps in select markets, to see what the market could create? And finally, to close where Bob admonished us at the front end, you know, if we get this right in an area where we can't even define what we're calling this space yet, there is a real opportunity to position our policy choices, not on the traditional Democrat-Republican, liberal-conservative, left-right continuum, but much more frame this in a future versus past.

And for all of us who kind of want to lean into the future, all of us who want to promote the innovation, promote the flexibility, but recognize if we don't make sure that there is a fair deal for all the folks who are working this space, that we're going to create something that is going to lead to further fragmentation of an already frayed social contract, we all ought to be rowing in the same direction. And again, commend The Hamilton Project and Alan for putting down the first, I think—Alan and Seth for putting down the first great marker in this space.

GREG IP: Thank you, Senator. Chairwoman Ramirez, the Federal Trade Commission stands on that frontier between the sharing economy and the consumers, the people who benefit or utilize these products. Can you talk a bit about some of the policy and enforcement issues that protecting or helping consumers interact with this new sharing economy poses for you in the Federal Trade Commission?

EDITH RAMIREZ: Sure, Greg, I'd love to. Let me take a bit of a step back. So, as I think most of you here know, the Federal Trade Commission has a dual mission. We promote competition and enforce the antitrust laws, but we also protect consumers. So I think that makes the FTC very well positioned to look at some of the high level macro issues involving the sharing economy. So, as you can imagine, we have a very deep interest in this.

We're mainly a law enforcement agency, but also we have a very rich history, and it's a priority for us to engage in research and study, and also provide and lend our expertise in the areas of both competition and consumer protection, to other policymakers at the state and local level who

may be dealing with these issues. So I'd like to just take a step back and explain the importance of the sharing economy from a macro perspective.

We certainly see the sharing economy growing in importance. And let me just give you a few numbers to illustrate that. It's emerging in a diverse set of sectors. So there's a 2014 PricewaterhouseCoopers study in the UK that estimated revenue growth in the following sectors: peer to peer finance, online staffing, peer to peer lodging, car sharing, as well as music, TV and video streaming.

So this PwC study estimated that these five sectors alone currently account for global revenues in the range of \$15 billion dollars, and that that number could explode to \$335 billion by 2025. And to give you just another data point, according to this study, AirBnB averages around 425,000 guests per night, which works out to more than 155 million guest stays annually, 22 percent greater than Hilton worldwide, just to give you a sense of the impact here.

So we're really interested in this topic. We held a workshop this past June because we felt that, given our role, we were a good convener to take a careful look at the issues that arise in the context of the sharing economy. From a competition perspective, we see that the sharing economy has brought what we call disruptive competition. In other words, there are new sources of supply. Consumers are getting access to products and services in a way that's vastly different from traditional methods. So this we see as a very positive thing for the economy. It's expanding consumer choice. It's lowering prices.

At the same time, we also see these new business models really taxing existing regulation and making it difficult for regulators, not only here in the U.S. but around the world. Question how it is that traditional regulation might apply to these new models. And, of course, they do implicate and raise new sets of consumer protection and other consumer related issues.

So we think that it's important for policymakers to be looking at these issues very carefully, to make sure that they don't hastily over-regulate, because we want to encourage innovation. We want to encourage these new forms of competition, because ultimately that is meeting consumer demand, and that's advancing consumer welfare, which is a touchstone of our work at the FTC.

So what we—a lot of what we've been doing recently in this area has been to lend our competition and consumer protection expertise to local regulators, local policymakers, encouraging them to be looking very carefully and ensuring that they take a targeted approach if they do feel that there is a consumer or health and safety issue that needs to be addressed, if they take a very targeted approach in regulation in order not to stymie the positive benefits of the sharing economy. So that's what we're urging. We're lending our competition expertise.

We also do a lot of work in the privacy data protection arena. We also find that these new models, precisely because they're taking advantage of technology, are oftentimes gathering significant amounts of consumer personal information. And we also caution and urge companies to make note of that, to only collect the absolute minimum amount of information that they need, and to ensure that, to the extent that they do have personal information, that they protect that information. So we feel that we can provide guidance to local policymakers on that front as well.

So our message is, think before you take action. Our fear is that sometimes you have incumbents in certain markets who have an ability to influence local policymakers. And they simply want to entrench their position and create barriers to new forms of competition that can ultimately help consumers. So that's the macro perspective from the FTC.

GREG IP: Thank you very much, Chairwoman. Gene, I know you've been thinking a lot about this recently. I'd especially love to hear from you on how we set about this question that Senator Warner said, how do you—so you can define the problem. I mean are we trying to fit a square peg into a variety of round holes?

GENE SPERLING: Well, you know, first of all, you know, thank you. And there's been a lot of good points made already. But let me start by mentioning a couple of divisions that maybe help one crystallize their thinking a bit. We often use the phrase “sharing economy.” And yet, even within that phrase, there are divisions. So, for example, I'll give one potential division that's helpful, which is to think of it as the—that part of it is the sharing or work economy. Part of it is the sharing or selling your asset economy.

Now the interesting thing about both of those is they both have significant policy issues. I do some consulting for AirBnB. Their issues, policy issues are probably not as much the issues we're discussing today, but they have very serious issues that they have to work through, in terms of offering this benefit, but not, for example, doing things that might reduce the amount of rental housing, etcetera.

So I think that, when we're looking at this, it's a mistake to just kind of call, think this deals with everything, particularly because you do have at least that division of sharing, selling an asset, deploying an asset, versus sharing your work. I think it's the latter that we're really focused on today.

The second division within the kind of sharing your work economy is that I think that there are some things that we are talking about today that are inherent to the nature of an employee/employer relationship, however you define it, whether you define it as a platform or contract. So, for example, things like control of your schedule, your time, setting the price, sexual harassment, those are all things that you have to deal with by definition within the employer/kind of employee relationship.

There is a second category which is really the kind of more broad benefit—where I take benefits that have traditionally been associated with employers. And the reason I divide those is because, while one can try to help align the new, you know, changes in the economy through the employer/employee classifications or relationship, there is a lot more options in the second

category. And those options include things like the Affordable Care Act, or had you passed—had we even passed, you know, a broader or like some countries would have a single payer, where, in a sense, the employer becomes less essential to the benefit itself.

As probably people here know, I have long pushed a universal 401(k). The idea is that the sense of getting a match for investing or even having a default towards investing is available to some people in an employee relationship. And yet that could be something that we make available to everybody in a way that it's not inherent that it has to be done only through the employer/employee relationship.

If you look at something like college opportunity, which is another essential thing to economic dignity and middle class families, we don't—we don't call that portable, we don't think. We do quite a lot, and we could do more. But it's a bit more between the government and the citizens. So I do think it is worth kind of thinking about those benefits, thinking about that division between what's inherent and what's traditional, and that there is a lot of potential creativity in the second category.

The punch line there is that people, I think conservatives will reject government types of things like the Affordable Care Act on the idea they're big government, etcetera, when, in fact, the Affordable Care Act allows people to start their own business, even if they have a child who has an illness, etcetera, it can allow more dynamism, more entrepreneurship. So what may seem traditionally big government can actually help provide a certain benefit or security and may allow for more dynamism and change in the economy.

Now the final thing is to say, you know, about the particular proposal. And you know, I share some of the thoughts that Senator Warner had. When I used to, for many years, help run the National Economic Council, we always thought that often you couldn't get people focused. And if you put down a specific proposal, you just do it to kind of get everybody to focus their mind. And I think what Seth and Alan have done is, you know, a really—These are two brilliant,

incredibly dedicated public servants and academics and intellectuals. And I think what they've done is they have kind of, at this moment in time, if you had to do a piece of legislation, what would it look like? And so I think they deserve a lot of credit for going through this exercise.

But, like Senator Warner, I'm not ready to endorse right now. And it's not because of the, you know, that it's not a significant effort. But, you know, but a few points. One, it's just moving very fast. This is moving very fast. And I don't feel like we know enough about how things are going to legislate yet in this area.

Secondly, and I think this is really important, it goes to the question you asked, I'm not sure about the divisions we are setting up. I mean I think, to be honest, yes we're very into the gig economy, and we're very, like, "Oh my God, these are these issues." And then we have to focus on it. But I'm not sure that this is the key classification difference. You know, I got news. Taxicab drivers were not treated well before there was ever Uber. They didn't have benefits. Their pay wasn't terrific. They didn't have healthcare. We're suddenly obsessed with it, now that there's the sharing economy.

How about household employees? How many forums have been about the protections for people who have household employees? Now they have a very direct employer-employee benefit, but they've often been left out of the social compact. Construction workers who are nonunionized, etcetera.

So, what I like is that I think this rethink about where the social compact in the light of change is important. But I'm not sure that this is the exact division that is the place that we should focus a huge legislative effort, because if we look from the household employees to nonunionized construction workers, we might find there are other divisions and policy solutions that reach these goals. And I think we need to take a look at that.

Third issue, and you know, I've tried to talk to people on all—you know, a lot of different people. But I think, you know, a point that is made by, you know, some of my friends who often are known to look at very much for the worker issues, Nell Epi who is here today and others, is that there are a lot of these things where you probably, in the existing framework, would look and say, “Just because they're using an app doesn't mean they're not an employer-employee relationship.” And you don't want to, you know, let this take away from analysis that I think in cases, as I think with Fed. Express, where they were an employer-employee, and all their modernization and, you know, newness did not take away from that.

And fourth is related to that, which is—and this is, I think, a little bit where you do the Hippocratic Oath, and you have to take your time. We're all here on the assumption that really cool sharing economy companies are all going in this direction. But that's not necessarily the case. You've seen, in the last several months, Instacart, Ship, Lux, Sprig, four companies that do things from helping you shop, to delivering healthy meals, to—Lux, you know, does valet parking, etcetera. In all of the cases, they have actually made decisions to move towards a more traditional employer-employee relation, because they actually, like many people, companies, ant to control the end to end experience. They want to control the quality, the training.

So I worry a little bit that, in a situation where we don't know how this is moving, and maybe some companies are going to find it is to their advantage to have a more employer-employee relationship, not out of their own business sense of controlling the quality and consistency of the service or product, that they may be going in that direction. I worry a little bit about suddenly say, “Well, you don't really need to. We can provide another area that maybe provides less good benefits for the employee.”

And then finally, I think that I want to think a little bit more within the structure Alan and Seth have laid out about what I would protect or have inherent, and what I wouldn't. There's one thing they said that is absolutely correct, which is that in a situation where you control your hours, it does not make sense to have overtime protection, obviously. If you can decide you want to work

12 hours a day and zero the next or etcetera, if you truly have control, not just the appearance but true control.

But I don't think I would have thrown over minimum wage quite so quickly. I think one can imagine a platform where the workers work, where it becomes very clear that the people engaged in that, by any construct, would work under the minimum wage. And so I understand these things are complicated. But I would not be as quick. And I realize they had to in the nature of their paper make those decisions. So I'm not blaming them. I'm just saying that policy-wise, I could imagine.

UI, the dislocated worker program right now, does allow people who are self-employed. Is it impossible that emergency unemployment insurance could look for people hurt in the market, etcetera? And I think we'll have to think about how we think about this when paid family leave becomes an issue.

So I think it's incredibly thought-provoking, excellent paper. But I'm going to, you know, reserve that, I think the world is moving fast, and I for one do not feel I could make a call on many of these issues yet.

GREG IP: Thanks very much, Gene. I want to actually go back to something actually you yourself said about moving too fast, and what Senator Warner talked about, that we don't know how to define what we're talking about. There seems to be a presumption, even in the existence of this panel, that there is a job for regulators and legislators to do. But I want to be a devil's advocate and say maybe there isn't. Because you know, Alan, in your paper you talked about how we don't want these companies to be exploiting regulatory arbitrage. But I say that maybe sometimes regulatory arbitrage is a good thing, because regulations have sprung up in a way to deal with incumbent business models. And what entrepreneurs do is they find ways to provide services that slip between the cracks of regulations, and they actually do a better job.

It is possible—I mean Uber itself started out as a regulatory arbitrage. Their drivers don't need to invest large sums of money in taxi medallions. You could argue that if the internet had been subject to fixed line utility regulation from the start, it wouldn't be what it is today. If the Federal Aviation Administration were to regulate drones as fixed wing aircraft, a lot of interesting business models wouldn't be talked about now.

So let me just put that question to the panel. Should there be a presumption as I think, Chairwoman you said that we do no harm, and therefore just let this thing ride and not presume that we need to actually act?

ALAN KRUEGER: Greg, why don't I start? Because I think it goes to the core of many of the comments. Seth and I very much believe that the social compact that covers workers is in our country's interest. It was developed over a century. It's improved living standards. It's made us a stronger country.

Gene wants to extend as much of that to the workers that we think fall into this gray area, and so do we. We want to extend as much of it as makes sense. You know, take the minimum wage. If it could be applied, I think it would be just fine. But if somebody is working for two employers at once, it's not obvious to me how you're going to administer the minimum wage. If you could do it, I think it would be great. If you're going to say, "Well we're going to do it for the six minutes that someone has a passenger in the car," then it's hollow, because it's never going to be binding. It's never actually going to help anyone.

So I think we, when it come to regulatory arbitrage and disrupting the social compact that we think is good for this country, I think that's bad. Just like if AirBnB does well by regulatory arbitrage because it avoids paying occupancy taxes, and that's how it does better than Hilton, I think that aspect is also wrong.

And I do worry a little bit about moving too fast. What I think is the scope potential for something like what Seth and I have proposed, is a little bit like the history of workers compensation insurance, where we had a system which then broke down. It was not in the interest of employers or of workers. And it led to a grand bargain where employers gave up the—employers were automatically liable, but it was limited liability.

And Congress may have to act if the courts all across this country reach varying and confusing decisions. And it's quite possible that under some laws, workers will be classified as independent contractors, some as employees. It's quite possible, in some jurisdictions, courts will say, under the same law, that their employees and others are independent contractors. And that's not a healthy environment for the economy.

So where I think I wouldn't suggest that Senator Warner go back and drop our proposal as a bill, but I do think it's worth thinking about what happens if our current system is falling apart at the scenes? And what we proposed is not necessarily supporting this particular model. I would say what we proposed is rather agnostic about whether companies should choose an employee relationship as opposed to an independent contractor relationship. If some of the companies that currently have treated their workers as independent contractors, and then they're required to treat them as independent workers, think, "You know, we do value the control," and they move over to employee status, I think that would certainly be just fine.

So I think that this does offer the kind of flexibility for companies to survive or for companies to succeed, based on the product they're producing, and not based on taking advantage of ways of escaping the social compact.

GREG IP: Okay, we're running a bit behind schedule. So I'm going to go to the other panelists just for a minute or two each.

MARK WARNER: Let me take a quick crack at it. One, I agree with Alan that leaving this to a thousand court decisions would be crazy. Secondly, you know, I get—as somebody who was taking advantage of gaps, in terms of my business career, and as somebody who’s been in business longer than politics, I think too much too quick on regulation, I get it. But if we suddenly turn a blind eye and tomorrow we’ve got 60, 70, 80 percent of the workforce in a contingent workforce, and no social insurance at all, the irony, from those who say they're conservative is, what you're going to end up doing is, putting more and more burden on an already feeble government entitlement system that is underfunded. So you might end up growing government rather than decreasing government, because you will have no shared responsibility kind of eating your broccoli or in between, in terms of forced social insurance.

Third is, I think that, you know, we do need—and Gene you're right, there's a difference between selling your labor and your stuff, but I believe everybody along the continuum, if you are 40 percent of your income is coming from AirBnB and 20 percent from Uber and 40 percent from Handy, you know, I do think there needs to be some level of joint contribution from all of those platforms along the way.

What I find right now, as you’ve talked to the platforms, is—you know, and some of this is because of threat of litigation or regulation. Some of it is, I do believe many of these are run by millennials for millennials, who, as an age cohort, I think do want to work for and work with more socially responsible companies. They are being—They are not able to even try new models because of this threat of legislation.

So the ability to have more pilots and more innovation out there in terms of the same kind of disruption that’s come to some of these industries, that same kind of massive disruption coming to the whole notion of benefits is a real cool opportunity. And we ought to take advantage of it. And the final point is just I know there are some who think, “Oh my gosh, if we create this third category,” and I do think we will ultimately end up with more than a binary choice, you're going to see more and more firms offload to get into this different category.

The flipside may be also true that you may actually say a third category that could seep into the balance of the contingent workforce a whole group of folks, ala taxi drivers and others, who have nothing at this point. This—This new category could go in both directions, actually.

ALAN KRUEGER: It would require the taxi drivers to [00:52:35] independent contractors.

GREG IP: Chairwoman, would you want to add to that a minute or two, especially because you talked about the do no harm, I think.

EDITH RAMIREZ: Yeah. Look, you know, we see a lot of very good things from these new business models. But at the same time, we cognize that there may be a need to have regulation. So our message is simply, take a hard look, study, evaluate the competitive implications. If there does need to be regulation, make sure that that regulation is in fact targeted to achieve the intended aims and that it isn't over-broad so as to stymie the benefits of these emerging business models.

GREG IP: Yep, Gene, very quickly.

GENE SPERLING: Very quickly. I do think—I don't think leaving room for regulatory tax arbitrage is the—is something we should be for in the interest of innovation. We want—What we should be aiming for is a leveled playing field, so that people are competing based on the services, the product, etcetera. So I don't think that that that—I don't think sharing economy companies should be at a disadvantage or an advantage from on the regulatory tax side. I think the goal should be a level playing field.

And just quickly, on the moving too quick, it's not that I think we should move fast to deal with these things, because I think our problem is that, too often, one side of the spectrum is ever—you

know, ever wants to have government come in and change and protect workers. The other side, you know, maybe my side occasionally wants to think that change can be stopped a bit.

So the fight to figure out how you fit the social compact to new and changing circumstances, I think is tried to do immediately. I'm being honest. When I say moving too fast, it's less more that the whole thing is moving too fast, in that I personally know that to have a major federal labor law reform effort would be kind of a once in a generation thing. And I personally don't know the right answers enough, and I'm not convinced anyone does, to launch that effort quite yet. But I do think these things provoke the discussion, excellent papers like they do, to provoke the discussion, sharpen all of our thinking.

GREG IP: There were question cards under your seats. Have we got any questions already? Okay, do you want to bring those up to me? Oh, okay. Thanks very much.

[pause]

GREG IP: This is a good question. The assumption behind a lot of this work is that these workers have this as their only job. But if I use Lyft to drive before and after my regular job, how does this impact me, you know, if I'm suddenly categorized in some new category that you've talked about.

ALAN KRUEGER: That's sort of what we have in mind in our proposal, is someone who may have another job, who values the flexibility when they have some spare time, to provide labor in the labor market. And at the same time, we don't want the intermediary to free ride off of the other employer. So we would require, for example, a contribution towards the ACA. And in case where somebody got health insurance on another job, you don't want a new company to grow because it figures out a way of avoiding the Affordable Care Act.

GREG IP: Anybody else want to?

MARK WARNER: If you believe this is part of a continuum of a fundamental transformation of work, which I'm increasingly believing, that we are taking work and breaking it into more and more discrete tasks. And the market is going to create a market for discrete tasks being serviced rather than, I'm going to enter into a long-term, multiyear relationship where I employ a person fulltime for all their—I think there's a bigger transformation taking place driven by technology, driven by globalization, driven by flows of capital, and getting this right could add implications way beyond just this notion of what we're calling gig on demand sharing economy.

GREG IP: How is the gig economy different from other older alternative forms of work? Now I'm actually going to exercise a moderator's prerogative and reword this question to the question I would like to ask, because I think—because it actually touched on something that was on my mind. The Hamilton Project has a nice background paper that shows that if you define contingent work broadly enough to include like day workers, part-timers, self-employed domestics, that's 30 percent of the economy. The gig economy, at most, is one percent. And as we've been discussing, we don't have good numbers. Are we obsessing over what is perhaps a somewhat, you know, bespoke bit of the contingent economy, and not paying enough attention to a lot of people who are working in very different relationships who might actually be more in need of some sort of attention from policy? Does anybody want to tackle that?

MARK WARNER: One of the more interesting folks that I have talked to in this journey was the folks at Kelly's Services, which used to be called Kelly Girl—I'm aging myself—which that point was supposed to be secretarial part-time. They employ about a million people. Half of them are folks, many of which are PhDs, many I didn't realize, many of the scientists who walk into NIH each day are independent contractors working on the NIH who, by choice, moved into this category.

The other half are folks who are kind of contingent workers, many of them in need of cobbling together a serious service to make things get by. I do know that there are a whole lot of workers

who are probably looking at this discussion, high falutin discussion and saying, “Gosh, trying to cobble together three or four jobs, that’s nothing new. That’s called being poor.” And so there is maybe more attention, and I have had some of the folks on some of these platforms say, “Why are you looking at us?” Well, you know, if you're getting multi-billion dollar valuations, you're going to get this kind of attention.

And I do think this wave is going to exponentially grow the hockey stick that Alan pointed out. I see nothing that’s going to slow that. And trying to get it right now, before we end up with 60, 70, 80 percent of the workforce in the contingent workforce, I think is important.

ALAN KRUEGER: Greg, let me add to that. There are not legal issues for, say, part-time workers. They're employees. We would like to do it—when I worked in the administration, Gene worked in the administration, we would—we made proposals to try to improve their circumstances, raise the minimum wage is an obvious thing. Congress hasn’t been able to do it for nine years.

I don’t think that it’s saying—I don’t think it’s diverting us from addressing some of the other problems which are separate problems. Sure, workers get misclassified who should be employed as independent contractors. We don’t need a legal change to address that. We need better enforcement of the labor law. So I don’t think that we lack capacity. By the way, this is the first time I have ever been on a policy panel where I'm the only one who didn’t say further research is necessary. [laughter] Academics end every paper with, “Friend, further research is necessary.”

GREG IP: Somebody said that six months when you responded.

ALAN KRUEGER: I don’t think that the problem is, we don’t have solutions to some of these issues. The problem is, Congress hasn’t addressed many of them where there are solutions. It gets back to what Bob Rubin said earlier, if Congress were to act, we could solve a lot of these problems.

MARK WARNER: I'm ready to act. [laughter]

ALAN KRUEGER: And I do think, as Senator Warner said, we are moving more to disintermediation. You can think of it as reverse coast. Ronald Coase, the Nobel Prize Winner tried to explain why there were firms. Because companies liked—companies benefit from the control, from the direct supervision. It's an oasis from the market. Because of the technology, because of globalization, both online and offline, that's why our proposal is for both online and offline workers who fall into this kind of category, which could be growing quite rapidly.

So I don't think it's premature for proposals to be discussed to address this problem, and I don't think it diverts us from other solutions to other problems that we have.

GENE SPERLING: I do think that the current situation, and the situation identified in the paper, does focus in on a particular issue where somebody has a distinctive amount of control perhaps on price or schedule or whether you can be on a platform, as they said. And yet, a person can control their hours and when they work. And that does create a distinctive issue. And I think we do—it is right to try to think policy-wise how to deal with it.

The place where I worry a little bit is that, you know, I think we've all had that experience in policy, where we think we've zeroed in on a particular issue, and somebody comes in, drops in at the White House, and they say, "Yeah, that's a problem. But look at this issue here. Or look at the situation of household employees, or etcetera. Here is a solution that maybe, you know, instead of zeroing right in, here's a couple of solutions that might have broader impacts, that would maybe perhaps both deal with people who might be in this new kind of sharing economy, but might also deal with other people who lack power, bargaining power, protections in the workforce right now."

So when I say going too fast, part of it, for me, is I'm not quite clear if we're going to have a rethink, what exactly should be the highest priority on that rethink.

GREG IP: On that note, I think I'll try and get us on schedule. So I'll wrap it up there. Thanks a lot for a great discussion. Please stand by. We have another great panel coming up.

[applause]

END OF PANEL 1

**PANEL 2 DISCUSSION: A PROPOSAL FOR MODERNIZING LABOR LAWS FOR
21ST CENTURY WORK: "THE INDEPENDENT WORKER"**

DIANE SCHANZENBACH: So thank you very much. We're going to transition directly into the next panel, because we've got a tight timeline this morning. I'm Diane Schanzenbach. I'm the Director of The Hamilton Project. And I wanted to take this opportunity to remind you that there are cards beneath your seats. If you have additional questions, I'll ask those at the end.

Let me briefly introduce our second panel. First to my left is Craig Becker. He's the General Counsel of the AFL-CIO. Prior to assuming this role, he was a member of the National Labor Relations Board. And he's also had a distinguished career in both the legal academy and as a practicing labor lawyer.

Next to Craig is Marcela Sapone, cofounder and CEO of Hello Alfred, which is a home operating system that pairs clients with a dedicated home manager. She's a thought leader in the sharing economy and was named one of Goldman Sachs' "Most intriguing entrepreneurs" and was the 2014 winner of Tech Crunch Disrupt San Francisco."

Next to Marcela is Arun Sundararajan. He's a professor of information, operations and management sciences at NYU's Stern School of Business. Next to Arun is Sara Horowitz. She's the founder and Executive Director of the Freelancers Union. And for more than 20 years, her union has been connecting freelance workers to group rate benefits, resources, community and political action.

And finally, on the end, is our other author, Seth Harris, who's a distinguished scholar at the School of Industrial and Labor Relations at Cornell. He's a labor lawyer and was formerly the U.S. Deputy Secretary of Labor in the Obama administration. And he served for six months as the acting U.S. Secretary of Labor.

I'm going to invite Seth to the podium for his initial remarks.

SETH HARRIS: Thank you very much, Diane. Good morning, everyone. Thank you to The Hamilton Project. Thanks Secretary Rubin. What a pleasure it is to be with so many old friends and make some new friends. And I want to especially thank my very, very old friend, Alan Krueger, for including me in this project.

So this slide shows the basic legal structure for classifying workers under American law. The system wasn't designed in this way. But if you step back from any particular statute or any particular rule, you can see that it's the story of the American social compact around work. The law imposes a social compact on the employment relationship in this way.

Employees make themselves economically dependent on their employers, which is a result of them giving the employer control over their work lives and, to some extent, their economic futures. In return, employers are required to provide workers with a modicum of economic security and a panoply of protections and benefits. And I'll talk about those and list them for you shortly.

Now one critic of our proposal has said that control is not the only factor in determining employee status. And that's a little bit like saying, "I really enjoyed the food except I didn't really like the meal." Control, or in the case of the Fair Labor Standards Act economic dependence, that the economic dependence that flows from employer control is the sine qua non of this social compact.

Now independent contractors are expected to go out and get their own compacts using their individual bargaining power in arm's lengths relationships with other businesses. They don't give away control over their business lives. And so the law doesn't require a return of protections and benefits from the people with whom they do business.

So why do we need an independent worker category? Why not just treat all of these workers as employees? And Alan has addressed the economics of this situation. So let's talk about the legal realm. In the legal realm, the reason is, that we need a new category because these independent workers satisfy some of the criteria for being an employee and some of the criteria for being independent contractors. They are both and neither.

Let me illustrate with reference to an excellent chart on page eight of the paper prepared by my research assistant Caroline Wald. Caroline, where are you? There you are. Thank you coming all the way down from Ithaca. Caroline listed the factors that determine employment status under four areas of law. I'll apply the factors for the Fair Labor Standards Act to the workers who work with intermediaries in the gig economy.

I chose the FLSA because minimum wage and overtime seem to be the issues that are giving the most people the most dyspepsia. But also, the Fair Labor Standards Act is reported as having, described as having the broadest definition of employee in all of employment and labor law.

Every time I say yes, that's a point for employee. Every time I say no, that's a point for independent contractor. So is the work of independent workers integral to the intermediary's

business? Always. Yes. Is the work not necessarily dependent upon special skills? I think the answer there is usually yes. Two for employee. Does the employer provide tools, equipment, and a place to work? No. Usually not. I think you could go so far as to say almost never. Has the worker withdrawn from the competitive market? No. As Alan described, you can work for more than one intermediary, often at the same time, often in direct competition with one another, two to two.

Does the worker have a permanent or indefinite relationship with the employer? No. It's an on-demand relationship, two to three. Does the employer set pay amount, work hours, and manner in which the work is performed? Well the answer is, kind of yes, with respect to pay amount in some cases, no with respect to work hours in almost all cases, half and half with respect to the manner in which work is performed. So let's give a half a point to each side.

Six factors, three and a half point one way, two and a half point the other way. Now the problem is, American law does not have a way of resolving a three and one half to two and one half virtual tie. There is no default rule in American law between employee and independent contractor, although let me just say we suggest in the paper that we need to discuss whether there should be a default rule.

There is no clarity about which of these factors is most important, at least there's a lot of debate about what should be most important. Instead, what we truly get is decisions by judges and administrative tribunals where the analysis is shaped to meet a pre-determined result. Let me say I'm seeing a lot of the same thing from critics of this proposal.

We also get a lot of inconsistency with the same kinds of workers being treated differently under the same law in different jurisdictions and differently under different laws in the same jurisdiction. It's a mess. One of the bad results is that there's a lot of misclassification, both intentional and unintentional. And the workers in the gig economy are especially, although not

uniquely vulnerable, to losing out on the social compact, because they're trapped in the legal gray area.

Now let me just say, you don't have to agree with absolutely everything I just said. You just have to be uncertain about what the correct answer under the law is going to be. And let me phrase it to you this way. As a general matter, in the gig economy, employers do not control whether a worker works, when a worker works, how long a worker works, where a worker works, or the manner in which a customer is provided with service or the duration of that service.

Ask yourself whether you have ever seen an employment relationship that can be fairly described in that way. The reason that you can't is that employer control over those issues and others is central to the employment relationship. Very quickly, here is how we solve the problem. As Alan described, we would read independent workers into the social compact by ensuring that the law imposes certain benefits and protections, but also that they have the opportunity to accumulate the requisite bargaining power to acquire other protections and benefits where existing laws just don't make sense.

I'll quickly cover a very few. First, independent workers must be allowed to organize and bargain collectively, given the serious problems with an ossified private sector, labor law—hat tip to my friend Cindy—we consider including them under the NLRA to be a fallback position. The big barrier here is antitrust law, as Alan described. Our proposal would move antitrust law out of the way entirely and let these workers organization in whatever manner they see fit, using whatever technology makes sense, into whatever kinds of organizations they want to form.

Elicit discrimination is always wrong, and it's completely inefficient for the labor market and workplaces. The problem is, as Alan hinted, the only tool that's currently available to people who are not employees is a law that protects only against race discrimination, and not all race discrimination. And it doesn't protect against sex, disability, age or religious discrimination, among other kinds. The shortest distance to success here is simply to include independent

workers in all of the workplace anti-discrimination laws that currently exist and we think actually work pretty well.

As I just described, one of the distinguishing characteristics—and Alan also talked about this—one of the distinguishing characteristics of the gig economy is that it is very difficult to distinguish work from non-work and to assign responsibility for a worker's time to a particular intermediary. Sometimes that can be impossible. Sometimes it's just very conceptually difficult. As a result, we would not have the law impose a minimum wage or overtime requirement or require participation in the UI system. We would, however, allow employers to pool workers, to offer private unemployment or wage smoothing insurance—Senator Warner referred to it as income insurance—it's the same concept. And we would certainly encourage bargaining between independent workers, their organizations, and intermediaries over pay issues.

And finally, I want to acknowledge—and Alan hinted at this, and that's where he left it to me, worker's comp is a very, very difficult issue for us in this space. Partly it's difficult because these workers don't work on the premises or use the equipment or supplies of the intermediaries with whom they're doing business. And the premise of the worker's comp system is that that is true. That's one of the premises of strict liability for the employer.

We also worry about concerns of adverse selection, that the riskiest people would opt into a voluntary system. So we tentatively, in the absence of worker's compensation coverage, workers can sue in tort. I'm not arguing that tort is an efficient system. I think that Richard Posner would both die and turn over in his grave if I did. [laughter] But we think that allowing workers to sue in tort might create the kind of interim effect you need to actually get genuine reform. But employers should be permitted, through their pooling enterprise that Alan described, be able to offer worker's compensation to all of their workers. And, if they do that, they should be able to ask in return that they be exempt from torts, that the workers individually waive their tort suits with the employer.

Let me just say, there is a rather serious problem in Texas and Oklahoma, which I view as outlier states in this regard, where workers are getting cheated out of fair tort recoveries because of ERISA, the Employee Retirement Income Security Act. That problem would not arise for independent workers because they're not employees and they are not covered by ERISA.

So before I close, I want to go back to restating what it is we're trying to accomplish here, and suggest to you that this perhaps should be the standard to which proposals and critiques of proposals should have to live up. We want to see efficient labor markets. We want to remedy the consequences of unequal bargaining power in the labor market and work relationships. We want neutrality to the extent possible to avoid regulatory arbitrage. And we want to preserve and extend the social compact.

So, as we discuss these proposals going forward, we have laid out our principles for moving forward. And we hope that we can live up to those principles for you. Diane, thanks a lot.

DIANE SCHANZENBACH: Thanks Seth.

[applause]

DIANE SCHANZENBACH: All right, I want to turn it over to the panel. Sara, I want to start with you. From your perspective, organizing freelance workers for more than 20 years, what benefits and rights are most important to workers in this sector of the economy? And how does this proposal do?

SARA HOROWITZ: So first of all, it hasn't been over 20 years. I just have the great need to say that. [laughter] So before I say that, I'd say like one great insight in organizing freelance workers or really organizing any workers is to really think about how—how do you get into this whole organizing thing anyway? And in short order, I would say we're here, we're looking at this thing called the on demand sharing gig economy. And it has such great parallels to, let's say,

the building of the railroads of the 1880s or whenever that was, where you needed a lot of capital, and you needed to be pretty big business to be able to lay down track and build those trains and run them across the country.

And so it was no wonder that the trains and the people who built them were going to be the ones who were going to set down the rules and were going to raise the questions and the issues about what they needed to lay those tracks and get those trains across the country.

And I think that the debate right now, as we're framing it, is very much about, here we are, in this new economy, and to be clear, the ones that are starting the agenda understandably are the ones with the capital who are the business, who are starting to run their businesses, and are starting to say, "What do I need to run my business?" And it's now clashing with a bunch of different cultural elements.

And so in organizing Freelancers Union, we start with the conception of, what do the workers need in this economy? And that we take it as the frame that it's about episodic income, because your income is just no longer predictable. It goes up, it goes down. And so one of the most important things is that we have to not wait for business or for government to tell us how to do it, but very much say to workers, "What is it that you need? How do you organize and start to build out?" And not get too worried about, what will be the classification?

Now that said, I think it's very important to start these conversations so that we start to get a sense of it. So to be—So forgive for answering this in a very long, I give two to the others. I think what we want to start to do is look at how do we think about a new portable benefit system? How do we make sure that, as people are going from so many jobs and gigs, the workers can decide who's going to be their representative? Who's going to hold that? Who's going to hold those benefits and keep track of them and have the argument?

So I think it suggests that we now are in the public policy 2.0 realm where we're now thinking about the workers, the workers' organizations, and how that's going to really start moving us in building the fair pieces of this next economy.

DIANE SCHANZENBACH: Thanks. Marcela, I wanted to go to you next. Somewhat unusually for this sector, Hello Alfred hires all of its home managers as paid W-2 employees. How did you come to that decision? And how has it impacted your business?

MARCELA SAPONE: As discussed, when you kind of look at these rules, we followed each of them and said, "Where do we fall?" And we were 50/50 in terms of 1099 or W-2. So we had to make a decision, and we were motivated in two parts: one, what was the best business decision in terms of our value proposition? And then two, what was the responsible thing to do? Because we wanted to be a good actor.

And I think the core difference between 1099 and W-2 is not even the control or the rules, but is three things: it's protections, benefits and training. And when you have all of those things, you have a good job. And with more and more of my peers in the Silicon Valley or startups, essentially starting businesses very, very quickly, with very little resources, which more than ever are not just online businesses, but are actually online to offline businesses, we are creating really large companies, very, very quickly, and not completely educated on what it means to be a good employer or to create a good job.

And we kind of started this journey trying to make the right decision. And it's been very, very challenging. It's very difficult to be a W-2 worker in a world in which we have many things that are flexible. So, to give you context, my business has everything to do with work. We offer a house manager who helps coordinate basically your to-do list and services that are coming in and out of your home, so things like grocery shopping, organizing a babysitter, home maintenance, dry cleaning, picking up packages and prescriptions.

And ironically, what it does is it allows many people to stay in the workforce, predominantly women. So that's like another face to this entire discussion. It's a prism. It's about work and who's staying in the workforce. So we're allowing people to have more decisions about how they spend their time, because they are supplementing their life with help provided by Hello Alfred. And our home managers have dedicated customers that they're visiting every week.

And so for us, it was really trying to figure out, how do we provide all of those benefits, protections, and the training to make a good job? And we have had to cobble together a patchwork quilt of insurance that does not exist for any other employer out there and is a very small company. We're only one year old. We are close to 200 people in a year. So that's a lot of responsibility. And we're having to kind of go through the dark and make some really hard decisions.

DIANE SCHANZENBACH: I think I speak for a lot of the people in the room that we're looking forward to you expanding to Washington sometime in the near future. Could you say anything about, is there something different about your business model? Could other gig economy employers make the same decision as you've made?

MARCELA SAPONE: Yeah, I think that there's two nuances that I would like to share. And I think, like, the predominant voices idea that the capital is talking, we're kind of moving now to—I don't have a billion dollar evaluation to defend. So we're kind of moving to—let's actually talk about the real underlying issues and not something that sounds good. And the nuances, this dichotomy of flexibility versus stability. And honestly, you can have flexibility as a W-2 employer. Employees can have more than one job. My employees may work for another on demand company. And I think a lot of my peers have said, you know, independent contractors have much more flexibility. They are, themselves, the employer.

But we have to give these employees the tools to turn themselves into the employer, to have access to benefits, to do tax withholding in their correct fashion. And, most importantly, to have

minimum wage requirements and to not be able to change their wages quickly without going through the proper process. And then, when things go wrong, workers compensation, like that's actually quite necessary. And things like travel times. So imagine you are a cleaner or a driver. And you have two jobs. And it requires you to move from point A to point B. During that time, you are not insured, and you are not paid. That doesn't feel very fair if, in fact, you are not selecting those two jobs, but they were given to you by a platform.

So there's lots of nuances, and I think the net result is the gray—wall gray. I think there's the right thing to do, and there's like, we can just follow the law. However, we do need help in making decisions that are not burdensome. So we have taken on, by our calculation, another 30 to 40 percent of a cost basis to the administration of the insurance and payroll, to education and to training. But as a result, we have lower turnover in our employees. We have higher retention in our customers and lower customer issue resolution or issues.

So I think that is making the business case and making sure that [01:24:19] economics, from the very beginning, allow for a fair wage of a W-2 employee, from the very beginning, has been like the core difference between us and other people in our space.

DIANE SCHANZENBACH: Arun, I was going to go to you next. You've said before that this legal dichotomy has made the provider platform relationship much more adversarial than it needs to be. And I think we just heard Marcela speaking about that. That in turn hurts platform culture and so on. What ways does this manifest itself? And does this proposal address that?

ARUN SUNDARARAJAN: Well, I really enjoyed reading this proposal. I read it in some detail over the weekend when it was embargoed[?]. And it was one of the two most interesting things that I've read on sort of constructing the social safety net over the last month. The other is a letter on media that some of you might have seen, that sort of calls for portable benefits that Natalie Foster, Greg Nelson and others have put together.

You know, I think the central issue here, really, is that part of the reason why the relationship might be adversarial is the fact that we're boxing what is a pretty broad spectrum of sort of provider platform relationships. We're trying to box them into these two sort of extremes. And you know, I like the proposal because it sort of puts a stake in the ground and sort of says some really good things about, you know, sort of the fact that we may agree with the objectives of overtime and minimum wage, but we might need sort of new mechanisms in order to sort of fulfill those objectives. You know, the bringing people under the NLRA, sort of the discrimination stuff.

And you know, I particularly enjoyed looking at that table of the different ways in which sort of employment might be defined by different statutes. But to your question, I think that it's important for us to keep in mind that there is a tremendous amount of variety in these provider platform relationships. I mean there's—you know, there are a dozen different dimensions that I have looked at, that you know, where you can see a varying range of independence that a provider that might have. And part of like the difference between AirBnB and Uber's platform culture could be sort of the difference in the level of independence that the providers have on pricing, on merchandizing, on managing inventory on sort of choosing customers and customer service. There's sort of a variety. There's a range of sort of incubation, so to speak, in terms of how much they funded by the platform, how much mentoring they provided by the platform.

And the point I'm getting to here is that we seem to be at the early stages of creating a new model of organizing economic activity. And this is the experimentation phase. We are going to see a lot of different models of provider platform that will sort of be tried by different platforms. The reason why we have sort of like all of this law around employment is that that emerged in the 20th century as sort of what the market wanted as the sort of the most effective, like you know, form of organizing economic [01:27:49], sort of labor provision. But it's not clear to me yet that we have found the two or three sort of models of providing label that are going to dominate the 21st century.

And so you know, I sort of echo what Senator Warner said earlier, that you know, it's—you know, we have to be cautious about rushing to regulation. That doesn't mean we shouldn't put sort of intelligent stakes in the ground. But you know, it seems to me that a lot of the things that I value about my fulltime employment contract with NYU are not government mandated, but are provided voluntarily by the institution that sort of employs me.

It also worries me a little that when I look at your definition of independent worker, I begin to worry that, you know, a lot of people who are fulltime employees like me might start to sort of slip back into that, especially the immeasurability of like, you know, sort of like workers and this blurring between sort of work and non-work.

__: [01:29:00]

ARUN SUNDARARAJAN: Yeah, I know. [laughter] It's—But that aside, putting my personal sort of concerns about that, that's why I say more research is needed. [laughter] But I mean the thing is, that you know, one of the ways in which we can create the space for the market to respond and say, “Well here is what we're going to provide,” and then for the government to be able to say, “Well here is what we want to be part of the social contract that is not being provided by the market,” is to sort of create this third category and say, “Well, like you know, then maybe the platforms are not going to be prevented from doing what they want to do, like training and benefits for retention.” Because of a fear that they're going to sort of be hit with a lawsuit.

But an alternative could also be to create a safe harbor of sorts, where you know, we don't include certain categories of—you know, where we're always sort of seeing like, you know, long before the sharing economy came along, there were a number of corporations that were taken to court for sort of misclassifying employees as independent contractors. I worry that, if we have a third category, that sort of space is going to expand significantly. And perhaps sort of like, you know, an alternative along the way, as we're in this experimentation phase, and as we see platforms, the different platform culture and different relationships, it's just sort of carve out a

safe harbor of sorts, where the platforms can demonstrate what it is that the market can provide freely, because, I mean to your point, Sara, I mean where we're sort of building the railroads here, and we're sort of defining the law based on that. But we're not just building one uniform railroad. There is sort of such a huge variety in the ways in which we're building these different things, that you know, we might benefit from sort of having a—like, you know, a phase of sort of experimentation, not just with the business models, but with sort of, you know, how much is the market going to provide its workers?

Because this is sort of—I'll say one final thing, which is, this is sort of the—This is an early stage in this sort of labor transition in more than one ways. You know, what we've seen so far is the movement of what used to largely be independent contractor work to digitally enabled independent contractor work, right. I mean sort of point about taxi drivers that was made earlier, like they were always freelancers, at least after the mid-80s.

What would, at the very early stages of—and we see sort of platforms starting to do this—is to actually sort of unbundle this work. And that is fulltime employment, and start to create on demand versions of sales forces, of people who do financial analysis, of people who have MBAs and sort of don't start companies, but you know, sort of go to work for McKinsey.

And as we start to sort of unravel that, then we will see a much bigger transition in the workforce. And I'm not sure that we are ready yet to say that this is the definition of what this middle ground is going to be.

DIANE SCHANZENBACH: Thanks. Craig, I want to turn it over to you. Can you speak to some of the legal aspects of the proposal? Do we actually need this new third category of workers?

CRAIG BECKER: Well, I'm going to, in honor of my friend Seth returning to the legal academy, I'm going to answer your question by posing four questions. The first, and I think most

fundamentally, is this question. What is the threat to the value proposition undoubtedly being offered by these new companies of treating their workers as employees? What is the threat? The paper makes a very strong claim, and I'll quote it for you.

Forcing these new forms of work into a traditional employment relation could be an existential threat to the emergence of online intermediated work. Why? Why is that true? I mean we all understand the economics, which has already been mentioned, the National Employment Law Project estimates 30 percent saving on parallel [?] costs if you transition from employees to independent contractors.

But what's the threat beyond that? That, I think, is a central question we have to ask. And that's what I think Alan and others should study. I mean take an example, and it's not from the new economy, but it's from similar piece of the economy, package delivery, right. UPS delivers packages, and Federal Express delivers packages. UPS delivers packages through employees who are unionized. Federal Express, at least it believes, delivers packages through employees—excuse me, workers, or independent contractors. What should we ask?

We should ask, is Federal Express any less innovative? Is our consumers of Federal Express Services any less satisfied? And maybe, most importantly, how do we compare the welfare of those who work for Federal Express and UPS over time and all the way into their retirement? Okay, those are the questions that we should be asking. So our research projects should be taking Hello Alfred and its competitors and asking that question. Is there really a threat to the value proposition of treating your workers as employees?

Second, does the central problem posited by the paper really exist? Right. The central problem posited by the paper is that in this new form of work, those who might classify as employers can't adequately track the time that workers are working for them, as opposed to doing other things or perhaps working for their competitors. The paper says, and again I quote, "It is impossible, in many circumstances, to attribute independent workers' hours to any employer."

Well let's take the case of Uber. Uber, in a very highly sophisticated way, tracks exactly what the worker is doing for Uber. It tracks when they make a pickup, when they make the drop off. And if you look at what I would call a pay stub, it actually says how many hours the worker worked for Uber and hinges their compensation to those hours.

Now the paper says that that's really not helpful, because during the time that the driver is actually taking someone someplace, they're working for that person and not for Uber. And that's a little bit like saying the waiter, when the waiter is at your table taking your order, is working only for you and not the restaurant, right. That is work being performed by Uber, right. Uber does something which to me looks very much like hiring. It gives people access to the platform. It does something which looks very much like assigning tasks over the app. It sets the price. It collects the price. It pays the worker, and it does something, in many instances, which looks a lot like firing, discontinuing access to the app.

So I'm not sure that's the problem. And in thinking about what the problem is here, I think the problem in the [01:36:06] of the categories really comes from this. The poor criteria under the common law is supervision. That is, telling people the manner and means in which they should perform their work. And the problem here is technology has replaced the foreman. The app is the foreman. So what is supervision in that context? And, moreover, that app, combined with the internet, has allowed supervision outside of closed proprietary workforce, right. That is, that app can essentially supervise people, not simply on the factory floor, but in their own cars, in their own homes, and all over the world. So these companies can provide continuous service without having a closed proprietary workforce. That's the problem I think we confront, and not the question of hours.

Third, the question of uncertainty in the square peg in the round hole, etcetera, Seth and Alan had a very interesting analogy in the paper. I was hoping one of them would describe it, but I'll describe it. They said, we only have two poles, employee and independent contractor. And the

problem is, the two poles are holding up the rope and the rope is sagging in the middle. So we need a third pole to hold it up and make it more taut.

The problem is, the categories are not the poles, they're segments on that rope, right. And as we think about the rope as a continuous array of different kinds of economic relationships, right. And the categories are segments which have a dividing line, right. Any time you're close to that dividing line, that's where you're going to have litigation. If we create three categories, we're going to have two dividing lines and not one. And so I really question whether we're going to have less litigation or more litigation. It's not only going to be whether you're an employer or independent contractor, and if you're close to that dividing line on your array of relationships, you'll have litigation, but you could have two dividing points. If you look at Italy, for example, where they created a third category in this way, that's exactly what happened. And it led to more litigation and not less.

Final question, the ambition of the paper, and I think it's a good one, is to be neutral. That is, to not encourage the formation of [01:38:25] or the structuring of economic relations in order to avoid legal obligations. But does the paper accomplish that objective? It reduces the consequences, right. That is, three categories do reduce the consequences of being on one side of what are now two lines as opposed to a one-side of what is currently one line. But of course, it doesn't eliminate it.

If you eliminate the obligation to pay overtime and a minimum wage, if you eliminate the obligation to pay unemployment compensation, if you perhaps eliminate the obligation to pay workers compensation insurance, there is an incentive to be on one side of the line as opposed to the other. There will be regulatory arbitrage. And I would suggest, any time you regulate, that's in the nature of regulation, and that, what the law should do, is to try to discourage that, is to have mechanisms to reach across that border, in order to pull people back onto the side we want to encourage them to be on.

So I thought it was an extremely interesting paper and a great first start at answering or asking some questions. And those are the questions I think we have to ask.

DIANE SCHANZENBACH: Thanks. Seth, I saw you taking furious notes. So I thought you probably had a few things you wanted to say in response.

SETH HARRIS: Sure. Let me start with Arun, because he also raised the question of misclassification, which is an issue we've heard from a number of people. And I think it is a fair one, because it is, I think, empirically true, and conceptually correct, that whenever you create a new legal rule, there is uncertainty around the application of a particular legal rule, the words in the legal rule, to specific factual circumstances of which there's a seemingly endless variety.

But my view is that that outcome which we would not allow, for example, to defeat a new overtime regulation, which many of the people in the room are strongly for and have advocated for. Also doesn't defeat the proposition that we need a new rule in this context, for this reason. And it's the—it was actually a tent, not a rope, Craig. And the reason why a third category is going to result in less misclassification, is because it is a more accurate description of the work circumstances.

I illustrated here, we illustrate in the paper, there are endless varieties of illustrations beyond that we're going to see in dozens and dozens and dozens of lawsuits that have launched and are going to launch in the future. That the existing categories simply don't describe this work in an accurate way. They don't give—they don't lead you to a resolution.

So, if you have a middle ground that more accurately describes the category, it will be much easier, not only for courts and administrative tribunals, but also for employers and workers to apply the law to the facts of their case and come to a clear resolution, which the existing rules do not allow. So I think that at least that will balance out the new rule problem that we would have

in a lot of other contexts as well, where we would willingly accept it, and maybe would overwhelm it as well.

There are a couple of other things. I don't want to go through all of Craig's questions. He and I can talk about this in some greater detail. But there are a couple of very specific things that I want to focus on. And it's this idea, does the central problem exist? And there is a focus, and perhaps this is—I'll take responsibility for this part of the paper that we used. We focused people on the countability of the time. Can you count it? And I thought we said in the paper, and I think we did, that actually, with technology, it's easier to count time, much easier than even using a watch or a clock, to precision.

That's not the problem. The problem is the point that I emphasized in my presentation, and I think was emphasized in the paper. And that is, you cannot accurately say that the intermediaries control the time of the worker. So Craig, you talked about the app being the foreman. You can't turn off a foreman, at least not without going to jail for assault. You can turn off the app. You can also have multiple apps, and you choose them. You choose when they're on, when they're not on. You can within some broad boundaries decide, in the case of Uber and Lyft, which ride you're going to take, which you're not. You task rabbit, you take which odd job you're going to take and which you're not. That's just not an accurate description of the employment relationships that you and I are familiar with.

So the control in that context, the supervision that you talked about, the standard in the laws control, really is quite a qualitatively different thing. And it's not countability, it's whether or not it's fair to assign responsibility, it is able, it's possible to assign responsibility for a time in the way that you clearly can in work relationships, which are never simultaneous. They're almost always seriatim[?] even if you have multiple jobs.

The threat to the value proposition—and I'm sorry that Alan didn't have more time to respond to this, because he's much more knowledgeable about it than I am. And that is, if you add fixed

costs, and require such things as counting of time and assigning of responsibility for time, you create a friction in the relationship which is going to interfere with a lot of these business models, perhaps not all, but many of these business models.

I mean the centerpiece of a lot of these relationships is that people can flow in and out of the workforce at their discretion. It is on demand. It's not on supply, it's on demand. And so if you add significant costs to that, I think what will happen is—and I've heard Alan describe this, and I think this is probably right—there are now 400,000 Uber employees. That number will be reduced by better than three-quarters, probably more than that. And that will happen with a lot of these folks, not simply because you're adding costs, but because you're fundamentally changing their business model about allowing workers to flow in and out of work at their discretion.

And I think, you know, that this is one of the risks of sitting here in Washington—and this is a criticism of me, not of you, Craig, but of advocating on behalf of workers without them having an opportunity to advocate on behalf of themselves—is a lot of workers really like this system. It allows them, as someone said on an earlier panel, monetize their time in a way that they were not able to do before. If you take away their ability to flow in and out of the workforce freely because there are fixed costs associated with that, that the employer is not willing to accept, UI, worker's comp, not just minimum wage and overtime, I think that you're going to interfere with that. And it's going to end up being a bad thing. It'll be inefficient. And you'll end up with taxi drivers instead of Uber drivers.

And, as one of the panelists said earlier, it's not like life is so great for taxi drivers right now either. Did I inadvertently quote you Gene? I'm sorry for doing that.

DIANE SCHANZENBACH: Sara.

SARA HOROWITZ: I just wanted to say that, you know what I thought was really to me the most exciting piece of this paper was really the discussion about the antitrust laws, because, you

know, when you study labor history, and you look back on the things that labor created in the 1920s, housing, banks, insurance companies, labor has this just incredible entrepreneurial history that just has just gotten—has just been forgotten.

And what I really want to see is that we're going to create new forms of unions. And that doesn't have anything negative to say about craft unions or industrial unions or mutual aid societies. They all have to sit in solidarity with one another. And I think that the goal has to be—and we should make it so and not in a cynical way—like we want to see unions grow. And we want to see new unions grow. And if we're just saying we want new unions because it's just a euphemism for saying, "We don't want unions," right, and we'll create, like, fake ones, that's not okay.

And so I really think that we have to start to say, how are we going to achieve this goal? You know, when Roosevelt was President, he said, "Let there be unions," he didn't say the government was going to do it. He said, "Let there be." And then unions had to go and do it. And so I think like let's get these antitrust laws into shape, and let's put the gauntlet down, and let's start seeing these creative workers creating incredible networks and new forms that we can't even imagine.

DIANE SCHANZENBACH: Any responses to that? Craig, do you want to—

CRAIG BECKER: This question of time, I think, is really critical here. And it's very much a regulatory issue right now. If you read recent LRB decisions about Federal Express and the back-and-forth it's had with courts of appeals about Federal Express, if you read recent guidance from the Department of Labor, whether people want it or not is one question. But whether simply the ability to work more less is what we used to think of as the opportunity for profit or loss, which makes one an entrepreneur, and gives one a modicum of independence, is a very different question I think.

I don't think that we'd say in the old days, before unionization, that a longshoreman's decision to show up on the docks for the shape-up was an entrepreneurial decision, because he or she was deciding whether to work more or less. So I do think that this question of time is very important and is shaped by but different from whether people want that flexibility or not.

DIANE SCHANZENBACH: Arun.

ARUN SUNDARARAJAN: One sort of one quick thought, which is that, you know, I mean one of the things that we haven't discussed in this sort of like, you know, two or three categories, is sort of the ownership that a provider has over what they've done. And I just wanted to inject that into the conversation here. And sort of through the guise of saying that you know, there are new challenges that are being raised by the—like, you know, by these new models of work.

And we need to spend a lot of time on sort of thinking about like, you know, how to sort of make sure that the old protections are not lost. But I think we need to also spend a little time on thinking about how new protections are introduced for the new sort of labor challenges. And what I mean by ownership of what you've done is that if you work for a company, you're typically not able to sort of take sort of like, you know, a detailed history of your work product out with you when you sort of go into your next job. If you're an independent contractor, you do. And if you're sort of an independent contractor through a platform, there's sort of this odd middle ground that is being created, where, are you allowed to sort of take your performance evaluations that the customers give you on Uber with you when you sort of go and try and become a Lyft driver?

And I sort of get the feeling that that might be sort of one touchstone around which to sort of think about whether someone is an employee or an independent worker or an independent contractor in the future.

DIANE SCHANZENBACH: Something that I think hasn't been drawn out very well yet in this panel is sort of the details of the labor law around this. So in doing some reading on this, I learned that very minor changes in business patterns will make you sort of in safer space for being an employee versus an independent contractor. So, for example, one legal analysis of Uber said, "Well, because they fire drivers who have low star ratings, that would argue for them being employers." On the other hand, if instead they said, "We'll let everybody stay on the platform, but you as a consumer can say, 'I only want drivers who have a rating star of three or higher,'" then they would be independent contractors.

And from a lay person's perspective, I'm no labor lawyer, that sort of seems puzzling, because those seem very similar to me. And it seems like we're splitting hairs. So I wondered if you wanted to—Seth wanted to speak more to, what are the costs of some of this uncertainty in the regulation here? And we heard on the first panel quite a bit about, "Oh, let's not rush into this." But what are some of the costs of us waiting?

SETH HARRIS: Well, I'm actually sympathetic to the position that Senator Warner and some of the other earlier panelists advocated, that we don't want to rush into anything. And certainly, Alan was exactly right. We're not going up to the Hill from this meeting to try to get somebody to write a bill based on this proposal.

My own prediction, I guess, is that both sides are going to have to lose some before this kind of a proposal can be discussed. Fortunately, that's going to happen—or unfortunately for the workers involved. Some judges are going to say, "Yeah, they're employees under this statute." And other judges are going to say, "No, they're not employees, they're independent contractors under another statute." And that'll take some number of years, and it'll cost tens of millions of dollars. And people practicing lawyers like me will make a mint off of it. And we'll end up really not much further along than we are at predicting it right today. So that's one very important cost.

There are very high transaction costs for the uncertainty we have. We also have employers who are not willing to—or intermediaries, I should say, who are not willing to undertake some of the responsible activity that Hello Alfred is talking about, because they're afraid that by doing so, they will trigger a legal rule that will subject them to higher costs and higher obligations, particularly costly obligations.

I don't think workers are going to change their behavior based on—I think workers adapt pretty readily, although they would like to—I think they'd probably like to do better if they could. All those workers would. So there are costs associated with it. And that's a point I think that gets to the earlier point that Gene made about, is this the biggest issue around? And I would concede that it's not in the workplace space, although as Alan said, there are a lot of solutions to most of the issues that Gene and others on that panel were talking about.

But picking up on Sara's point, talking about this industry segment, which in ten years we won't be talking about as just a half a percent of the economy, it's going to be much, much, much, much larger. And there is a value in getting there early and trying to shape values or shape rules early in trying to determine what we want to see as the industry grows.

But this kind of a discussion does spark the larger discussion that Sara was talking a bit about, how antitrust law, a problem that Congress thought it fixed 80 years ago, with respect to worker organizing, it didn't. And lots and lots of workers who don't happen to be employees, and don't happen to be in traditional labor unions, are still prohibited from organizing by these laws. That's a discussion that we should be having, not merely about independent workers, but about independent contractors as well, if you don't mind my treading on your territory a little bit there.

The very discussion about whether or not there is and should be a social compact around work and whether government has a role in enforcing that, that's a discussion that is, by no means, over in this country, and it's one that needs to be reinforced at every point. We can debate about

what should be in that social compact. I might want a little bit more, others might want a little bit less. But we have to reinforce that point all the time.

The other point that we need to make and need to repeat—and I congratulate Alan for being really relentless on this point—is that making the point that law makes labor markets often—not always, but law often makes labor markets better, makes them more efficient, makes them not just fairer, but makes sure that we have a fairer distribution of result, of product.

That’s a critically important point that we tried to emphasize in this paper. So the other final point that I would want to make is, I’m sort of surprised by how some folks are clinging—and again, not a reflection on anybody in this conversation or in this room necessarily—but folks are clinging to an existing legal structure that we know stinks. I mean it just is terrible. It doesn’t work well. And I can say in 22 years of involvement in public policy in this space here in Washington, on and off, not one person has come to me with a proposal, even for a default rule, to try to fix what is an atrocious problem throughout the economy.

So let’s use this as an opportunity to have that discussion, rather than nitpicking particular, “Oh, I didn’t get this thing that I want, and I want the other thing.” This is a real opportunity. We have a new work relationship. Let’s acknowledge that. Let’s use that as a launching pad for talking about these very big issues.

DIANE SCHANZENBACH: Arun.

ARUN SUNDARARAJAN: Yeah, so I was just going to say, Diane, that the example that you gave them just kind of lost a little bit of track of now, because you made so many other sort of interesting points in between. Of like, you know, should the employment status of an Uber provider be dictated by whether Uber makes the choice to screen like, you know, sort of drivers themselves, or whether to let the customer make the choice, right?

It's an interesting example, because it brings up two points. I mean one is that you know, there is—it's not as if we don't have platforms that have that model of like, you know, choosing side car does this in San Francisco. And the market seems to have determined that customers prefer being assigned drivers rather than having to choose like, you know, competing sort of drivers and wait times and this.

And so there are competing objectives here, right. I mean do you sort of disconnect someone from the platform because they are sort of an inferior provider versus do you sort of create the customer experience that sort of customers are demanding? But it also points to sort of this blurring of lines between, you know, there are so many blurring of lines here, right, between the personal and the professional, between the gifted one and the market economy, between casual labor and fulltime work.

But you know, there's been a progressive sort of shift over the last decade in the rules of government to different digital platforms, right. I mean like, you know, Google and Facebook, Surveillus, like Apple and Amazon sort of dictate what we can and can't do with our books and music.

And you know, the sharing economy platforms have been a big part of this sort of conversation, in terms of them sort of starting to, as a new intermediary, starting to take on some of the rules that we needed a government regulator for. And you know, if you think about it, in Uber's role as the new sort of regulator of like, you know, sort of who is a qualified driver, or in playing some part in that, that role of theirs is going to conflict with a role of like, you know, not being the employer, I mean unless we sort of sought this out soon.

And so we have to sort of be sensitive to the multiple roles that these platforms are going to be playing in sort of determining which of the actions that they take should be applied to their status as employers, rather than as sort of like, you know, sort of the de facto regulators.

DIANE SCHANZENBACH: So going to the audience questions, unless any of you want to weigh in on that, many of the audience questions are wanting us to talk more about, other than legislation, what do we have as an option here? Is it possible to harmonize the tests to determine worker status? Is there regulatory guidance that could be issued here? Is there something else we could be doing administratively, other than, you know, proposing the Independent Workers Act of 2016?

SETH HARRIS: So we tried to address this in the paper, although we didn't want it to end up being a tactical paper, we wanted it to be a paper about analysis and discussion of principle. But we talked between ourselves about what the right tactic might be here, although we didn't go into great detail.

The problem is that individual regulatory agencies have responsibility for individual statutes. And we view this as sort of a holistic social compact discussion, rather than one statute here, another statute here, a third statute there. So if, for example, we were able to persuade Secretary Perez of the brilliance of our plan, and he were to go about trying to persuade our friend Dave Wile at the Wage and Hour Administration to follow this proposal, that might address the Fair Labor Standards Act, although it's unclear whether they have the regulatory authority to do that.

But it wouldn't get you the unemployment insurance, workers compensation. It certainly would not get you the antitrust law. If, God-forbid, judges get involved, then we're going to end up maybe even worse off, because it'll be decisions in particular cases with respect to particular sets of facts about particular issues.

So the only way to get something that is something like a comprehensive solution is for Congress to act, although I would add that a number of these laws are state laws. Workers comp is quintessentially state. Unemployment insurance coverage, at least, is state, although perhaps the federal government could modify it because it's the Social Security Act. Tort law, to the extent that it's a substitute for workers compensation, and there are state antitrust laws.

So it may be, and talk about making a difficult problem complex, it may be that Congress acting won't be enough, that states will also have to act following Congress.

DIANE SCHANZENBACH: Sara.

SARA HOROWITZ: I would propose that we have the Jefferson Project. [laughter] So—And it would be complementary, because they're both so great, right. I saw the play. [laughter] But I think the Jefferson Project would be to say that we're going to start seeing a lot of experimentation in the states. We're going to see huge difference where you're going to see mayors and city councils starting to play a role because they can, because they're not bicameral. And you'll, I think, start to see that there is going to be cities that want to experiment for very good reason. They want this workforce in their area. And then you're going to see others that aren't going to want it at all. And so I think sadly Washington is not going to be where this is going to happen. And in some ways, that's better, because we need to start to see how it's going to play out.

And so we are now starting to look—and if you go to Freelance Isn't Free, and starting to have the New York City, we just introduced legislation yesterday or Monday, I believe, so that if you're an independent contractor and a freelancer, you have to have a contract. And others are trying to do similar things. We're seeing the states really be the next legislators of labor law in America. I don't think it'll end there, but I think that's where it's going to start. So we're going to start Jefferson Project. Just join me there.

DIANE SCHANZENBACH: Sure.

CRAIG BECKER: I would caution that we should not be too moved by litigation. Most, you know, keeping with the analogy of the rope and the border between the two categories, most economic relations are clearly in one category or the other. And I wouldn't exaggerate the

amount of litigation and the difficulty of applying the categories. Yes, they're close questions. But we also have to ask, what choices are driving economic entities to stay close to line, right? They could make a choice not to be so close to the line and avoid litigation. So how much litigation really is there? And should that be a driver of public policy here?

Then, just let me say one final thing, and it goes back to what Secretary Rubin said. I think we also have to put a dose of realism into this conversation, in terms of what's likely to drive public policy in this area. And if you look at the cities, city councils, and if you look at the states, and if you look who is actively lobbying for changes in the law in this area, it is entities who are making a lot of money in this arena. And they're capturing the kind of panache of this new economy and driving regulatory change.

So I think this is an incredibly important discussion, because it brings some hard thinking to this question. But I think we also have to be realistic about where and how policy is going to be made in this area.

DIANE SCHANZENBACH: Arun.

ARUN SUNDARARAJAN: Yeah. I mean I'm all for sort of greater level of delegation. I agree that we shouldn't underestimate. And to sort of the original question of what else could be done, what are the other alternatives. And I don't think we should over-estimate the amount of litigation, but I don't think we should underestimate the impact it has on sort of small companies or the threat of it has on sort of early stage companies.

And if you look at the investments that these platforms have made in government relations as a fraction of their total employment, it's just sort of immense, compared to any sort of type platforms that preceded them. And you know, I mean, to me, like the most important sentence in the paper, to me, was—for example, independent contractor status is currently inefficient for many intermediaries and their contract workers, because the intermediary avoids providing

benefits that would make both the worker and the intermediary better off to reduce the chances of the relationship being ruled an employment relationship.

I mean this really summarizes like, you know, the fact that we don't have a sort of rich and sort of deep government provided social safety net in the United States. We rely on private entities to sort of shore that up. And we've got to make sure that they have the space, maybe through a safe harbor, to be able to sort of step up and start providing. Because if we look to the government as sort of the place from where the safety net is going to come, we're going to fall short like we do today.

DIANE SCHANZENBACH: I hate to cut this short. I know we have run over time. But I'm sure we'll have many more conversations about this in the future. Thank you very much to our panelists.

[applause]

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