Tech Drift & Powerlessness

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Tech drift is the phenomenon where a change in technological context alters policy outcomes. Tech drift can cause legal vulnerabilities. Socially empowering policies such as labor and employment laws can become inaccessible or ineffective because of changing technological contexts. But tech drift begets more than legal weakness. It also constitutes tech politics, as one of tech drift's outcomes is a shift in the locus of struggles over policy outcomes: from policy enactment, blocking, or reform to the very shaping of tech context.

Tech drift can be designed as a power move, reallocating power from one set of actors and institutions to others. Tech drift has profound effects on tech change's ecosystem of actors and institutions. Specifically, I survey how drift divided losing coalitions and dissident groups. Using qualitative interviews, I document how Uber's tech drift split labor actors on institutional, substantive, and jurisdictional grounds.

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Following these findings, I offer a set of structural remedies. These remedies aim at intervening in tech change's ecosystem of actors, ethos, and the initial allocation and attainment of legal powers. With these novel intervention points, we can find new levers to bend the arc of tech change toward justice and democracy.

Introduction, or: José's Failure

José[1] described himself as "quite large, hard to miss :)" in the SMS he sent me before our meeting in a Baltimore Starbucks sometime in 2018. I arrived ten minutes early, making sure we would have a place to sit in the busy cafe, somewhere I could see him walk in, but quiet enough for the audio recorder to capture the conversation. Finally, I spotted him: he was 5'9" and roughly 300 pounds—indeed hard to miss. Before even sitting down, he told me that he was "*done*" with the Uber drivers' group he founded, the Baltimore Drivers' Association (BDA). "Enough is enough," he said.

José called it quits that evening after the previous night's BDA meeting exploded over the question of who would lead the group. The leadership question was tied to mounting tensions between UberX and UberBlack drivers and broader, personal conflicts over strategy. It did not help that José's wife hated all the time he spent on the BDA. She loathed the long late-night meetings, she hated his routine trips to the airport's parking lot to recruit drivers, and she hated that he left her with the kids for long phone calls when he was finally home. He did not spell it out, but I assume she was not keen about his meeting with me that evening.

José didn't quit the BDA's leadership that night. This was one "enough is enough" moment out of many. I followed the BDA for three years, right until COVID-19 started spreading. It is a group of Uber drivers gathered after one of Uber's pay cuts in 2017. Back then, José decided drivers in Baltimore "could use an organization" to do something about fare cuts, the "unfair and unjust" way Uber treated the drivers, and the looming threat of automation. Here is how José tells it:[2]

> I thought that it would be nice if Uber gave drivers . . . maybe five cents a mile on a ride,

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[1] Interview with José, President of the Baltimore Drivers Association, in Baltimore, Md. (Feb. 18, 2018) [hereinafter "José's interview"]. All the quotes below are taken from this interview.

[2] *Id.*

> like a pension fund, so when they do go ahead with automation, it will give people like me, drivers, something to fall back on, and drivers would be protected. But, I said, you know, there is no representation for drivers. There's nothing making Uber do that.

Organizing drivers with the BDA was José's solution for securing their interests in preparation for what he thought was an inevitable transition to automation. This kept him going through the hard times. But for José and the BDA, like countless other similar grassroots organizing attempts of Uber drivers,[3] getting anything at all from Uber, not to mention justice and fairness, was an effort plagued with troubles.

The BDA had no regular meeting place, always with an anxious hustle before meetings to secure a spot. Local union support, minuscule and halfhearted as it was, always seemed to come with strings attached. Local airport administration, the arena in which the group had seen its most successful campaigns (advocating for fixing and routinely cleaning the airport's parking lot bathrooms), ignored or dismissed them.[4] Often drivers who came to meetings and actions came to voice *their* individual concerns and troubles. Sometimes those concerns were about the way José described the BDA's demands and actions as standing for *all* drivers.[5] Other drivers, entrepreneurial spirits, used those meetings to promote new drivers' products they sold (like small candy trays for the backseat) or to lure cash-starved drivers into participating in what José called "marketing schemes." Internal strife and disagreements about what to do and, crucially, who would actually do it, had taken a constant emotional toll on the group's leadership.

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[3] *See generally* Gali Racabi, *Despite the Binary: Looking for Power Outside the Employee Status*, 95 TUL. L. REV. 1167 (2021) (reviewing various forms of Uber drivers' organizing).

[4] Interview with Jane and Ashely, Traffic and Taxi Division, International Thurgood Marshal Airport (Jan. 10, 2018).

[5] On the day of a national strike planned to coincide with Uber's IPO, the BDA organized a rally outside the local Uber office. There, two drivers came specifically to shout at José and the other BDA activists that they would not strike and that the BDA does not speak for them.

When José talked about the previous night's events at the BDA's meeting, he was in tears.

Most drivers who stuck around for more than one or two sessions eventually stopped coming. But the lesson José unrelentingly took from the dwindling, ever-changing attendance at meetings and actions was an urgent need to put all activities on hold until more drivers were on board. "We need at least a thousand stable members before we can move to the next stage," he told me.

But the BDA never reached a thousand members, nor did they make it to the "next stage" or succeed in "making Uber do" anything. "The strong do what they can, the weak suffer what they must,"[6] I wrote in the yellow binder where I took my notes from José's interview.

Power, and the lack thereof, were a recurring theme in my conversations with José and other drivers, organizers, political actors, and regulators in my research of law, labor, and Uber in the United States.[7] Power was the currency by which their projects—whatever it was they wanted to accomplish in regard to Uber—lived or died. José's plan of protecting drivers' interests by organizing them is an example of a failed project. As power abhors a vacuum, instead of José's interests, fears, and hopes regarding Uber, we find the interests, fears, and hopes of others.

Mainstay writings identify the relative powerlessness of Uber drivers as legal in origins, resulting from their status as

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[6] THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 269 (Richard Crawley trans., Digireads 2017).

[7] *See generally* Racabi, *supra* note 3; *see also* Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKLEY J. LAB. & EMP. L. 79 (2022) [hereinafter Racabi, *Abolish the Employer Prerogative*]; Gali Racabi, *Effects of City-State Relations on Labor Relations: The Case of Uber*, 74 INDUS. & LAB. RELS. REV. 1155 (2021) [hereinafter, Racabi, *City-States*]; Gali Racabi, Transportation Network Companies (TNC) And Marketplace Contractors (MC) State Laws: Preemption of Local Government Regulations And Treatment of Employment Status of Drivers (2018) https://ssrn.com/abstract=3269522.

independent contractors (as opposed to employee status workers).[8] But the main solution legal scholars offered and pushed, that of re-classifying Uber drivers as employee-status workers, proved difficult to achieve in the US.[9] Uber drivers' powerlessness stemmed not only from their legal classification, but also from the power-politics that was supposed to activate or amend that legal frame.[10] Focusing on the classification of Uber drivers as the be-all, end-all problem and solution for the empowerment of Uber drivers missed some crucial dynamics in how Uber interacted with the law and politics.

In this Article I identify one cause of such dual—legal and political—powerlessness of Uber drivers: tech drift. Tech drift happens when technological change changes policy outcomes. I argue that tech drift causes powerlessness in both direct and indirect paths. In a straightforward way, tech drift can fail the anticipated distribution of legal rights, duties and immunities of a given policy; tech drift can fail policies that are meant to empower individuals and groups or immunize those from the reach of others. José and the BDA are a case in point. The running example in this Article of direct policy failure is how labor and employment law as a framework fail to create or protect collective capacities for Uber drivers. And in an indirect way, tech drift creates powerlessness as changing policy outcomes breed political weakness. Facing tech-induced policy failure, political coalitions are thwarted, disturbed, and scattered.

José's story encapsulates both direct and indirect effects of tech drift. When Uber classified José and the rest of its drivers as independent contractors, it effectively locked José outside

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[8] *See, e.g.*, Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1687-88 (2016); Nicholas L. DeBruyne, *Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy*, 92 CHI.-KENT L. REV. 289, 307-14 (2017); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C.D. L. REV. 1511, 1519-21 (2016); Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 98-101 (2015).

[9] *See*, *e.g.*, Racabi, *supra* note 3, at 1183 (summarizing literature and case law).

[10] *See*, *e.g.*, Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 34 (illustrating some of the politics surrounding the classification issues).

of the traditional frameworks for empowering workers in the workplace.[11] Uber defends this classification based on the novelty of its technological framework; in theory, its algorithmic coordination of its drivers does not amount to the level of control needed to designate them as its employees.[12] In this direct sense, technological change frustrates the enforcement of an empowering policy frame (employment and labor law).

José's story also demonstrates the second, indirect effect of tech drift. Without access to the mainstay policy frame for the empowerment of workers, finding collective paths to power becomes complicated. It is not so much that there are no alternative options for finding power outside this traditional work law policy frame;[13] instead, it is that the social, political, and emotional costs of successfully rallying around and organizing agreed-upon alternative routes becomes prohibitively high.

This Article illustrates these two connected paths to disempowerment using the example of Uber and work law, but that example is useful for more. Public-oriented speech is now delivered primarily in and through private, unaccountable spheres;[14] work is facilitated through online platforms outside of the scope of traditional work law institutions;[15] mass data mining and predictive analytical tools create new harms

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[11] See, Racabi, *supra* note 3, at 1177.

[12] *Id*. at 1183.

[13] *Id*. at 1213 (summarizing various paths to workers' empowerment outside the employee status).

[14] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace — the 'vast democratic forums of the Internet' in general, and social media in particular." (citation omitted) (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997))); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1662 (2018) (comparing the operation of content moderation in social network platforms to traditional First Amendment categories).

[15] *See* Steven Vallas & Juliet B. Schor, *What Do Platforms Do? Understanding the Gig Economy*, 46 ANN. REV. SOCIO. 273, 275-77 (2020) (reviewing literature).

outside data protection doctrines.[16] In all these cases, policy outcomes shift and existing political coalitions are challenged because of technological change.

Because both mechanisms of disempowerment are based on the vulnerability of policy frames to actors using technology to change policy outcomes, we cannot solve technological drift by simply throwing more law at it. We must expand our frame of reference, analysis and action to the dynamics between law, tech change, and politics. Tech drift is not merely an issue of "work law," "free speech," or "data protection." Instead, tech drift should be viewed as a mechanism for allocating power over policy outcomes. It also allocates distributional gains away from current policymaking actors to other ones. Tech drift provides a path towards power; it is not just a doctrinal wrinkle to be ironed out or a policy gap to be closed.

To substantiate these claims, I use both qualitative and traditional legal analysis. Using interviews with Uber drivers, organizers, regulators, and politicians from across the United States I expose three mechanisms whereby law and tech drift have shaped the political ecosystem of Uber in the United States. First, drift has a splitting effect on its dissidents, those who find themselves on the losing side of this new power equilibrium. Drift brings to the surface political dilemmas and internal tensions in organizations and social movements. The changes in expected policy outcomes raise touchy questions about strategy and priorities on which dissidents diverge.[17] Which institutions should be the centerpiece of policy pushback? Which stakeholders and substantive goods are to be protected, and which are to be sacrificed? And what jurisdictions should answer these questions?

The first division happened when tech drift pushed similar stakeholders to opposing ends of Uber-politics because of

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[16] Salome Viljoen, *Democratic Data: A Relational Theory for Data Governance*, 131 YALE L.J. 573, 580-81 (2021).

[17] *See generally* Daniel J. Galvin & Jacob S. Hacker, *The Political Effects of Policy Drift: Policy Stalemate and American Political Development*, 34 STUD. AM. POL. DEV. 216 (2020). I thank Rafael Bezerra Nunes of YJoLT for his help clarifying this point.

diverging institutional projects. As rapid tech change challenges the effectiveness of contemporary institutional structures, stakeholders split over whether to work within the confines of the stymied contemporary legal frames, work to reform them, or exit them entirely. Here I demonstrate how this dilemma tore through labor coalitions around the question of employment status and whether labor advocates should work within it, exit it, or reform it.

Tech drift's second mechanism relates to the emergence of new goods and interest-holders. Consider the interests of social media users, Uber drivers, Facebook's advisory board members, etc. These new groups are often politically invisible, lacking legal protections to guard their newfound interests and the agency necessary to barter with other actors over those. Law determines who is recognized in the political and economic bargaining dynamic. Lacking agency and protection, these constituencies can be used as pawns by more powerful actors that might—if they please—protect these new groups' interests in exchange for submissive cooperation.

The third mechanism pertains to jurisdiction. In a post-drift world, actors scramble to find alternative jurisdictions in which to pursue their interests. For example, if federal lawmaking is impossible, dissidents will mobilize state and local jurisdictions. Law plays a crucial role in establishing the relevant jurisdiction (city, state, federal) to regulate particular activities. Law also determines how to attack the allocation of jurisdiction. Local regulations, for example, might be preempted by legislative action on state and federal levels.[18] Accordingly, although innovative local regulations are often more politically feasible than state or national ones, local laws are also less durable. Local law's comparative weakness might push local

[18] Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018); *see also* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2264 (2003); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1111-12 (1980) (describing and critiquing the emergence of the state creature conceptualization of cities in American law).

political organizers to be less aggressive and more cooperative with potential adversaries.

Law is endogenous to the distributive struggles within tech's ecosystem. By reorienting tech law literature to focus on the ubiquity of law and the importance of structural analysis of power and law, I hope to identify new intervention points. In considering structural remedies, I analyze three elements of tech's ecosystem: *actors*, *ethos,* and *power*. Regarding *actors*, I provide ways to use the law to insert into tech's ecosystem democratically accountable actors or to inject contemporary actors with democratic inputs. Regarding *ethos*, I offer institutional interventions to facilitate broad stakeholder bargaining instead of winner-take-all-loser-losses-all legal or market competition. And in terms of *power*, to counter some of tech drift's effects, I suggest "inflation" in recognizing new stakeholders' legal standing and interests and "deflation" in the legal significance of that standing and those interests. In this moment of mass constitutional recalibration of powers, we can use interventions in tech's ecosystem of actors and institutions to tilt tech change towards justice and democracy.

The Article proceeds as follows: Part I describes tech drift. Part II provides examples of how law and tech drift have shaped the ecosystem of Uber and its political struggles with labor advocates. Part III offers possible legal interventions in the ecosystem of tech change, herein focusing on actors, ethos, and power. A short conclusion follows.

I. Tech Drift: An Introduction to a Political Project

A. An Introduction to Policy Drift

Policy drift is a known concept in political science describing the phenomenon in which policy reforms are blocked to the point that policy outcomes change.[19] In this literature,

[19] Galvin & Hacker, *supra* note 17, at 2 ("Drift occurs when a policy or institution is not updated to reflect changing external circumstances, and this lack of updating causes the outcomes of the policy or institution to shift—sometimes dramatically"); *see also* Jacob S. Hacker, Paul Pierson & Kathleen Thelen, *Drift and Conversion: Hidden Faces of Institutional Change*, *in*:

"change" usually relates to the policy's advocates and promoters goals and purposes. The repeating historic narrative of policy drift describes a case of democratic-level interests (for example, political parties, commercial associations, or civil society organizations) shifting from *losing* on the policy-enactment-front to *winning* by successfully preventing policy change.

Over time, policy drift might even cause stalled policies to come to serve some interest opposite to what they were enacted to do in the first place. Examples abound: the erosion of inflation-unindexed benefits;[20] the Freedom of Information Act changing from a progressive tool to a corporate money-maker;[21] copyright law failing to protect individual online publishers but amply protecting institutional actors;[22] the rise of political parties and their influence on the US's constitutional governance structures;[23] the change in function of boilerplate contracts and their widespread use;[24] the National Labor Relations Act (NLRA)'s failure to facilitate worker organization in

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ADVANCES IN COMPARATIVE-HISTORICAL ANALYSIS (JAMES MAHONEY & KATHLEEN THELEN, ed., 2015); Jacob S. Hacker, *Policy Drift: The Hidden Politics of U.S. Welfare State Retrenchment*, *in* BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 40 (Wolfgang Streeck & Kathleen Thelen eds., 2005); James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, *in* EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 1 (James Mahoney & Kathleen Thelen eds., 2010).

[20] Galvin & Hacker, *supra* note 17, at 2.

[21] David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1101 (2017).

[22] Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 31-33 (1994).

[23] Daryl J. Levinson, *The Supreme Court, 2015 Term-Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 37 (2016); *Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2348 (2006).

[24] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 7-9 (2014) (describing the rising prevalence of boilerplate agreements); JULIET E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTION OF INFORMATIONAL CAPITALISM 133, 154-55 (2019) (describing the importance of boilerplate agreements for private power in the digital context).

as the industrial world changes employers mount growing resistance;[25] and the diminished enforcement capacity of regulatory agencies as the number of inspectors falls compared to the population.[26]

"Drift" is usually defined relative to an assumption about expected outcomes. As a result, it encapsulates both under- and overreach of policy effects. Underreach is when the effectiveness, generosity, or scope of the policy diminishes as its context changes. This is the case, for example, of an inflation-unindexed minimum wage in the case of rising cost of living prices. But policy drift does not solely cause underenforcement and underachievement of policy goals—with the unavailability of public power. Drift can also create overreach, where the coverage or effectiveness of a policy extends as contexts change. For instance, the 1911 Federal Arbitration Act has come to protect an increasing number of consumer and worker contracts, barring countless disputes from the courtroom.[27]

Policy drift is generally perceived as a slow process, happening over decades in a hidden way.[28] But at its core, drift is a policy change mechanism. As a gap grows between policies, their contexts, and their effects, the status quo of power, risks, and benefits can radically change.[29] Massive, rapid

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[25] *See*, *e.g.*, John P. Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 INDUS. & LAB. RELS. REV. 3, 4 (2008).

[26] MICHAEL J. PIORE & ANDREW SCHRANK, ROOT-CAUSE REGULATION 3 (2018); Galvin & Hacker, *supra* note 17, at 218.

[27] Sarah Staszak, *Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace*, 34 STUD. AM. POL. DEV. 239, 240 (2020); KATE HAMAJI ET AL., ECON. POL'Y INST., UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK 11 (2019) (stating that by 2024, 80% of non-union private sector employees will be prohibited from suing their employers in court); ALEXANDER J. S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 10 (2018) (estimating that as of 2018 more than 60 million workers have signed mandatory arbitration agreements).

[28] Galvin & Hacker, *supra* note 17, at 2.

[29] *Id*., at 2-3.

technological change can similarly shift the status quo over a shorter timescale.

B. Breaking Drift Apart & Recomposing Tech Drift

Analytically, policy drift involves a relation between policy, context, and policy outcomes. A given policy (p) (say, a federal minimum wage of $7.25 per hour) is expected by its proponents to interact with a particular set of contextual facts (c) (say, assumptions about the cost of living) in a way that produces outcome (o) (for example, a certain level of real income for minimum wage workers). Policy drift's first insight is that when (c) changes, and (p) is held steady, (o) also changes.

While we usually think of power in politics as the ability to make new policies (p), policy drift literature highlights that power is measured by control over policy outcomes (o). Adversaries of an effective minimum wage can win not only by legislating lower rates of minimum wage or abolishing the minimum wage in its entirety, but also by obstructing it while some key contextual facts change. Such adversaries engage in this backdoor policymaking because blocking minimum wage reform is more politically palatable than abolishing the minimum wage entirely. And given the right context, blocking can be just as effective.

There is no closed set of context factors relevant to a policy's outcomes, and these factors can be either anticipated or underappreciated by policy advocates. Technological change, for example, affects context in multiple ways.

I offer tech drift as a subcategory of policy drift. In tech drift, a change in technology changes a (c) in a way sufficient to change (o). In comparison to the traditional policy drift model, tech drift has two particular attributes. First, tech context is vulnerable to control by democratic-level interests; regular context is not typically vulnerable in the same way. In the usual policy drift model, democratic level interests struggle to enact/block/reform (p) in a *given* (c) to produce (o). In tech drift, (c) is up for grabs and is not just *given*. The fact that tech context is easier to control than traditional policy context

broadens the scope of politics in a way traditional policy drift literature is less concerned about.

Second, tech drift can happen in a much shorter timeframe. Because tech-dependent (c) can change rapidly, observers no longer have to wait decades for (o) to change. In fact, given sufficient control over tech context, actors might alter the pace of change to achieve specific distributive outcomes. For example, interest groups might estimate that dissidents will need a certain amount of time to jumpstart some regulatory reform, and therefore change context faster or slower to achieve policy outcomes optimal for them. Even if some reform cannot be permanently blocked, the interest group "succeeds" simply by maintaining a sufficient gap between (p) and (c).

Tech (c) change can happen both deliberately—to intentionally secure some policy outcome—or gradually—as an emergent property of a complex system of successive innovations—or as anything in between. The analysis itself is not useful in identifying intent or assigning blame. Instead, it is meant to be helpful in clarifying incentives and opportunity structures; it is an explanatory tool, not an adjudicative one. As the fight over policy outcomes splits from the policy enactment/reform/blockade part of the equation into the question of control over tech context, so must any analysis of political organizing and the effects of law split its focus.

Imagine that developments in end-to-end encryption completely frustrate contemporary policy regarding police surveillance.[30] Legitimate modes of surveillance can no longer obtain the same kind of relevant information. This is a case of tech drift. The technological context pertinent to a particular policy changed; in changing, the context shifted the policy's outcomes. Now, it might be that this tech change happened as an emergent property of a complicated system of market-based development and innovation, or it might be that this particular change in end-to-end encryption was developed with the intent to frustrate the surveillance policy. Tech drift does not help us find culpable actors. Instead, it points our attention to the

[30] I owe this clarifying example to Rafael Bezerra Nunes of YJOLT.

incentive and opportunity structures produced by the vulnerability of policy outcomes to tech change.

In sum, a necessary condition for a change in policy outcome to count as tech drift is that the change in context leading to the change in policy outcomes be related to technological change. Two derivative conclusions follow: 1) technological change might be a political project of policy-outcome-oriented actors; and 2) an account of policy change that disregards (1) is necessarily incomplete.

C. Some Legal Settings

Legal literature recognizes that at least descriptively, law constantly lags behind technological reality.[31] This is tech change's dead hand problem.[32] Law always finds itself one step behind reality, playing catch-up. Through this prism, drift cannot be a strategic choice but rather an unfortunate inevitable outcome. Tech firms are often thought to be one step ahead of legislators and regulators.[33] In legal discourse, this argument serves to dissuade the public, regulators, and courts from enforcing or enacting supposedly ill-fitting regulatory interventions until tech-friendly regulation is imminent.

Applying regulatory interventions in tech change is thus often portrayed as an exercise in futility. For example, recent legal literature on content moderation urges us to take social

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[31] Gary E. Marchant, *The Growing Gap Between Emerging Technologies and the Law*, *in* THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM 19, 22–23 (Gary E. Marchant et al. eds., 2011) (arguing that law lags behind technology both because legal regulations "are based on static rather than a dynamic view of society and technology" and because legal institutions take significant time to revise laws); Simon Deakin & Christopher Markou, *The Law-Technology Cycle and the Future of Work* (Univ. of Cambridge Ctr. For Bus. Rsch., Working Paper No. 504, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183061 [https://perma.cc/BBB7-QZTQ].

[32] Alicia Solow-Niederman, *Administering Artificial Intelligence*, 93 S. CAL. L. REV. 633, 684-88 (2020).

[33] *Id*. at 644.

networks' content moderation practices extremely seriously. In some accounts, the historical arc of content moderation moves from "standards to rules."[34] In more recent instances, it moves, perhaps backward, from categorical free speech rules to proportionality and probability standards.[35] But, regardless of the trend, it is still widely accepted that "changing the regulatory environment without a proper understanding of content moderation in practice will make the laws ineffective or, worse, create unintended consequences."[36]

Regulatory futility and jeopardy are guaranteed for those regulating tech change in a way that is not responsive to the particularities of tech context. But nothing is inherently stable in any of those technologically-based practices. Content moderation practices, to follow the example, are potentially dynamic, not inherently static. Even more so, the entities controlling those technological contexts, say, Facebook or Twitter, are the ones the law is supposed to counter or regulate. The decision-making power over which elements of content moderation remain stable and which shift lies with the regulated platforms. These firms have significant levers over their content moderation practices, organization and institutions. Facebook control, to a great extent, the context to which any content moderation regulations will apply.[37] The specter of tech drift haunts content moderation practices.

Content moderation is not a singular instance. Tech context matters for policy effects. And control over tech context and the ability to change it thus turns to a significant factor in how we think about and do regulatory interventions. In other

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[34] Klonick, *supra* note 14, at 1631.

[35] Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 763 (2021).

[36] *Id*. at 767. Similarly, Viljoen argues that it is necessary in the context of data to connect tech firms' regulatory structure to internal practices. Viljoen, *supra* note 16, at 607, 630 ("The absence of horizontal data relations in law may cause data-governance law to miss—or misconceive of—how data production results in particular kinds of injustice.").

[37] Cf. Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 108.

words, the ability to create tech drift is perhaps *the* force to contend with in analyzing and creating new governance structures.

D. A Power Coalitions Theory

The concept of tech drift changes how we perceive policy-related power. Drift shifts our attention away from control over policy enactment onto policy outcomes. Moreover, it correctly focuses our inquiry onto the entities who aim to change tech context to change those outcomes. For example, Uber can control the effect of minimum wage legislation either by lobbying to change the minimum wage or by rearranging the technological context—the literal means by which it directs and remunerates its workers—so that the minimum wage does not apply to its drivers. Using Uber as an illustrative example, the tech drift analysis advanced by this Article moves away from the traditional analysis of legal categories to the relationship between politics, technology, and law.

Obviously, changing tech context to reshuffle distributive outcomes has political implications. As detailed in the following Parts, tech drift rearranges democratic-level interest coalitions and the projects they pursue. In addition to focusing on the effects of new technologies on the distribution of legal rights and immunities, I focus on the mobilization and demobilization of project-oriented coalitions. Those democratic-level interest coalitions are interested in various political outcomes, mostly with no strong preference as to how they are obtained. Focusing on democratic-level coalitions makes sense as far as we take seriously the assertion that policy breeds politics which breeds policy, and so forth.[38]

This analysis is similar to a recent piece by Benkler and Bargil, recognizing that firms can attain numerous goals (divided by them as efficiency-enhancing and power-enhancing) by multiple means (legal intervention, ideology, technological change, etc.).[39] I adopt from their analysis the fluidity of both

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[38] *See* Levinson, *supra* note 23, at 37.

[39] Oren Bargil & Yochai Benkler, *Productivity Versus Power: The Role of Law and Technology, (Mis)Perceptions and Ideology* 85 (Harv. L. Sch. John M. Olin Discussion Paper Series, Discussion Paper No. 1057, 2021),

means and goals of tech-wielding companies. This analysis also draws from the work of Brenda Dvoskin, analyzing the ways in which coalitions of NGOs strive to affect social networks' content moderation practices.[40] I adopt Dvoskin's emphasis on tech change's ecosystem and the importance of power dynamics within it, and the endogenous role law plays in those dynamics.

This Article also draws on a long line of institutional analysis in political science that focuses on the melding of interests into politics. On these accounts, the locus of power is not in "public" or "private" hands; instead, power is acquired by broad coalitions of various types of actors—firms, NGOs, individuals, and so on—mobilizing and advocating for their favorite goals. The following Part aims to demonstrate how law is endogenous in the shaping of such coalitions. It also suggests how critical those power coalitions are in shaping the arc of tech change.

E. Uber as the "Hill to Die on"

One of the first interviews I held for this project was with Eshana, an organizing director of a nonprofit from Boston working with Uber and Lyft drivers. I first asked her, as I routinely do in my interviews, what made her organization focus on organizing platform drivers, considering all the obstacles involved.[41] Here is how she tells it:

> [In 2015] We were doing work with labor allies in the service sector, organizing hospitality, security guards, drivers. Doing really groundbreaking work, reaching over four thousand workers. But we were faced with this narrative,

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http://www.law.harvard.edu/programs/olin_center/papers/pdf/Bar-Gill_1057.pdf.

[40] Brenda Dvoskin, *Representation without Elections: Civil Society Participation as a Remedy for the Democratic Deficits of Online Speech Governance*, 67 VILL. L. REV. 447, 457-61 (2022) [hereinafter Dvoskin, *Representation with Elections*]; *see also* Brenda Dvoskin, *Expert Governance of Online Speech*, 64 HARV. INT'L L.J. (forthcoming 2023).

[41] For a short methodological explanation see *infra* Part I.E.

> from reporters, from the broader community, of "why are you bothering organizing those workers? Uber is going take everyone's jobs." Why bother, right? Everybody is going to be a gig worker anyway.
>
> At that time, Uber and Lyft were doing a lot of lobbying and a lot of narrative about helping low-wage workers. We said, "Hell, we should be talking to workers. This is crazy; we can't let the company, the boss, represent the workers." . . . The old campaign ended with a bitter taste. The project caved and turned into our gig workers' project. Now we focus mostly on Uber and Lyft.[42]

Eshana's sense of Uber's inevitability and the urgent need to adapt her organization to the platform economy's existence or perish is prevalent among many other organizers and regulators I interviewed. This certainty made Uber into what one of my interviewees, a labor organizer from Seattle, called "*the hill to die on*" for the labor movement.[43]

"Uberization" has become a verb for the tech transformation of the labor market.[44] Uber classifies its drivers as independent contractors, effectively excluding them from most work law coverage.[45] This creates an additional legal burden when it comes to fulfilling work law policy goals in regard to Uber. The background rules of contract and property,

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[42] Interview with Eshana, Organizing Director, Boston M.T.W. (Feb. 20, 2017).

[43] Interview with Shawn, Teamsters Organizer, Seattle, Wash. (August 7, 2018).

[44] Marion Maneker, *The "Uberization" Of The Economy Is Really About Building A Better Trap For Ideas*, QUARTZ (Jan. 4, 2015), https://qz.com/326569/the-uberization-of-the-economy-is-really-about-building-a-bettertrap-for-ideas [https://perma.cc/6BET-8CZV]; E. Tammy Kim, *The Gig Economy is Coming for Your Job*, N.Y. TIMES (Jan. 10, 2020), https://www.nytimes.com/2020/01/10/opinion/Sunday/gig-economy-unemployment-automation.html [https://perma.cc/27SB-KQ3H].

[45] *See infra* Part I.C.

alongside Uber's market power, allow it to dictate the rules of engagement and create an organizational structure to support its claims that traditional work law classifications are too ill-fitted or outdated to be applied to it.[46]

Removing or circumventing the classification obstacle was the leading enterprise of numerous workers, lawyers, academics, and unions, who engaged in a decade-long fight to redistribute power in Uber as a workplace.[47] Uber triumphed over taxi interests by ignoring and then legislating around taxi regulation in the late 2010s.[48] Accordingly, labor challenges remain Uber's primary political struggle.

The following Part will examine three ways in which law and policy drift affected labor organizing as a political adversary to Uber. I use qualitative research to obtain the fullest understanding of this political project and the role law played in shaping it. In particular, I draw on interviews with organizers, drivers, politicians, regulators, and activists in Boston, Baltimore, New York, Seattle, and California (mainly in Los Angeles and San Francisco). My interviews were typically one hour long, held in coffee shops and offices in those locations between January 2017 and September 2020. Due to COVID restrictions, I conducted my interviews in 2020 over Zoom or by phone. While my interviews provide a thicker description of the cases and mechanisms relevant to tech drift, they in no sense exhaust all possible political organizing opportunities. Instead, they highlight the importance of analyzing technological change as the intersection of multiple overlapping political projects. My research aims to provide deeper insight into the operation of one cross-section of one tech company's ecosystem at one contested point in time, through the eyes of the actors themselves.

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[46] *See* Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 109.

[47] *See generally* Racabi, *supra* note 3.

[48] Ruth Berins Collier, Veena B. Dubal & Christopher L. Carter, *Disrupting Regulation, Regulating Disruption: The Politics of Uber in The United States*, 16 PERSPS. POL. 919, 923 (2018).

My second goal in bringing these interview materials to light is to give a sense of the people involved in this decade-long David and Goliath fight between labor and Uber. All the interviewees gained my respect and appreciation, regardless of whether I thought their actions prudent or correct. In addition to the analytical point, my goal in offering those materials here is to give a voice and a window to the interviewees' understanding of their circumstances, dilemmas, and goals.

II. Drift Breeds Tech Politics—Law & Uber's Ecosystem

A. Institutional Divides—Labor and the Employee Status

1. Tony and The Way to Get Things Done

A middle-aged man in his underwear and a white sleeveless undershirt opened the screen door of the suburban home my Uber pulled up to. He held a cigarette in his hand and talked loudly on his cellphone, looking at me as I got out of the car. I searched for the house number, and yes, I was in the right place. I quickly glanced at my watch, still yes, the right time. I smiled awkwardly at him and asked, "Tony? Is this a good time?" Still on his phone, he signaled I come in and stepped back inside the house. The door closed behind him. A dog was barking inside the house; I heard Tony shout "Down, down! No!" I stood outside for a short while and then entered slowly into the yard and up the few stairs. When I finally reached to knock on the screen door, he pushed it open again and asked, "Are you coming?"

Tony was the organizing manager in the local branch of the International Brotherhood of Electrical Workers (IBEW). At the time of our interview, Tony was running for local political office. Throughout the interview, he was constantly on the phone arranging for endorsements from other local leaders. "Here," he said, handing me a few fliers as we sat down in the cluttered living room. The fliers were of him, now properly dressed, smiling against a blue background.

The reason I came to this New York suburb was Tony's history with organizing Uber drivers. In 2016, Tony and the

IBEW petitioned the National Labor Relations Board (NLRB) to be certified as legally representing Uber drivers at La-Guardia Airport. This petition was one of a handful of Uber-related cases the NLRB handled, and to my knowledge, the only certification petition. The petition effectively meant that Tony had argued that Uber drivers were employees covered by the NLRA[49] and asked the NLRB to conduct a union representation election among drivers at the airport.[50]

Tony took immense pride in the fact that while most other unions and drivers' groups involved with Uber were engaged in informal organizing and advocating, he did things the *proper* way: first, he asked the NLRB to classify Uber drivers as covered employee-status workers; second, he won a union election. And he thought they could win. Tony walked me through his strategy:[51]

> If you look at history and you look at the wars of past . . . World War I, World War II, you enter the war by going in piece by piece by piece by piece. When you know you have ground, you hold on to that and then you move on to the next area. When you're fighting a boxing match, sometimes [boxers] want to go for the kill, but sometimes that fighter doesn't go down with one shot. How do you wear them down? You go to the midsection with this side, and then you try to get them on that side [demonstrating boxing moves]. You try to bring his guards down; then you knock them out. That is the same

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[49] This position was rejected later by the NLRB in a different, adjacent case. Jayme L. Sophir, NLRB, Advice Memorandum on Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483 (Apr. 16, 2019) [https://perma.cc/X6TX-4HKK]

[50] Jon Weinberg, *Gig News: Union Files NLRB Petition to Represent Uber Drivers in New York*, ONLABOR (Feb. 3, 2016), https://onlabor.org/gig-news-union-files-nlrb-petition-to-represent-uber-drivers-in-new-york.

[51] Interview with Tony, former organizing manager at the International Brotherhood of Electrical Workers New York City Local, Long Island, N.Y. (August 1, 2017).

> tactic that you use to bring down a giant. Especially a giant that has a lot of money.

Splitting Uber into tiny, NLRB-winnable pieces was Tony's path to gaining representation and to victory. But back in 2016, the IBEW was not the only union on the scene. The Amalgamated Transit Union (ATU), a prominent public transportation union, had mobilized more than 17,000 drivers across town and pushed for a citywide representation election managed by the city government.[52] The New York Taxi Workers Alliance (NYTWA), a taxi union stronghold in the city, was also mobilizing thousands of drivers around misclassification claims.[53] Additionally, the Machinists Union was in direct contact with Uber, hoping to sign a deal to form a joint cooperative entity to promote drivers' interests in the city.[54] A labor turf war of diverging strategies ensued.

The ATU's strategy of pushing for local, city-based, labor elections and the Machinists' strategy of forming a cooperative quasi-union with Uber depended, crucially, on drivers remaining classified as independent contractors, excluded from the NLRA. This was the only way to avoid the NLRA preempting local labor laws like the one the ATU pushed, and the only path for establishing company quasi-unions.[55] However, the IBEW's and the NYTWA's claims depended on the drivers' legal classification as employee-status workers under the NLRA and various state and federal employment laws.

All sides of this labor turf war chose different, mutually exclusive legal routes to mobilize and organize Uber drivers. On the one side, labor innovations; on the other, the IBEW and Tony, steadfast in the 80-year-old process of NLRB filing, elections, and bargaining. Table 1 summarizes the composition of unions, strategies, and legal baselines:

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[52] Racabi, *supra* note 3, at 1207.

[53] *Id*. The NYTWA is the only union or drivers' group mentioned in this Article whose leadership refused to talk with me on the record.

[54] Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1750-52 (2018).

[55] *See* Racabi, *supra* note 3, at 1205-10.

Table 1

Union	Strategy	Depends on
IBEW (Tony)	Petitioning for NLRB elections under the NLRA	Uber drivers being classified as covered employee-status workers under the NLRA
NY-TWA	Organizing drivers around misclassification claims	Uber drivers being classified as covered employee-status workers under various state and federal laws
ATU	Organizing for city-sponsored labor regulations and elections	Drivers being classified as independent contractors under the NLRA. Otherwise, preempted by the NLRA
Machinists	Negotiating with Uber on the establishment of a cooperative quasi-union	Drivers being classified as independent contractors under the NLRA. Otherwise, prohibited by NLRA

Tony acknowledged the tension between the approaches. But for him, his way was not just the *best* way to organize workers—it was the *only* way:

> If you want things to happen, you have to . . . first, get the signatures, and have an election, be certified, and then sit down to bargain. That's how you get things done. Otherwise, no association [referring to the Machinists' initiative] does anything. . . . You see, there's no choice here [bangs on the table]. I can't fathom how can anyone look at these little programs and think that it helps workers. We're not here to give them little programs. That's not why we are here for. A union is here to fight for your

> benefits, to fight for your salary, for your wages,
> for your commissions, for your protection.
> That's what the union is here for.

The association Tony mentions is the Independent Drivers' Guild (IDG), the product of the successful negotiations between Uber and the Machinists Union to form a cooperative quasi-union.[56] After the Machinists' Union won its quasi-representation in an internal AFL-CIO arbitration between it and the IBEW, Tony backed off from his NLRB petition and the ATU backed off from its city-based labor initiative.[57] To this day, Tony regrets stepping back.

The IDG is not a formal union. It cannot strike nor collectively bargain with Uber in any traditional way. It can and did, however, lobby for effective local regulations of working conditions for Uber drivers in New York City. Alongside a broader labor coalition, the IDG won local regulations like in-app tipping, a minimum wage, and a cap on new rideshare cars. The IDG also arranges training programs for new drivers and drivers whom Uber had terminated due to low passenger star rating.[58] These are the "little programs" Tony is referring to. In 2021, reports are that the Machinists and the IDG plan to expand this model from New York City to the entire state.[59]

Like many other labor movement organizers and activists,[60] Tony sees the IDG as a company union, signing sweetheart deals with employers, doing Uber's bidding. According

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[56] *Id.* at 1206.

[57] *See id*. at 1207-08.

[58] IDG, IDG OFFERS CLASSES TO MAKE DRIVERS' LIVES BETTER, https://ny.driversguild.org/classes/ [https://perma.cc/U4DJ-J8QB].

[59] Ben Penn & Keshia Clukey, *New York Gig Workers to Get Easy Unionizing Path in Draft Bill*, BLOOMBERG LAW (May 21, 2021), https://news.bloomberglaw.com/daily-labor-report/new-york-gig-workers-to-get-easy-unionizing-path-in-draft-bill; Kate Andrias, Mike Firestone & Benjamin Sachs, *Lawmakers Should Oppose New York's Uber Bill: Workers need real sectoral bargaining not company unionism*, ONLABOR (May 26, 2021), https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism.

[60] See, e.g., Penn & Clukey, *supra* note 59.

to Tony, whichever regulatory achievements the IDG had accomplished in New York City, it only did so with Uber's permission: "If Uber says no, it's not going to happen."

When I asked Tony whether Uber tried to retaliate or fight back his organizing campaign in La-Guardia, he said, surprisingly, no. "Actually, Uber was fairly laid back. They filed whatever they had to file with the NLRB, but I believe they actually let the infighting take its course. They just stood back and let us fight between ourselves," Tony said and leaned into his chair. "It is a really sad labor story . . . the fight between the unions halted the organizing on all fronts. After that, going back was impossible. The drivers were tired, frustrated, and divided."

Machinists and IDG representatives I interviewed said they did what they had to get their "foot in the door of the gig economy."[61] In their view, spending years in legal struggles over legal classification issues was a waste of effort on a losing fight.[62] They were not the only ones in the labor movement thinking of using Uber as a platform for finding innovative paths for power and voice outside the NLRA and the employee status.

2. Arnold and The Search for Novelty and Power

I met Arnold in one of those fancy "Future of Work" conferences; this one was held at Yale. We scheduled over email to meet for an interview sometime during the conference's aperitif break, right before the keynote address. Still, approaching him was hard. He was constantly surrounded by people, greeting, chatting and laughing. When I said to a union acquaintance, "it looks like it's his night," he replied with a smile, "Yeah, that's what *he* likes you to think."

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[61] Interview with Michelle, Lead Organizer, Independent Drivers' Guild, New York, N.Y. (Mar. 14, 2019).

[62] *See* Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 796.

But it was not just him. In Seattle, when I asked around for who was behind the initiative for a novel, local, progressive bargaining law for platform drivers, conditioned on the drivers being classified as independent contractors, his name kept popping up. All paths seem to lead back to Arnold. When I managed to pull him away from all the distractions to a side table, I asked what he was currently doing. To this, he replied that "the thing that I spend most of my time now is a monumental, ambitious new project."[63] Arnold was a labor entrepreneur. To him, the U.S. labor movement is weak because it is ossified.[64] For those seeking to strengthen workers in the workplace and in politics, innovation ought to be the principal word:

> What I find fascinating about institutions of labor is their insistence [to] conform to a business model from 1935. We have to build time machines to make our current labor models relevant. Instead of building new models... the operators of the system keep wanting to go back 80 years. The price of stability is death. . . . The American labor movement has become very predictable and very easy to kill.

With Uber, Arnold's path of innovation entailed pushing for a novel local labor law for independent contractors. He referred to the regulatory field of independent contractors as "the Wild West."[65] This is so because independent contractors are excluded from the scope of the NLRA, and, importantly, from the NLRA's extensive preemption regime of local regulations of labor.[66]

Seattle's labor institutional entrepreneurship used Uber drivers' exclusion from the NLRA to regulate Uber.[67] The exclusion opened the legal door to push for substantive labor

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[63] Interview with Arnold, former Seattle organizer, New Haven, Conn. (July 2019).

[64] *Cf.* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527-28 (2002).

[65] Interview with Arnold, s*upra* note 63.

[66] Racabi, *supra* note 3, at 1220-23.

[67] *Id.*

innovation that could never pass on the federal level. For example, the Seattle law allowed certifying a workers' representative using a "card-check" procedure (instead of NLRB-type elections).[68] It also enabled either party to initiate interest arbitration after three months of bargaining without agreement, to avoid leaving negotiations solely to loose good faith requirements.[69] Both of these tools, which are currently absent from the NLRA and merely proposed in other prospective labor reform bills, came to life in Seattle's local labor ordinance for platform workers.[70]

But this innovative approach came with a substantive and symbolic price tag. It entailed agreeing with Uber on the initial classification of its drivers as independent contractors and splitting from the legal and political struggle of the rest of the labor movement for a benchmark of universal employee status protections. It meant breaking from efforts like Tony's, the IBEW's, and the NYTWA's. This did not come cheap. A union representative from Seattle I talked to said that he was booed when he came to present this idea at a labor conference in California.[71] It was as if Seattle's labor had crossed an imaginary picket line around Uber, the worse offense any labor advocate could be accused of.

When I asked Arnold about this potential divide in labor ranks, he told me that in the choice between independent contractor status and employee status, "Many labor leaders . . . if forced to choose between [workers] being equally unwaged, almost equally un-benefited, and having no reasonable path to form an organization, but, being covered by W-2 employment laws, then that [employee status] will be their choice."

To Arnold, this is a mistake. According to him, the labor movement should strive for an organization, not minimum

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[68] *Id.* at 1218.

[69] Charlotte Garden, *The Seattle Solution: Collective Bargaining by For-Hire Drivers & Prospects for Pro-Labor Federalism*, 12 HARV. L. & POL'Y. REV. ONLINE 1, 4 (2017); Racabi, *supra* note 3, at 1219.

[70] Garden, *supra* note 69, at 3-5.

[71] Interview with Saul, Seattle Teamsters Organizer, Seattle, Wash. (July 8, 2018).

legal rights. His approach, and the one pushed in Seattle and victorious in New York City, was that organizers must figure out "how workers can have an organization and worry about the rest later. . . . [First] you build the organization, the organization builds power, and because the organization has power it could change the arc of history, over time."

While employee status confers minimum legal rights like a minimum wage and safety and health protections, it does not confer an organization. For Arnold, all those other employment benefits are the sideshow, the epiphenomena of political organization. Centering the labor movement on organization, at all costs, even at the expanse of fundamental workplace rights, was his attempted reorientation.

3. Tony, Arnold, and an Institutional Split

The rise of Uber brought with it internal splits within the American labor movement. Debates revolved around whether the labor movement should stay wedded to the employee status and its institutions as its benchmark, working to reform it from within, or whether the labor movement should focus on finding other sources of power outside of the employee status.

Arnold described this as a debate between legal rights organization opportunities. Tony described this tension as between "real" unionization versus insignificant "little programs." This tension permeates the struggles of the labor movement with Uber. At almost every significant juncture in the political history of Uber in the United States, it became possible—sometimes at Uber's initiative—for workers to give up their classification claims and minimum rights in order to form an organization.

Take, for example, the *O'Connor* case.[72] This case was a significant misclassification class action suit of Uber drivers from California and Massachusetts and was one of the most famous in Uber's legal ensemble. The case, which was

[72] O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015). For additional discussion of the case, see Hirsch & Seiner, *supra* note 54, at 1741-43.

eviscerated after the Supreme Court decision in *Epic Systems*,[73] featured a judicial dismissal of a settlement proposal reached between Uber and drivers' advocates.[74] In the settlement, Uber had consented and encouraged workers to form IDG-like unions in various cities, in exchange for workers' advocates dropping their classification claims.[75]

As part of the supplemental briefing the parties filed in support of the settlement proposal, Uber emphasized its willingness to adopt and establish IDG-like local drivers' associations:

> At this early stage, Uber envisions that a series of associations will be established in several of the major cities in which Uber operates. Uber is open to discussion and prepared to engage in good-faith negotiation regarding the specific format that the Driver Association eventually will adopt. Uber welcomes the opportunity to work with stakeholders . . . .[76]

In another case, *Dynamex Operations West, Inc.*, the California Supreme Court adopted a strict "ABC test" for classifying workers as independent contractors.[77] This decision led the

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[73] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1094 (9th Cir. 2018) (reversing district court's denial of Uber's motion to compel arbitration in light of the *Epic Systems* decision).

[74] Joint Supplemental Briefing in Support of Motion for Preliminary Approval [of Settlement], O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (3:13-cv-03826-EMC), ECF No. 617 (defending settlement proposal); Order Denying Plaintiffs' Motion for Preliminary Approval, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (3:13-cv-03826-EMC), ECF No. 748 (denying settlement proposal).

[75] *See* Joint Supplemental Briefing in Support of Motion for Preliminary Approval [of Settlement], O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (3:13-cv-03826-EMC), ECF No. 617.

[76] Joint Supplemental Briefing in Support of Motion for Preliminary Approval [of Settlement] at 26, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (3:13-cv-03826-EMC), ECF No. 617.

[77] Dynamex Operations W., Inc. v. Superior Court, 4 Cal. 5th 903, 966-67 (2018). For additional commentary, see Benjamin Sachs, *Looks Like the Gig is Up for Uber in California*, ONLABOR (May 1, 2018),

legislature to pass Assembly Bill 5 (AB5), which expanded the *Dynamex* decision across the California labor code.[78] Before AB5, California Governor Gavin Newsom had pushed labor and platform representatives to agree on a compromise that would include forming a state-sector bargaining law for platform drivers and forming statewide drivers' organizations in exchange for drivers agreeing to waive their employee status claims against Uber.[79] An internal debate within the California labor coalition erupted as to which route to take.

The stakes were high—not only with respect to Uber specifically, but with respect to the entire institutional structure of employee status. For some actors, unwavering labor support and mobilization around employee status was a win in itself—regardless of actual outcomes. As one California organizer described it to me:

> [T]he [decision whether to push for AB5 or a sectoral bargaining law] was not really that thought through or done in an orderly fashion. The SEIU [Service Employees International Union, initially pushing for sectoral bargaining] started receiving pressures from the construction unions, that said, wait a minute, if they are going to cut a deal here, how is that going to affect our struggles against misclassification in construction? . . . This, and an accumulation of setbacks, made the SEIU back away.[80]

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https://onlabor.org/looks-like-the-gig-is-up-for-uber-in-california [https://perma.cc/JJV7-3T7Y].

[78] Nayantare Mehta, *Flexible Working Hours and Employee Status: The Truth About AB 5*, NELP (June 21, 2019), https://www.nelp.org/publication/flexible-work-hours-employee-status-truth-ab-5 [https://perma.cc/A8LW-RE8S].

[79] Josh Eidelson, *Uber Has Bigger Problems to Worry About Than the Shutdown*, BLOOMBERG (Jan. 16, 2019), https://www.bloomberg.com/news/articles/2019-01-16/uber-has-bigger-problems-to-worry-about-than-the-d-c-shutdown [https://perma.cc/8PGX-QNJ6].

[80] Interview with Chris B., California Organizer (June 1, 2020). Like the other interviewees, Chris B. related that the concrete reason the

Much like Arnold, who thought that mere innovation was a win for a dying labor movement, insisting on a universal fundamental workplace benchmark was a win for the California advocates. The potential of institutional political projects to split labor in times of tech change is a reality to reckon with. With Uber's arrival, labor unions and advocates became acutely aware of the drift of labor and employment protections. Advocates split on whether to work within the institutional confines of the employee status through enforcement and reforms or whether to exit to pursue other institutional innovations. Splitting has political effects. It makes coordination more complex and more expansive—which can be a fatal obstruction to unions facing a coordinated, politically savvy, and moneyed adversary like Uber.

B. The Political Fate of Invisible Interests

Tech drift brings with it not only new institutional opportunities and risks but also substantive ones. In the aftermath of tech change, new stakeholders and interests emerge. New substantive political projects like Arnold's appear, shifting the focus of work law from providing a universal set of minimum rights to providing political and workplace organization first. Arnold's new substantive political project clashed with the project of cementing and expanding work law's universal minimum rights. These substantive struggles were tangled with the question of which institutions labor advocates should use to actualize those policy goals.

New constituencies are another example of substantive rifts in a post-tech drift world. Uber drivers, Facebook users, and Tik-Tok influencers are all new tech-drift constituencies with a possible stake in tech politics. These new groups are usually politically transparent. They typically enjoy few recognized legal claims to preserve their interests. Their legal inferiority is sometimes cemented in boilerplate contractor or consumer

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construction unions were so alarmed was that in 2019, a Taskrabbit worker hired through an app had shown up on a California union construction site. News of the worker filtered up through the construction union's grievance procedure and was brought to the attention of the leadership during those negotiations.

agreements with the platforms they work with or use.[81] Alternatively, their inferiority may simply happen because they live in an era of mass technological utilization.[82] These groups also lack political agency to advocate for their legal rights or to barter away some rights to better protect others. Collective action problems block them from achieving such agency—and, as José learned, so do the real hardships of bottom-up organizing.

Without political or legal agency, these stakeholders' interests are held by tech companies. The interests of the new stakeholder groups formed by tech drift are bound to the firms that pushed for it. Those groups can then be politically monetized or conveniently ignored, depending on context. Who other than Uber, Facebook, and TikTok can protect the interests of their users? Who other than those users and workers are the best political shields for Uber, Facebook, and TikTok facing adverse regulators and courts?

Consider, for example, Viljoen's work on the relational aspects of technological data gathering and utilization practices.[83] She gives the example of a person identified as a potential gang member by a matchmaking algorithm that collects and processes visual data of tattoos from various individuals.[84] The person identified and the population to which he was attached have a significant stake in tech politics. But currently, few legal rights exist over such practices of data analysis.[85] Those who suffer or enjoy such broad "population-level interests"[86] must overcome significant collective action problems necessary to create the political agency to do something about it. For now, they are legally and politically invisible.

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[81] COHEN, *supra* note 24, at 154-55.

[82] *Cf.* Viljoen, *supra* note 16, at 613-16 (describing the importance of horizontal harms of data gathering on affected populations—those that suffer or enjoy the consequences of gathering the information of others).

[83] *Id.* at 603-13.

[84] *Id.* at 604-06.

[85] *Id*. at 608-09.

[86] *Id*. at 579.

Consider another example: Uber's struggles against taxi companies and local regulators. Facing adverse local regulatory interventions and attacks from local taxi conglomerates, Uber positioned itself as the champion for the rights of Uber users—drivers and riders alike.[87] It then used its app to mobilize its users against adverse regulatory intervention; they were a lynchpin of its successful political strategy.[88] Since Uber drivers and riders depend on Uber's continued existence and operation outside of taxi regulations, it was easy for Uber to align those constituencies with its defense. In a world where tech drift has brought with it new substantive claims, tech companies position themselves as the only guardians of those interests.

Finally, consider the example of flexibility and employee status. Most Uber drivers I interviewed did not care about their employment status as a legal abstract.[89] However, they sincerely cared about what their legal status meant practically. Often, both in my research and that of others, drivers identified being classified as independent contractors with flexibility—their ability to work when and where they like.[90] As most drivers cared deeply about this feature of their work, they cared about their classification. Unlike Arnold and the internal labor fights about the institutional arena, classification was a means to a substantive end, a purely practical concern to most of them.

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[87] Sabeel Rahman & Kathleen Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-First-Century Capitalism*, 47 POL. & SOC'Y 177, 180 (2019).

[88] *Id.*

[89] The outliers were drivers active in organizing California's push for AB5. *E.g.*, Interview with Leon, Driver Organizer for Rideshare United (June 26, 2020). All the California drivers I interviewed who were involved in such organizing campaigns cared deeply about their status. *See also* Veena B. Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy* 3-4 (U.C. Hastings L. Legal Studies Research Paper Series, Rsch. Paper No. 381, 2019), https://ssrn.com/abstract=3488009.

[90] Racabi, *supra* note 3, at 1192-94.

Uber at times portrayed the legal classification as binding in that regard, as if Uber would have no choice but to impose strict shifts and places of work among drivers classified as employees. At least legally, that is simply not the case.[91] However, there is nothing inherent in the employee classification that prevents employers from deciding that they will *not* grant their employees flexible scheduling and work placement or that they will only give flexibility to whomever they deem profitable to do so.

Contemporary labor and employment law does not protect employees' rights to choose when and where they work. On the contrary, this decision-making power is considered the employer's inherent prerogative.[92] Management has the unilateral legal authority to direct all manner and means of one's work. However, controlling workers' schedules and work location can be used as an indicator for employee status.[93] Some drivers correctly recognized that being classified as independent contractors was the only legal obstacle preventing Uber from taking their cherished flexibility away.[94]

Judicial readings treated this interest of drivers in securing their flexibility as negligible compared with the benefits

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[91] *Id.* For additional commentary on this topic, see Benjamin Sachs, *Uber, Flexibility and Employee Status*, ONLABOR (May 18, 2018), https://onlabor.org/uber-flexibility-and-employee-status [https://perma.cc/CH2X-VCL6]; Cynthia Estlund, *Why Flexibility Is Not Just a Trope*, ONLABOR (May 17, 2018), https://onlabor.org/why-flexibility-is-not-just-a-trope [https://perma.cc/WU9W-GZ2E]; Benjamin Sachs, *Enough with the Flexibility Trope*, ONLABOR (May 15, 2018), https://onlabor.org/enough-with-the-flexibility-trope [https://perma.cc/JA53-JE7P]; Benjamin Sachs, *Uber: Employee Status and "Flexibility"*, ONLABOR (Sep. 25, 2015), https://onlabor.org/uber-employee-status-and-flexibility [https://perma.cc/379C-BAEW].

[92] Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 87.

[93] Racabi, *supra* note 3, at 1192-94.

[94] Dubal, *supra* note 89, at 21 ("While [drivers] need and want protections, many recognize the immense structural and instrumental powers of the corporations, and they fear what kinds of control gig companies might exert if they feel authorized to behave as employers. Workers are particularly worried about losing on-the-job scheduling flexibility").

obtained by inclusion in employment and labor law. In a politically important way, the law left those new interests unprotected, and left completely alone and unallied those who held those interests dear—alone that is, except for Uber.

Consider a judicial treatment of Uber's claim that drivers would lose their flexibility after being classified as employee-status workers. The below quotes are from an injunction order issued by a California state trial court, ordering Uber to classify its drivers as employee status workers under the—then-applicable—newly enacted AB5 law. Here the court directly responds to Uber's claims of irreparable harm that will be caused to its flexible business model and the drivers relying on it:

> The Court does not take lightly [Uber's] showing that a preliminary injunction may . . . have an adverse effect on some of their drivers, many of whom desire the flexibility to continue working as they have in the past, and may have commitments that make it difficult if not impossible for them to become full-time or part-time employees. . . . [T]hose concerns are magnified by the sweeping scope of the injunction [requested] . . . and by the Court's uncertainty as to how precisely [Uber] will go about complying with it.[95]

Here the court acknowledges that imposing an injunction on Uber forcing it to classify its drivers as employee-status workers might harm workers' interests in maintaining a flexible workplace. But because of the unilateral authority Uber would in fact gain over flexibility, the exact nature of such harm is unclear. Nobody, perhaps not even Uber itself, knows what Uber would decide to do with flexibility after reclassification. However, the court states few reasons to discount this harm. First, Uber cannot use drivers' flexibility as a get-out-of-jail-free card for having violated California law, no matter how many people's lives are affected by enforcing said law:

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[95] People v. Uber Technologies, Inc., No. CGC-20-584402, 2020 WL 5440308, at *17 (Cal. Super. Ct. Aug. 10, 2020).

> [I]f the injunction the People seek will have far-reaching effects, they have only been exacerbated by [Uber's] prolonged and brazen refusal to comply with California law. Defendants may not evade legislative mandates merely because their businesses are so large that they affect the lives of many thousands of people.

And second, the harm to drivers is negligible because those drivers work on a casual or sporadic basis, or perhaps, due to COVID19, do not work at all:

> [C]oncerns about the effects of the Court's injunction on drivers are substantially mitigated by at least two factors. First, as [Uber itself] emphasize[d], the vast majority of their drivers work on a casual or sporadic basis, for only a small number of hours per week, and thus the effects on those drivers of a reorganization of [Uber's] businesses are likely to be correspondingly minor. Second, the ongoing effects of the pandemic have drastically reduced the demand for [Uber's] services, and even those drivers who are able to find work may elect not to do so to avoid exposing themselves to the coronavirus . . . .[96]

The harm from the injunction to drivers is "minor" per the court's reading—or at least, minor compared to the overall advantages of having Uber comply with the law. The court is correct in that it is the law that recognizes those interests as less worthy of defending. Those new constituencies and interest-bearers are, to a great extent, invisible to the law—only coming to light before the court under Uber's auspices and entirely dependent on Uber to represent and fulfill their interests.

The court found the arguments about harming drivers' interests and the interest of the broader California rider

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[96] *Id.*[97] Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 118; Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 539 (2021).

community as a result of enforcing the injunction to be negligible. Notably, the California public did not share those views. Uber used the drivers' flexibility and well-being and its continued operation in California as its central talking points in the referendum on the application of AB5 to its business model.[97] While it is difficult to estimate the effects of each argument in the actual political decision-making of California voters in adopting Proposition 22, some evidence demonstrates that it was not negligible.[98] Uber's political embrace of drivers' flexibility and Uber's role in the community's well-being ultimately politically won the day.

Focusing on employee status as *the* battleground for labor interests facing Uber, workers' advocates also treated control over flexibility as negligible. On the substantive debate, securing a minimum wage, safety and health protections, and access to workers' compensation programs was a much higher priority than was making sure drivers' flexibility was protected. Tony, for example, argued that employee classification and unions can bring the substantive goods of salaries, health insurance, and benefits. He did not mention flexibility.

Here, tech drift and the ability of tech companies to control context brought new interests to life; these interests are then mobilized by tech companies in the political ecosystem, creating a feedback loop empowering them and resisting adverse regulatory interventions. This is not to say that those interests are more or less worthy than other interests, nor to suggest that every case of tech drift will necessarily be politicized in this way. It is only to recognize one such political mechanism tying together control of context, substantive legal rights, and political power-building.

Herding unprotected stakeholders into a coalition with the promise of guarding their interests against intervention is not a new political move. American businesses are known to offer

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[97] Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 118; Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 539 (2021).

[98] Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 118.

subjugated classes and communities a chance to participate in the labor market in exchange for exclusion from legal protections.[99] Facing an adverse job market, with essentially no legal guarantee of a good job, some community organizations accepted, and still accept, this offer.[100] The weak joining the strong is not an unusual political choice. In the aftermath of tech drift, workers are powerfully motivated to join tech companies as protection from "invading" regulators.

C. The Political Outcomes of Jurisdiction

1. The Jurisdictional Politics of Innovation

The repeating account I heard about how the Seattle local labor regulation came to be involved a cocktail party, union leaders, lawyers, and city council members. Though the person who came up with the idea amusingly changed identities in some accounts, the gist remained the same. Arguably, the most innovative labor regulation on American soil in the past decades—the legislation of local, progressive labor law for independent contractors—stemmed from something one person said to another at a party. For example, this is the account of a Seattle City Council member:

> I remember talking to [a union executive] at a cocktail party, and we were just standing around with a couple more city council members and union leaders. I said, you know what, have you thought about, maybe we legislate a new labor law? And then we just went off and did it.[101]

In California, the path to regulatory intervention was not as simple. I interviewed Nicole on the phone after COVID-19 started spreading. Everyone and everything went into

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[99] IRENE TUNG, YANNET LATHROP & PAUL SONN, NAT'L EMP. L. PROJECT, *THE GROWING MOVEMENT FOR $15*, AT 1 (2015) (summarizing data on demographic characteristics of low-wage workers); Bargil & Benkler, *supra* note 39, at 57-58.

[100] Dubal, *supra* note 97, at 508.

[101] Interview with George T., Seattle City Council Member, Seattle, Wash. (Aug 22, 2018).

lockdown mode. We started the interview by mutually apologizing, letting each other know that our kids might interrupt us, which they in fact did. She was watching her sons while they were playing out in the backyard. I was waiting to buzz my kids in when they got tired of socially distanced playing outside. This mutuality created an unusually comfortable phone interview.

Nicole was an organizing director of a union working in California. In 2017, they began to organize Uber and Lyft drivers into "communities." In the beginning of the interview, Nicole acknowledged that because Uber and Lyft drivers were classified as independent contractors, formal unionizing was not a viable path:

> [When] [w]e launched the organizing campaign . . . we understood that these workers are excluded from labor law, and our project with gig workers was never meant to be a union. Our goal was to explore the question of community and how they might achieve organizing rights. The workers had demands: we want more money, we want respect, we want more control over deactivation. But the debate in California come 2019 gets really complicated.

When I asked Nicole about choosing the strategy of pushing for AB5, the labor-backed state overhaul of classification rules aimed explicitly at reclassifying Uber drivers as employee-status workers, she answered:

> Our goals were not on a linear path. The question of what to do always depends on a political context which shifted all the time. We had a new governor, and our driving force was asking, what is the role of California in this shaping of the future of work? We were watching closely

> Seattle, as other organizations, and learning from it.[102]

As Nicole describes it and as described in Part II.B., the dilemma California labor faced in 2019 was choosing between pushing for a sectoral bargaining law—thereby compromising the classification of Uber drivers as employee status workers—or focusing on reforming the state's employee classification test. The first was a novel, innovative labor relations initiative. The second was a much-needed rehaul of the legal entryway into the state's existing protections for employee-status workers.

According to Nicole, how to answer this question depended highly on shifting political contexts. But there was one stable thing about California politics—it was big. And to move it to any direction necessitated a broad coalition of unions and labor groups to push and vouch for any new work regulations, innovative or not. Nicole said that some unions and some of the informal drivers' groups supported the sectoral bargaining initiative but simply could not move ahead without the support of many, if not all, other unions. These unions served as coalitional gatekeepers, where any joint action is conditioned on their approval. Per Nicole:

> Any progress was dependent on a coalition of unions, and the internal dynamic between the unions didn't allow for choosing the path of sectoral bargaining or for finding other means of representation [for drivers]. The building trades representative, [who] opposed sectoral bargaining, told the drivers' groups representatives [some supporting the sectoral bargaining initiative], "We speak for 600,000 members. How much do you have?" The[] [building trades union] spent years and millions of dollars in building the employee status and [wasn't] going to step away from it.

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[102] Interview with Nicole S., Organizing Director for a California union (June 14th, 2020).

The jurisdictional difference of local and statewide politics involves a necessary shift in political organization. Broader jurisdictions necessitate the creation of broader coalitions of stakeholders. This makes the role of coalitional gatekeepers, those actors who can make or break joint action, much more crucial.

The distinction between jumpstarting a regulatory intervention at a cocktail party compared with conducting complex internal labor negotiations across sectors and trades might seem far too simplistic. We can find coalitional gatekeepers in local settings as well. It can always be complicated to form coalitional support, no matter the size of the jurisdiction. But as a rule of thumb, the broader the jurisdiction, the more complex coalition building becomes.[103] This is part of what makes local governments more prone to regulatory innovations. It is not just that there are more localities than there are states and more states than there are federal unions. Political innovation is more accessible and politically cheaper and less likely to be hampered by institutionally conservative actors.

Alongside institutional and substantive rifts within the losing coalitions of tech drift, we can also find jurisdictional gaps. As different adversaries of Uber were located in different political geographies, in different jurisdictions—their context required differing political organizing methods and subsequent institutional and substantive projects. Here, different jurisdictions affected the political opportunities by ascribing more weight to coalitional gatekeepers. Those, at least in this case, were inclined to more conservative takes on both institutional questions and their derivative substantive ones.

2. The Politics of Assertiveness

The choice of jurisdiction is linked to innovation and how aggressive regulatory intervention can hope to be. This is true because, in general, local governments are more vulnerable to losing from too aggressively regulating capital, for example, because of capital flight, but also because localities are legally

[103] Racabi, *City States*, supra note 7, at 1157-58.

susceptible to preemption of their regulatory powers.[104] This sort of legal enfeeblement can be done via court-based attacks on the capacity or authority of the local government to enact specific regulations, and this can also be carried out via state or federal legislation, explicitly or implicitly preempting the local regulatory intervention. The political dynamic of "progressive cities—preemptive states" has become critical during the past decade.[105] This dynamic stems directly from the legal vulnerability of local governments.

As in other contexts, Uber rode this legal dynamic to its maximum potential. Facing in its early years a slew of local taxi-regulations-based attacks on its business models,[106] Uber shifted jurisdiction and lobbied state legislators to solve its local legal fights. Uber was immensely successful in that, passing 49 state Transportation Network Company (TNC) Laws.[107] By 2018 42 states' TNC laws preempted local governments from regulating nearly all aspects the TNC sector, with some exceptions.[108]

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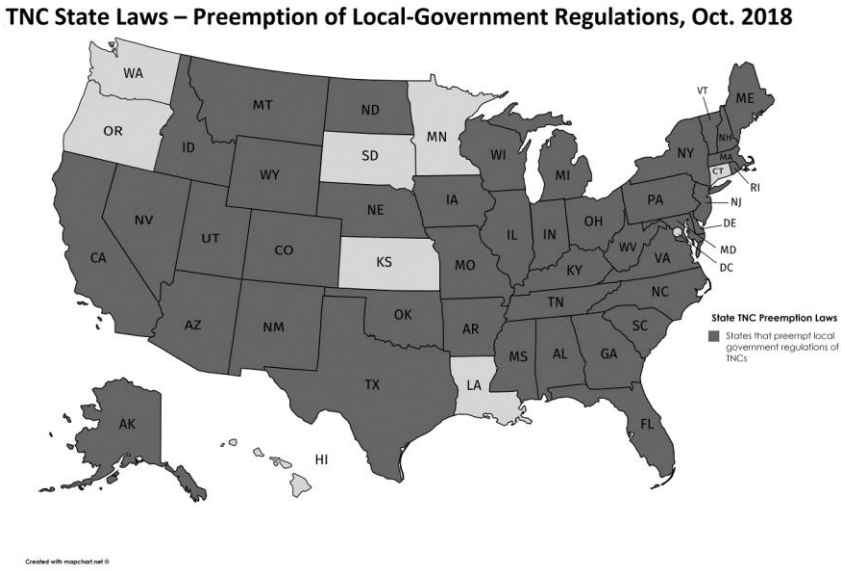
[104] *See* Frug, *supra* note 18, at 1109-15; Barron, *supra* note 18, at 2264.

[105] See Olatunde C. A. Johnson, *The Future of Labor Localism in an Age of Preemption*, 74 INDUS. LAB. REL. REV. 1179 (2021) for a good recent articulation of this dynamic.

[106] Berins, Dubal, & Carter, *supra* note 48, at 293.

[107] *See* Racabi, *supra* note 3, at 1173-74; Racabi, *City States*, *supra* note 7, at 1170-71.

[108] Racabi, *City States, supra* note 7, at 1170-71.



Another preemption path was through the courts. The Seattle local labor law for platform drivers was blocked because Uber convinced the court that city regulations are not immune from antitrust scrutiny like state regulations are.[109] Though the city argued for a state exemption from antitrust scrutiny, the court demanded a higher bar of state involvement in the city's internal rules to grant immunity from antitrust preemption arguments. The city and labor lost; Uber and state supervision won.

That holding joined a long line of local business-adverse or plain progressive measures preempted on state or federal grounds.[110] This legal vulnerability can push local political organizing to be less assertive and more cooperative with other interests, especially those with access to preemptive measures (state legislators, courts, etc.). The IDG in New York serves as an example of a local cooperative initiative facing such a strong adversary.

In a post tech-drift world, actors scramble to find venues for power. This part argues that alongside institutional and substantive rifts, jurisdiction selection and shifting also

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[109] Racabi, supra note 3, at 1221-23; Racabi, *City States, supra* note 7, at 1165.

[110] *See* Briffault, *supra* note 18, at 1997-98.

significantly affect political organizing. Local regulations might be more accessible and can offer a venue for novel political projects. But localities are also more vulnerable to preemption attacks. This makes aggressive local interventions legally and therefore politically risky endeavors. While more resilient to legal challenges, broader state- or federal-wide coalitions are much more difficult to construct and maintain. This is especially true regarding institutionally or substantively innovative regulatory interventions.

D. Summary of the Political Splitting Argument

Law is the terrain on top of which tech politics happens. The fight over control of the stakes of technological change is conducted against the background of various legal facts, rules, and procedures. Actors define and construct their varied political projects with this terrain in mind. Law is endogenous in those struggles, with far reaching effects.

The overarching legal feature described here was that of drift—a gap between policies and the context in which they operate, which creates a policy failure. Uber pushed the already-adrift labor and employment laws to a clear point of failure. Against the background of tremendous difficulties of organizing, the emergence of new interests and interest holders unprotected by contemporary legal frames served to reinforce Uber in its political coalition building. The spread of labor actors across jurisdictions and the weak legal status of localities affected the means and goals of political organizing of workers and their advocates around Uber.

From my interviewees' point of view, the law was only as good as it is used *in particular political projects*. José is concerned about losing his livelihood, Arnold is worried about the death of the American labor movement, and Nicole is concerned about losing her organization's voice in a broad coalition. By the same token, the law is only as valuable as it is used *by particular actors*. A complete law-and-political-economy analysis of tech change must treat the law not just as a set of rights and immunities or as swords and shields but also as the

bedrock upon which political projects may be constructed within a particular ecosystem.

The mechanisms described in this Part and those specific political projects are far from exhaustive. On the contrary, they are here to spark the realization that there must be additional legal terrains, more political actors, many more political projects around tech change to be uncovered.

III. Structural Tech Law Remedies—Towards a Pluralization of Tech Politics

Legal interventions in tech change are at a crossroads. On the one hand, the early optimistic visions of tech law pioneers of a self-regulating space have collapsed.[111] An idea of a decentralized technical infrastructure creating decentralized power relations was thwarted as companies built what were effectively toll booths and bottlenecks around the basic technological layers of the internet.[112] Direct legal interventions face the same risk. Because the technological context of work, speech, and data is unilaterally governed by tech overlords, changing that context in response to regulatory threats or using it to achieve political levers is commonplace.[113] Both sides of the policy-technology context are potentially dynamic, not inherently static. If we have learned anything in the past twenty years of tech regulations, it is that power can flow over direct policy or technical layers.

In a recent paper, Bargil and Benkler recognize that firms can create market power using various techniques: technological, legal, informational, and ideological.[114] Firms can utilize new technologies to usurp market power, can use the law to cement monopolistic market position and can use ideology to

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[111] Yochai Benkler, *A Political Economy of Utopia*, 18 DUKE L. & TECH. REV. 78, 81 (2019).

[112] *See generally* Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 DAEDALUS 18 (2016).

[113] Racabi, *Abolish the Employer Prerogative*, *supra* note 7, at 118.

[114] Bargil & Benkler, *supra* note 39, at 85.

justify one type of specific state involvement over others.[115] Considering the malleability of those areas, Bargil and Benkler's vantage point for intervention is to aim to identify which kind of action increase overall welfare (say by measures of efficiency) or will increase the firms' market power. Here, I follow their assumptions about the plasticity of law and tech[116] but offer to adopt a systemic view, one that aims to analyze and intervene not in particular actions but in systemic dynamics.

Power over technological change is a structural problem, not a particular domain of law. The splitting of Uber's adversaries over institutions, substance, and jurisdictions happens over and across substantive fields. In this Part, I will demonstrate how structural tech law interventions can push for the democratization of tech change, broadly defined. We can think of democratizing tech's ecosystem using three analytic components: *actors*, *ethos*, and *power*.[117] *Actors* refer to those who are included in tech change's ecosystem. *Ethos* refers to the mode in which those actors relate to each other. *Power* refers to the distribution of control over stakes between those actors. The following parts review some suggested reforms to those elements of tech change's ecosystem.

A. Actors—New Dogs and New Tricks

Tech change's ecosystem comprises those actors who seek to accomplish political or economic goals arising from technological change. This could include, for example, emerging tech companies that commercialize new technological affordances to achieve market power or efficiency gains. This could also include previous economic incumbents using legal or political levers to stop or thwart the operation of the new tech-riding entrant, regulators who are in charge of a particular policy area, think tanks engaged in policy research and advocacy, consumer and worker groups aiming to maximize their gains from the

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[115] *Id.*

[116] *Cf.* Bargil & Benkler, *supra* note 39.

[117] This part draws heavily from Johnnie Lotesta, *Rightward in the Rustbelt: How Conservatives Remade the GOP, 1947-2012*, at 41-42 (2019) (unpublished dissertation) (on file with author).

technological change or to minimize their risks (however those might be defined). Technological change is deeply enmeshed in such networks of actors pursuing various political projects, using tech change as a lever or facing actors who use it as a lever against them.

For example, Kate Klonick's research of social media platforms' early content moderation practices describes the effects of "third party influences," including civil rights organizations, academics, and specialized advocacy groups.[118] Most recently, social media companies internalized some of those external networks by introducing a formalized advisory boards in Facebook, TikTok, and Twitch.[119] These groups, and now boards, advocate and push for broad "best practices" and suggest actions on thorny content moderation issues.[120] But other than anecdotal observations, the role of the wider tech ecosystem remains largely underexplored.[121]

In the case of Uber, this ecosystem included Uber as the tech entrant, taxi companies as the struggling market incumbent, regulators, and an array of labor actors with varying institutional and substantive projects engaging in these with different degrees of success. One apparent democratic deficit in tech change's ecosystem is the lack of democratically accountable actors. Considering other tech change hot issues, Uber faced much more significant pushback and resistance from localities and broad membership-based organizations than Facebook did. Uber competes with taxis, a sector that localities had traditionally regulated. It threatened to change the labor

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[118] Klonick, *supra* note 14, at 1655.

[119] Dvoskin, *Representation without Elections, supra* note 40, 460; Vanessa Pappas, *Introducing TikTok Content Advisory Council*, TIKTOK (Mar. 18, 2020), https://newsroom.tiktok.com/en-us/introducing-the-tiktok-content-advisory-council; *Introducing the Twitch Safety Advisory Council*, TWITCH BLOG (May 14, 2020), https://blog.twitch.tv/en/2020/05/14/introducing-the-twitch-safety-advisory-council/.

[120] Klonick, *supra* note 14, at 1655-56; Dvoskin, *Representation without Elections, supra* note 41, at 460 (reviewing various community engagement initiatives at social media platforms).

[121] *But see* Dvoskin, *Representation without Elections, supra* note 40 (theorizing the role of NGOs in the governance of social network platforms).

market, which created an countervailing interest from the side of labor unions. Both unions and localities are comparatively weak legal actors. But content moderation lacks even the weak presence of such actors. Substituting for them, to some limited extent, are those advocacy organizations and the platforms' reliance on user reactions. This deficit opens the possibility of injecting more broadly based actors into the process of tech change or working to democratize actors currently operating in that field.

1. Nurturing Democratic Actors in Tech's Ecosystem

We can understand tech politics as suffering from a democratic deficit. Most actors involved in tech change are not obligated or accountable to any broad-based democratic constituency. These actors lack any direct incentive to pursue broad-interest beneficial political projects and are not penalized for failing to take public interest to heart. Private investment funds and firms may have some overlap in their political projects with the broader community's interests, like the effects of Facebook's users' base on content moderation practices.[122] But this link is tangential, contingent on an overlap of interests, and consistently subjected to the stakeholders' manipulations. With no actors pursuing democratic projects, any democratic gains of tech change depend on technological change's invisible hand.

Law can help us remedy or intervene in this democratic deficit. Recent legal literature identified both the crucial role of broad membership-based organizations in the distribution of political power in a democracy and the essential role of law in fostering those organizations. Recently, Sachs and Andrias offered a slew of legal reforms aimed at creating broad-based organizations for lower-income and working-class people in areas such as rent, housing, and debt, in addition to the workplace.[123] According to their suggestions, law could help create the "framing" to assist broad popular movements to congeal, help such organizations secure funding and a "seat at the

[122] Klonick, *supra* note 14, at 1655.

[123] Andrias & Sachs, *supra* note 59.

table," guarantee a right for spaces in which to organize, and prohibit retaliation against participation.

Broad organizing in labor, rent, and debt demonstrate how law can help create countervailing political power by adding democratically led organizations into organizing deserts—ecosystems that lack substantial broad-participation movements. Tech change could be another example of an ecosystem bereft of democratic organizing law could help nurture.

The most straightforward example of such an organizing desert in this Article was José's story. The lack of experience, resources, a seat at the table, and legal frames for José and the BDA left them completely powerless vis-à-vis Uber and with relevant regulators. The lack of funding and participation structure for such an organization, the lack of space in which to meet, and the sense of butting their heads against the regulatory and corporate wall were all tremendous obstacles. Even in a policy area already prone to the logic of massive membership-based organizations like work and labor, José failed also because of a lack of an accommodating legal framework for organizing. This organizing desert surrounds tech giants like Uber and helps bolster their influential role in their ecosystems.

We can democratize tech change by adding legal affordances encouraging relevant stakeholders to organize. Facebook users, TikTok influencers, and Uber drivers can be legally prompted and encouraged to establish and join broad membership-accountable organizations. Legal interventions, similar in spirit to those Sachs and Andrias suggest, could bring us there.

Another possibility for injecting more democratically accountable actors into tech change is to localize some jurisdictional elements of regulating it. By allocating various regulatory or advisory features to localities, we can gain both smaller and more deliberative processes than those conducted in hyper-elite institutions, with an added value of potential local experimentation.

One of the reasons for José and the BDA's failure, alongside numerous other such failures of grassroots organizing, was the slew of state preemption laws prohibiting localities from undertaking any actions related to TNCs like Uber. But allocating regulatory authorities to localities in times of tech change could encourage both the democratic debate and the benefit of local innovation into an area prone to regulatory stalemates.

Another less explored possibility is to insert into tech change's ecosystem publicly owned or democratically controlled investment funds and tech firms. The option of founding a publicly owned Uber or a publicly controlled Facebook is usually ruled out as less feasible, even impossible.[124] The possible gains to democratic inputs into arenas currently far removed from citizens' impact, however, might also be as significant.

2. Injecting Democratic Inputs into Existing Actors

One possible means of making tech change more democratic is to add democratically accountable actors into its ecosystem. Creating the conditions for forming broad membership-based organizations, local governments, and publicly controlled venture capital firms and tech companies is one kind of policy option made available by reconceptualizing tech change as an ecosystem to be intervened in. Another set of options is not to add new actors into the ecosystem but to inject democratic inputs into existing actors.

For example, we could add democratically elected workers' or other stakeholders' representatives to the boards of tech companies—a process known as co-determination.[125] We could also assign seats to workers' representatives on boards of venture capital firms investing in labor-heavy tech firms. Publicly

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[124] *See*, *e.g.*, Douek, *supra* note 35, at 768 ("[T]he scale of online content will make private platforms' role as the frontline actors in content moderation an ongoing practical necessity. Governments will not have the resources or technical capacity to take over.").

[125] *See generally* Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321 (2021).

elected advisory boards for social media companies could augment their internal content moderation practices or allocate certain regulatory decisions to public-facing or stakeholder-specific ballot measures. These public boards could also review and advise on other aspects of internal governance, complementing internal and semi-external boards.

Another possibility is to add deliberative spaces into regulatory agencies. This idea was recently advanced by Rahman and Gilman, illustrating how reforming administrative agencies' deliberative practices can help movements and organizations mobilize and influence policy issues.[126] These spaces could be *ad hoc*, focusing on a specific regulatory decision, or instead focus on the adoption of comprehensive regulatory policies. Courts could also use this practice by soliciting amicus curiae briefs and testimonials from broad stakeholder organizations. Alternatively, they could expand the possible purview of interests to be heard and considered, perhaps circumventing, to a degree, the problem of tech companies capturing new interest holders.

These possible interventions and the addition of democratic-facing actors into tech change's ecosystem are possible intervention points outside the scope of current law and technology. Focusing narrowly on the legal rights and duties of tech companies vis-à-vis the state has its place. That said, a structural perspective enables us to consider much more varied democratic and regulatory responses to tech change.

B. Ethos—Cooperation and Bargaining Instead of Winner-Take-All

Another point of entry for law into tech change is altering the ethos of tech's ecosystem. By ethos, I mean the mode in which actors relate to each other within tech's ecosystem. The networked nature of many online platforms seems to demand

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[126] SABEEL RAHMAN & HOLLIE RUSSON GILMAN, OF, FOR, AND BY THE PEOPLE: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 37 (2019).

a rush for scale and a winner-take-all competition.[127] We can counter that by adding institutions to create broad social compromises and deal-making across various stakeholders' representatives.

The contemporary ethos of tech change is considered highly technical or legal. But the discourse surrounding tech change lacks a coherent, publicly accessible debate about stakes. What tech change loses from the exclusivity of these forums is the ability to form comprehensive deals that include multiple stakeholders. Without the ability to gauge the stakes and the power to broker wide political deals, democratic-pursuing actors lose an input into tech change.

One of the crucial lessons from comparative political economies is that economically interested actors are not inherently predatory toward other actors. For example, the lack of broad, coordinated labor relations institutions in the United States[128] and a focus on a firm-based organizing model motivates employers' push against unionization.[129] No employer is obligated to coordinate with a union, and few do. In comparison, broad and over-encompassing employers' and workers' associations prevail in European models of labor relations. This is the difference between liberal and coordinated economies. The zero-sum kill-or-be-killed, "rationally predatory" ethos of American employers towards unions is not a force of nature but rather a product of the institutional environment.

In tech change's literature, this kill-or-be-killed ethos, much like tech change more broadly, is considered inevitable. This ethos might create some social goods. For example, some accounts hold that the cycle of creative destruction, with its

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[127] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1035, 1095 (2019).

[128] Kathleen Thelen, Employer Organization in the United States: Historical Legacies and the Long Shadow of the American Courts (2020) (unpublished manuscript) (on file with author).

[129] CLEAN SLATE FOR WORKERS' POWER PROJECT, https://www.cleanslateworkerpower.org/about [https://perma.cc/FR5R-YPHU].

prizes and penalties, is useful for innovation.[130] But it might harm other social goods, like the community structure built around the previous economic incumbent. Moreover, technological change can often be used as leverage against workers, suppliers, consumers, and communities to gain the upper hand in economic bargaining. Benkler and Bargil seem to assume that we can someday distinguish between technological utilization as a power move and technological utilization as an economically beneficial move.[131] Another option, less optimistic about our ability to distinguish between the two, is to create broad bargaining institutions, including various stakeholders surrounding specific issues of technological change.

Broad bargaining institutions could benefit both the creation of actors and, most importantly, elicit dialogue, political bargaining, and compromise on specific aspects of technological change. Our current modes of such political contestation—courts and legislators—face known institutional challenges. Courts are backward-looking, cryptic, and usually only capable of piecemeal change. Any deals they broker among stakeholders will be unstable. Legislators, like courts, are prone to forum-shopping. They are also too readily accessible by and susceptible to moneyed interests. Establishing forums for deliberation without the need for a state-sanctioned solution could be a model for another sort of regulatory intervention into the process of tech change.

C. Power—Countering Drift with Legal Inflation and Deflation

Tech drift is used to create and herd politically vulnerable populations. New constituencies like Uber drivers with no say on their flexibility, people identified as gang members by a matchmaking algorithm, and similar demographics are harnessed into tech politics. Drift entails pushing weaker stakeholders' claims outside of recognized legal boxes, and entrenching interests via a broader scope of rights in recognized

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[130] *See generally* THOMAS MCCRAW, PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION (2009).
[131] Bargil & Benkler, *supra* note 39, at 5.

ones. To balance the political playing field, we could make legal recognition of stakeholders' claims more accessible but less absolute. In other words, we might counter drift by more charitably recognizing possible legal claims and less charitably acknowledging their legal significance. Claims would be more available but less weighty and constraining.[132]

Recognizing more legal claims but weakening their significance empowers new populations by vindicating their stake and stripping away some of the advantages of stronger, entrenched actors. In turn, this empowerment would have a political impact. It could create agency, coordination, and leverage among politically dormant stakeholders. It could facilitate bargaining and better balancing of competing values and projects. Creating such agency and power by recognizing new stakes could serve as another intervention point into tech's ecosystem.

Doing so could be beneficial from the perspective of epistemic uncertainty. As we do not know the end game of tech and law, we do not know *a priori* which values should be woven into its development. How much do we care about privacy? About flexibility? How should the costs and benefits of data gathering practices be weighed? Because these answers cannot be assumed to be known now or fixed, we cannot risk deciding *a priori* on the answer or even constructing governance systems that inherently, perpetually carry specific sets or balances of values. A second-best, pragmatic solution is to allow multiple voices and multiple political projects to have their way with technological change. For that purpose, a more egalitarian distribution of legal power could serve as a procedural aid.

This power reallocation can occur in multiple ways. But the overall aim is to reduce the threshold for legally recognizing further harms and goods, duties, and immunities. This could mean that courts would tilt toward accepting new

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[132] For a discussion of a similar move in constitutional law, see Jamal Greene, *The Supreme Court 2017 Term: Rights as Trumps*, 132 HARV. L. REV. 28 (2018) (advocating for relaxing the threshold for what counts as a constitutional right but also relaxing the effect of rights' recognition as a tool for reducing political polarization).

stakeholders' claims as legally enforceable by reducing entry barriers into existing categories and by including new stakeholder interests in their analysis. In turn, this would mean that regulatory agencies should tilt towards interpreting the law they administer and enforce in a broad and inclusive way. Their goal too would be to prevent or complicate the act of creating additional techno-political arbitrage on the backs of those excluded from legal frames.

In other contexts, this recognition of stake could be prompted by reducing the gap between political action and legal recognition. We can, for example, create an NLRA-like-institution for tech-related stakeholders—a process starting with a petition for a particular stake and ending with protected negotiation over control over that stake. A recognized stake, say in drivers' flexibility against Uber, grants the stakeholder-claimant (drivers) a legally recognized right to bargain over it and could prevent another stakeholder (Uber) from having the right to unilaterally change or modify it. It could also grant the stakeholder a right to be present in legal and political proceedings involving his or her stake. Within this bargaining process, a recognized stakeholders' group could receive an exemption from antitrust law and be eligible to collectively deactivate, suspend its services, or strike, according to the nature of the stake involved—with the law placing limitations on retaliation and actualization of the stake. This way, Uber drivers, for example, could gather signatures to recognize a stake in flexibility, regardless of what current work law states, and could barter over what degree of flexibility they enjoy with Uber.

Allowing greater flexibility in legally recognizing bargaining chips could be used to prevent situations of regulatory arbitrage or of the leveraging of new tech affordances against political communities. Additionally, it could help stop disconnected regulators and courts from preventing desirable agentic barters of these stakes in place of other interests.

Legal scholarship pays close attention to the impact of the initial allocation of rights on data markets and governance.[133]

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[133] *See*, *e.g.*, COHEN, *supra* note 24.

What is missing is how to move from a concrete Hohfeldian analysis of rights and duties to actual sustainable power and agency. By connecting the tangible rights and duties of the actors in tech change's ecosystem to a structural analysis of tech law, we can discover paths leading from law to sustainable democratic power in and over tech change.

Conclusion

Tech drift animates the need for the concept of a structural branch to tech law. The analytical benefits underlying this suggested split of focus are known to legal scholars. To understand where power is allocated now, to acknowledge the possibility of a debate about the proper allocation of power, and to examine the effects of changing contexts and legal and political interventions, we must have a structural outlook on tech law.

Acknowledging that tech change encompasses an ecosystem of actors, organizations, and institutions with varied and shifting political projects should be a leading analytic path. To acknowledge tech change's systemic features is to recognize that some actors may engage and pursue structural political projects and to acknowledge our power to make structural interventions, or at least, to familiarize ourselves with the structural implications of substantive intervention.

To demonstrate the utility of such a structural analysis, this Article described tech drift and the dual policy and political crisis it begets. The Article offered a framework for structural remedies in tech law, including the analysis and intervention in discrete aspects of tech change's ecosystem. Namely, the Article offers interventions aimed at the *actors*, *ethos,* and *power* aspects of tech change's ecosystem. These analytical instruments are meant to elucidate the path to democratization or pluralization of tech change. Still, the concept of tech drift can also be used for other political purposes and likely in more successful ways than my imagination can conjure. I hope this form of structural thinking and intervention will help tech law scholars and activists imagine and create the vantage points to push for alternative projects in this moment of tech change.