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BETWIXT AND BETWEEN: REGULATING THE SHARED ECONOMY

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"Innovation, by its nature, does not always fit within existing structures."

—Turo CEO, Andre Haddad[1]

INTRODUCTION

Airbnb, Uber, Eatwith, and other sharing economy[2] platforms facilitate short-term rentals, transportation, meals, and even pet-sharing. The platforms in the sharing economy use technology to connect people who have private excess capacity to those who want to purchase it. Rather than staying in a hotel, customers can stay in a spare bedroom through Airbnb; rather than hiring moving companies, customers can get help moving via TaskRabbit; rather than going to a restaurant, customers can have a meal prepared for them in someone's home via Eatwith.

TIME Magazine listed the sharing economy as one of the ten ideas that will change the world,[3] and Forbes estimates that the revenue flowing through the sharing economy surpassed $3.5 billion in 2013, with growth exceeding twenty-five percent per year.[4] At that rate, peer-to-peer sharing has moved beyond a fringe movement and into a disruptive economic force. Look only to Airbnb, which at six years

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1. Andre Haddad, *New York Rentals Suspended Until Further Notice*, TURO BLOG (May 15, 2013), https://blog.turo.com/news/new-york-rentals-suspended-until-further-notice [https://perma.cc/HA8S-K938].

2. Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013), http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition#8 [perma.cc/4UNG-29F2] (explaining that the "sharing economy" goes by many names, such as "collaborative consumption," "the peer-to-peer economy," and "the 1099 economy"). This Article uses the term "sharing economy" to refer to the peer-to-peer networks facilitated by platforms that allow people to profit from their excess capacity.

3. Bryan Walsh, *Today's Smart Choice: Don't Own. Share*, TIME (Mar. 17, 2011), http://content.time.com/time/specials/packages/article/0%2C28804%2C2059521_2059717_2059710%2C00.html.

4. Tomio Geron, *Airbnb and the Unstoppable Rise of the Sharing Economy*, FORBES (Jan. 23, 2013), http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/.

old had a valuation of $13 billion,[5] much higher than the Hyatt hotel chain ($7 billion),[6] and Uber, which at four years old had a valuation of $40 billion, greater than Hertz,[7] Avis,[8] and Enterprise[9] combined.[10]

Companies using this relatively new business model have faced innumerable legal challenges. In some places, platforms are simply banned from operating;[11] in others, supply-side users[12] or the platforms themselves are fined.[13] The reason for the difficulty and uncertainty is that the sharing economy is in a "betwixt and between space"—it does not fit within existing legal frameworks. Platforms view themselves as online companies regulated by Internet law, though they execute mostly in the offline world.[14] Furthermore,

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5. Ankit Ajmera, *Airbnb Valued at $13 Billion as It Discusses Employee Stock Sale: WSJ*, REUTERS (Oct. 23, 2014), http://www.reuters.com/article/2014/10/24/us-airbnb-financing-idUSKCN0ID03420141024#yCEcMQMVTAZeIx6w.97 [perma.cc/L6YH-8GR5].

6. *Hyatt Hotels Selected Fundamentals*, MACROAXIS, http://www.macroaxis.com/invest/ratio/H—Current-Valuation [perma.cc/G4WX-SVLW].

7. *Hertz Global Holdings, Inc.*, YAHOO! FIN., https://finance.yahoo.com/q/ks?s=HTZ+Key+Statistics (last visited May 25, 2015).

8. *Avis Budget Group Inc.*, MARKETWATCH, http://www.marketwatch.com/investing/stock/car (last visited May 20, 2015).

9. *America's Largest Private Companies: #16 Enterprise Holdings*, FORBES, http://www.forbes.com/companies/enterprise-holdings/ (last visited May 20, 2015).

10. Note these valuations have been hotly contested. *See generally* Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/ [perma.cc/2W58-3KMK]; Neil Irwin, *Can Uber Live Up to Its $40 Billion Valuation*, N.Y. TIMES (June 13, 2014), http://www.nytimes.com/2014/06/14/upshot/ubers-real-challenge-leveraging-the-network-effect.html?_r=1&abt=0002&abg=0; Maxwell Wessel, *Making Sense of Uber's $40 Billion Valuation*, HARV. BUS. REV. (Dec. 10, 2014), https://hbr.org/2014/12/making-sense-of-ubers-40-billion-valuation [perma.cc/G7R4-V7XA].

11. For example, Little Rock, AK; Las Vegas, NV; and Portland, OR, have banned Uber. Laurie Kulikowski, *Uber Banned in 5 U.S. Cities That Want Your Taxi Business*, MAINSTREET (Sept. 3, 2014), http://www.mainstreet.com/article/uber-banned-in-5-us-cities-that-want-your-taxi-business/page/2 [perma.cc/5TQN-WBCF].

12. Throughout this Article, the term "supply-side user" refers to the providers of services via the sharing platforms.

13. *See* Ron Lieber, *A $2,400 Fine for an Airbnb Host*, N.Y. TIMES (May 21, 2013), http://bucks.blogs.nytimes.com/2013/05/21/a-2400-fine-for-an-airbnb-host/?_r=0 [perma.cc/BR6P-4JDA]; Edward Russo, Register-Guard*: City Fines Uber Over Licensing Violation*, OPB (Nov. 20, 2014) http://www.opb.org/news/article/register-guard-eugene-fines-uber-over-licensing-violation/ [perma.cc/4MW7-29TX].

14. Claire C. Miller, *Is Owning Overrated? The Rental Economy Rises*, N.Y. TIMES (Aug. 29, 2014), http://www.nytimes.com/2014/08/30/upshot/is-owning-overrated-the-rental-economy-rises.html?partner=rss&emc=rss&abt=0002&abg=0.

sharing economy platforms are facilitating transactions that have always been legal but are now executed on such a large scale that the potential for harm to the public is very real. What are the rules when the lines blur between giving a friend a ride to the airport and operating as a professional driver?

This Article argues that existing laws cannot effectively regulate the sharing economy because the sharing economy is uniquely comprised of individuals profiting from their personal excess capacity. These individuals operate microbusinesses, which cannot, without devastating consequences, be regulated like traditional businesses. This Article proposes a shift in liability rules to mitigate the harm caused by market defects in the sharing economy.

This Article is divided into four parts. Part I outlines the evolution of the sharing economy, its benefits, and two sharing economy platforms, Airbnb and Uber. Part II defines the sharing economy and describes the current regulatory environment governing it. Part III proposes a method to achieve many of the goals of regulation in a manner that balances protection of users, consumers, and existing businesses with the need to support innovation and microbusiness. The Article concludes with recommendations for further research.

I. THE DISRUPTIVE EVOLUTION OF THE SHARING ECONOMY

Humans have always exchanged goods and services. However, new sharing economy markets enabled by technology and the free flow of information present a new form of market that is difficult to conceptualize.[15] The sharing economy is a disruptive force that facilitates exchanges involving underutilized assets, from spaces to skills to things, for monetary gain on a scale that would not be achievable without modern technology.[16] This system facilitates localized production, cooperation, and the proliferation of microbusinesses,[17] which allows consumer needs to be met by a large

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15. *See id.*

16. *See* Botsman, *supra* note 2. Note, Botsman includes nonmonetary gain in her definition of the sharing economy, while this Article does not.

17. *What is a Microbusiness?*, SMALL BIZ CONNECT, http://toolkit.smallbiz.nsw.gov.au/part/20/99/449 [perma.cc/AMU3-Y27U]. They operate as microbusinesses, which are the very smallest of businesses with little overhead and capital. *See id.* The owners of microbusinesses act as managers and are responsible for all aspects of the business not outsourced to platforms. *See id.* Because margins are so thin for these microbusinesses and resources are limited, they must not be overly burdened with regulations. *See id.* As discussed in greater detail in the parts below, many people are involved in the sharing economy at a micro level, offering whatever excess capacity they personally have. *See infra* Parts II.A.1, II.A.2.

cross-section of society.[18] This ease of access is made possible by platform companies, which are the businesses that broker the transactions.[19]

A. The Driving Forces Behind the Sharing Economy

The sharing economy in its current form began making waves at the turn of the century.[20] There are three interconnected forces that gave rise to the sharing economy: modern trust, technology, and economic pressure.

1. Modern Trust

Many companies in the sharing economy facilitate behaviors that previously would have seemed unthinkable or foolish. People are hopping into strangers' cars (Lyft, Sidecar, Uber), welcoming others into their spare rooms (Airbnb), and dropping off dogs at unfamiliar houses (DogVacay, Rover). The sharing economy requires individuals to trust complete strangers. Trusting strangers is not only an economic breakthrough; it is also a cultural one "enabled by a sophisticated series of mechanisms, algorithms, and finely calibrated systems of rewards and punishments."[21]

Notably, the concept of facilitating economic relationships by sharing with strangers is *not* a newly developed concept; it is, rather, a return to an older one. Before the Industrial Revolution, sharing was common. It was acceptable to borrow someone's tool, horse, or spare bed, because Americans tended to cluster in small towns and farming communities, where people built tight-knit relationships over the course of many years.[22] In this system, there were natural incentives to treat people well, because if you developed a bad reputation, no one would want to share with you.[23]

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18. *See* Benita Matofska, *What Is the Sharing Economy?*, THE PEOPLE WHO SHARE, http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/ [perma.cc/CXF9-E4NK].

19. This Article does not include peer-to-peer goods-marketplaces, such as eBay, in its definition of the sharing economy because those sites generally do not deal in the sale or rental of personal excess capacity.

20. *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy [perma.cc/EJ6G-HM69].

21. Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014), http://www.wired.com/2014/04/trust-in-the-share-economy/ [perma.cc/63UV-DUB7].

22. *Id.*

23. *Id.*

This economic system started to change around the mid-nineteenth century. When Americans moved from small towns to cities, people could no longer rely on interpersonal relationships or cultural norms to safeguard their transactions, because they did not know, and often had never met, the people with whom they were doing business.[24] The result, Lynne Zucker has argued, was the destruction of trust.[25]

As a result of this trust shift, formal systems sprang up as proxies for the trust that citizens had lost in one another. Between 1870 and 1920, a series of laws were enacted to establish a framework of rules and backstops designed to produce trust. These included many permissions-based systems of licensing, inspecting, and permitting.[26] "Through institutionalizing socially created mechanisms for producing trust," Zucker writes, "the economic order was gradually reconstructed."[27] The combination of laws and facilitators replaced the "casual, intimate, interpersonal form of trust" of small towns.[28]

The problem, however, with this "institutionalized trust" is that it is incredibly burdensome. Think about the hoops an entrepreneur starting a simple granola company has to jump through just to prove to the government that it is "ready" to operate: find or build a commercial kitchen, secure a food establishment license, secure a business license, secure a tax identification number, complete food safety and sanitation training, comply with Food and Drug Administration regulations and Department of Agriculture regulations regarding labeling, etc.[29] These regulations are designed to ensure that the granola manufacturer will provide safe food, inform the public about its product, pay necessary taxes, etc. All of these ends are worthy and give consumers a strong sense that the food they eat is safe.[30]

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24. *Id.*

25. Lynne G. Zucker, *Production of Trust: Institutional Sources of Economic Structure 1840–1920*, at 2 (RES. ORGANIZATIONAL BEHAV., Working Paper No. 82, 1986) *in* 8 Research in Organizational Behavior (L.L. Cummings & Barry Staw eds., 1985).

26. Nick Grossman, *White Paper: Regulation, the Internet Way*, DATA-SMART CITY SOLUTIONS (Apr. 8, 2015), http://datasmart.ash.harvard.edu/news/article/white-paper-regulation-the-internet-way-660 [perma.cc/8WYG-C9HK].

27. *See* Zucker, *supra* note 25, at 4.

28. *See* Tanz, *supra* note 21.

29. *See generally* IDAHO STATE DEP'T OF AGRIC., STARTING A SPECIALTY FOODS BUSINESS IN IDAHO (2010).

30. Seventy-eight percent of Americans are very or somewhat confident in the safety of the U.S. food supply. Food Insight, *2012 Food & Health Survey: Consumer Attitudes Towards Food Safety, Nutrition & Health,* INT'L FOOD INFORMATION COUNCIL FOUND. (May 22, 2012), http://www.foodinsight.org

Peer-to-peer companies do not need such a complicated series of regulations or assurances to build trust, because they create and utilize what this Article calls "modern trust." Modern trust is built on a feedback loop system of ratings and reviews, as first utilized effectively by eBay.[31] In 1995, eBay developed a highly successful online platform where individuals create accounts to enable the buying and selling of items through an online auction process.[32] eBay creator, Pierre Omidyar, recognized the vast potential of the Internet and the absence of a virtual secondhand market.[33] While some of eBay's success could certainly be attributed to luck,[34] there is no doubt that eBay tapped unrealized potential.[35] There were two needs identified: first, the need for a place where people could buy and sell directly from one another online, and second, the need for peer-reviews and community enforceability.[36]

Mr. Omidyar and his eBay team quickly discovered the truth of these needs when it became apparent that community members might behave in a fraudulent, or simply lazy, manner. For example, in 2002, a few short years after eBay's launch the United States National Fraud Information Center reported that eighty-seven percent of complaints involved online auction transactions.[37] In addition, in 2000, the Federal Trade Commission (FTC) received more than 25,000 complaints for web-based auction fraud, an increase from only 100 complaints in 1997.[38]

Trust had to be systematically "built in" to eBay. Therefore, Omidyar's team created a mechanism for a feedback loop that

/2012_Food_Health_Survey_Consumer_Attitudes_toward_Food_Safety_Nutrition_and_Health#sthash.OVA320d6.dpuf [perma.cc/54WP-4SSX].

31. *See* ADAM COHEN, THE PERFECT STORE: INSIDE EBAY 26–29 (2008).

32. *Id.* at 25.

33. *See id.* at 19–20.

34. *See id.* at 19.

35. eBay's 2014 first quarter (April) revenue is reported as $4.26 billion, slightly higher than the expected $4.23 billion. *See* Jillian D'Onfro, *eBay Beats on Earnings, Stock down Slightly*, BUS. INSIDER (Apr. 29, 2014), http://www.businessinsider.com/ebay-q1-earnings-2014-4 [perma.cc/AA5U-V5H5].

36. Andrés Guadamuz González, *PayPal and eBay: The Legal Implications of the C2C Electronic Commerce Model*, 18TH BILETA CONFERENCE: CONTROLLING INFO. IN THE ONLINE ENV'T 1, 2 (Apr. 2003), http://www.bileta.ac.uk/content/files/conference%20papers/2003/PayPal%20and%20eBay%20-%20The%20Legal%20Implications%20of%20the%20C2C%20Elctronic%20Commerce%20Model.pdf [perma.cc/7R6R-HQ35].

37. *See id.* at 3; *see also Online Auction Fraud Skyrocketing in 2002*, NAT'L CONSUMERS LEAGUE (Aug. 2002), http://www.nclnet.org/fraudweek2.htm.

38. *See id.* at 3.

allowed buyers and sellers to rate one another.[39] They also "began monitoring the activity across the eBay marketplace, flagging potentially problematic sellers or buyers, providing its own payment options, and eventually guaranteeing every purchase."[40] In so doing, eBay created a new system that served as a trust proxy. The new system did not require people to trust one another, because people could rely on a crowd-sourced, centralized system of feedback to protect their interests.[41] This trust proxy was to the Internet age what complex business regulations, institutional banking, and insurance were to the early twentieth century. As described in the sections below,[42] sharing economy platforms use the same centralized systems of ratings and reviews as eBay to protect customers and create modern trust.

2. Technology

Technology is essential for the development of the sharing economy in three ways: it allows for the free flow of information, it reduces transaction costs, and it regulates behavior. Before the advent of many of the technologies that connect our world, it was difficult, if not impossible, to access information about excess capacity at the individual level. For example, before an app was created that would immediately tell you everyone in your vicinity who is willing to give you a ride the airport, you had to call a friend or your local taxi company, schedule a pickup, and hope the driver arrived on time. "Our limited access to information was a *structural constraint* on [the] supply for a given market."[43] It was not that people did not have excess capacity—we always had empty spare bedrooms and back seats—it was that there was no way to connect the people who needed something with the people who had it. Specifically, technologies such as high-speed Internet, the Global Positioning System, open data, the ubiquity and low-cost of mobile phones, and social media made this possible.[44] Sharing would struggle if it were

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39. Anjanette Raymond & Abbey Stemler, *Trusting Strangers: Dispute Resolution in the Crowd*, 16 CARDOZO J. CONFLICT RESOL. 357, 377 (2015).

40. Tanz, *supra* note 21.

41. *Id.*

42. *See infra* Part I.C.

43. Hutch Carpenter, *Harvesting Abundance in the Sharing Economy*, HYPE INNOVATION BLOG (Sept. 10, 2014), http://blog.hypeinnovation.com/harvesting-abundance-sharing-economy [perma.cc/DV7Z-PFBJ].

44. *Cf.* Andrew Batey, *Mobile + Sharing Economy + Internet of Things = the Coming Economic Boom*, ENTREPRENEUR (Sept. 22, 2014), http://www.entrepreneur.com/article/237646 [perma.cc/GRY8-R8RN].

not convenient, and sharing would never have been convenient without the free and instantaneous flow of information that technology made possible.

Technology also allows for the reduction in transaction costs. Computerized systems allow for user-friendly and efficient search functions, nearly instantaneous payment processing, and fully integrated accounting functions among other things.

Technology also is essential for regulating participant behavior via *lex informatica*. *Lex informatica* is the concept involving the use of technological architectures to regulate the flow of information and require or prohibit certain actions.[45] The effect of technology on behavior is similar to that of law and, at times, can go further, especially when the user has no choice but to follow the rules imposed by technology. For example, if an eBay user failed to follow through with a transaction, she could be removed from the system.[46]

3. Economic and Cultural Pressures

Economic pressures also greatly contributed to the birth of the sharing economy. It is no coincidence that many firms in the sharing economy were founded between 2008 and 2010, in the aftermath of the global financial crisis. People during this time "needed new ways to save money, as well as new ways to make it."[47] As suggested by Kevin Roose, the depressed labor market was a precondition for the sharing economy.[48] With fewer full-time jobs, Americans were forced to take temporary work, and the sharing economy provided many sources of temporary or "gig" work.

Millennial[49] values also have driven people toward the sharing economy. Due in part to the impact of the recession, millennials grew up with the mindset of preferring access over ownership—they

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45. Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 554–55 (1998).

46. *See, e.g.*, *Unpaid Item Policy*, EBAY, http://pages.ebay.com/help/policies/unpaid-item.html#additional [perma.cc/NUM9-WNLE].

47. Miller, *supra* note 14.

48. Kevin Roose, *The Sharing Economy Isn't About Trust, It's About Desperation*, N.Y. MAG. (Apr. 24, 2014), http://nymag.com/daily/intelligencer/2014/04/sharing-economy-is-about-desperation.html.

49. Millennials include individuals born after 1980. *The Generations Defined*, PEW RES. CTR. (Mar. 5, 2014), http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/sdt-next-america-03-07-2014-0-06/ [perma.cc/EQ4A-VFGH].

"share[], rent[], or pay small transaction fees for access."[50] As stated by the co-founder and chief executive officer of Rent the Runway, a clothing sharing company, young people "are now in a state of mind where [they] want to acquire more experiences" as opposed to things.[51] "The 1990s 'MTV Cribs' show-off-how-much-money-you-have generation is over."[52]

B. Benefits of the Sharing Economy

The sharing economy is shaking existing industries. So why should we allow it to continue? Why should we develop a new regulatory regime to address the problems created by this new economy? The answer lies perhaps in its overwhelming benefits to society.

Job Creation. The sharing economy creates jobs by utilizing the existing capacity of individuals and their real and personal property. A resolution at the U.S. Conference of Mayors meeting in June 2013 stated that in the sharing economy, "companies have proven to be engines of innovation and job creation, driving economic development in the hearts of American cities, where joblessness is still most pervasive."[53] Participating in the sharing economy also enables people to be more entrepreneurial and pursue nontraditional forms of income generation. For example, in Portland, Oregon, "45% of Airbnb hosts are self-employed, freelancers, or part-time workers, [and] 12% of hosts . . . have used Airbnb income to support themselves while launching a new business."[54] Platforms themselves are also creating jobs. "There are now 17 billion-dollar companies with over 60,000 employees in the sharing [] economy."[55]

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50. Michael Costonis, *Lead the Pack or Follow the Leader: Insuring Risk in the Sharing Economy*, ACCENTURE 1, 3 (2014), http://nstore.accenture.com/IM/FinancialServices/AccentureLibrary/data/pdf/Insuring_Risk_Sharing_Economy.pdf.

51. Miller, *supra* note 14.

52. *Id.*

53. Approval of Resolution in Support of Policies for Shareable Cities, U.S. Conf. of Mayors, 81st Annual Meeting (June 2013), http://www.usmayors.org/resolutions/81st_Conference/metro18.asp [perma.cc/LX54-SJY5].

54. Molly Turner, *The Airbnb Community's Economic Impact in Portland*, AIRBNB (Apr. 22, 2014), http://publicpolicy.airbnb.com/airbnb-communitys-economic-impact-portland/ [perma.cc/M54J-PSGU].

55. Jeremiah Owyang, *The Collaborative Sharing Economy Has Created 17 Billion-Dollar Companies (and 10 Unicorns)*, WEB STRATEGY (June 4, 2015), http://www.web-strategist.com/blog/2015/06/04/the-collaborative-sharing-economy-has-created-17-billion-dollar-companies-and-10-unicorns/[perma.cc/LZ32-C65T].

The barriers to entry in the sharing economy are also very low. "Sharing leverages a wide variety of resources and [makes it easier to start] small businesses," with the outsourcing of tasks and "innovations like shared workspaces, shared commercial kitchens, community-financed start-ups, community-owned commercial centers, and spaces for 'pop-up' businesses."[56] Anyone with a car or free time can participate in the sharing economy. The opportunities for individuals to create their own microbusinesses to supplement or fully provide income are virtually unlimited.

Environmental Benefits. As for the environment, "the sharing economy blends the world of profitability and sustainability."[57] It minimizes manufacturing and distribution costs and reduces the need for capital-intensive infrastructure because products are shared locally.[58] The sharing economy encourages people to reuse or recycle goods rather than buy new ones (for example, you can swap an old book for a different book with a swapping site).[59] Furthermore, the sharing economy discourages waste by tapping into under-utilized assets. For example, Uber reduces the number of cars we need to have on our roads or in our parking lots.

An additional benefit of the sharing economy is that it offers a solution to the peak load problems that have been plaguing cities for decades.[60] Consider a city hosting the Super Bowl. It could much more easily accommodate an onslaught of out-of-towners if individuals were allowed to rent out their spare bedrooms, instead of building a new set of hotels that would oversupply the market much of the year.

Competitive pricing. Due in large part to the free flow of information and the increase in supply, sharing economy markets

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56. Janelle Orsi et al., *Policies for Shareable Cities: A Sharing Economy Policy Primer for Urban Leaders*, SHAREABLE 1, 30 (Sept. 9, 2013), http://d3n8a8pro7vhmx.cloudfront.net/theselc/pages/209/attachments/original/1394836950/policies_for_shareable_cities_selc_9_9_13.pdf?1394836950 [perma.cc/UHZ9-R6BN].

57. Sara Gutterman, *'Sharing Economy' Will Save Our Economy and the Environment*, ENVTL. LEADER (July 17, 2014), http://www.environmentalleader.com/2014/07/17/sharing-economy-will-save-our-economy-and-the-environment/#ixzz3K77vHFCl.

58. *See id.*

59. *See* JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES (2012).

60. *EconTalk: Michael Munger on the Sharing Economy*, LIBR. ECON. & LIBERTY (July 7, 2014), http://www.econtalk.org/archives/2014/07/michael_munger.html [perma.cc/3QXJ-ELDX].

often sell products and services at lower prices than their analogs in the non-sharing economy.[61] Yochai Benkler has provided a thorough analysis of the "information collection cost" savings of peer-to-peer networks, and it appears that when such networks operate in a market, these savings accrue partly to the benefit of buyers in the form of lower prices.[62] Prices are also lowered because key business functions are outsourced to platforms, thereby creating economies of scale.

Greater product and service variety. Another benefit of the sharing economy is its product and service variety.[63] Because there are so many individual microbusinesses, there is more diversity in products and services available to meet the needs and interests of buyers. For example, Handy is a marketplace for housecleaning and "handyman" work,[64] while TaskRabbit and Mechanical Turk let people outsource a wide variety of tasks and services, ranging from simple errands and chores to website design.[65]

As discussed, the sharing economy offers a number of advantages: jobs, more efficient and sustainable allocation of resources, lower prices, stronger communities, and greater access to services. Although the benefits of the sharing economy justify "special treatment," a new regulatory structure must still serve the goals of regulation. The question then becomes: How do we develop such a structure?

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61. A recent survey of U.S. adults familiar with the sharing economy found that eighty-six percent agree it makes life more affordable. PRICEWATERHOUSECOOPERS, THE SHARING ECONOMY: CONSUMER INTELLIGENCE SERIES 9 (2015), http://www.pwc.com/en_US/us/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf [perma.cc/QL7V-YHML]; *see also* Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. Bus. Entrepreneurship & L. 529, 531–36 (2015), http://digitalcommons.pepperdine.edu/jbel/vol8/iss2/4/; Neil Irwin, *Uber, Lyft and a Road Map for Reinventing the Ride*, N.Y. TIMES (July 11, 2014), http://www.nytimes.com/2014/07/12/upshot/uber-lyft-and-a-road-map-for-reinventing-the-ride.html?_r=0.

62. *See generally* Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 407–15 (2002).

63. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 2 (1985).

64. *About Us*, HANDY, https://www.handy.com/about [https://perma.cc/UC39-BRA5].

65. *How It Works*, TASKRABBIT, https://www.taskrabbit.com/how-it-works [https://perma.cc/U9FB-NU64]; *Mechanical Turk*, https://www.mturk.com/mturk/welcome [https://perma.cc/Z2SU-5V65].

C. Drawbacks of the Sharing Economy

To start the process of determining appropriate regulations for the sharing economy, drawbacks of the sharing economy must be identified.

Consumer Safety. The sharing economy puts an enormous number of people in inherently vulnerable positions—getting into someone's car, inviting someone into your home, etc. A score of high-profile incidents over the course of the past few years have highlighted the potential threats the sharing economy presents to consumer safety.[66] For example, in 2011, an Airbnb host came home to an aggressively ransacked apartment, finding her cash, credit cards, jewelry, and electronics missing, as well as evidence that the thieves had photocopied her birth certificate and social security number.[67] Additionally, Lyft was the subject of a widely publicized stalking episode involving a Lyft driver and his female passenger.[68] While sharing economy platforms certainly want to reduce the number of these incidents, they wash their hands of responsibility for them. Platforms are thus criticized for profiting from transactions in the sharing economy without accepting all of their negative externalities.[69]

The regulatory response to safety concerns has been either to ban sharing businesses from operating or to require them to obtain the same permits required of their competitors in the non-sharing economy for rooms, rides, and other services.[70] For example, in early

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66. In the ride-sharing arena, the consumer protection website www.whosdrivingyou.com keeps a comprehensive list of safety incidents. *See Complete List of Incidents Involving Uber and Lyft*, WHO'S DRIVING YOU?, http://www.whosdrivingyou.org/rideshare-incidents.html [perma.cc/J44M-Z36X].

67. Michael Arrington, *The Moment of Truth for Airbnb as User's Home Is Utterly Trashed*, TECHCRUNCH (July 27, 2011), http://techcrunch.com/2011/07/27/the-moment-of-truth-for-airbnb-as-users-home-is-utterly-trashed/ [perma.cc/XSY8-TLTW].

68. *See* Sam Biddle, *When Your Smartphone Chauffeur Becomes a Stalker*, VALLEYWAG (July 16, 2013), http://valleywag.gawker.com/when-your-smartphone-chauffeur-becomesa-stalker-801080008/ [perma.cc/B526-LM4G].

69. *See* Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE (Oct. 2014), http://greattransition.org/publication/debating-the-sharing-economy [perma.cc/5UH8-BRMB].

70. *See* Lori Aratani, *Competition from UberX, Lyft Has D.C. Taxis Crying Foul*, WASH. POST (May 11, 2014), https://www.washingtonpost.com/local/trafficandcommuting/competition-from-uberx-lyft-has-dc-taxis-crying-foul/2014/05/11/5920c866-d60a-11e3-8a78-8fe50322a72c_story.html [perma.cc/MSN7-RWKG]; *see also* Rasier, LLC, Public Service Commission of South Carolina Directive, Docket No. 2014-372-T (2015), http://dms.psc.sc.gov/pdf/orders/5A23B2F8-155D-141F-23C07EAA18BA1E64.pdf [perma.cc/6DJD-NSXX] (ordering Uber to cease and desist operations in South

2014, the Virginia Department of Motor Vehicles issued cease and desist letters to both Uber and Lyft, ordering them to stop operating their services in that state.[71] Bans and permits are effective ways of protecting consumers from harm, but they have the serious potential to devastate sharing economy markets.

Fraud. Because the sharing economy often involves the exchange of personal information, including credit card data, people interested in committing fraud lurk throughout the sharing economy. For example, HiGear, a car-sharing service focusing on luxury vehicles, was forced to shut down in early 2012 after a criminal ring used stolen identities and credit cards to bypass security checks and stole four cars totaling $400,000.[72] Airbnb has also seen a substantial rise in the number of fake listings. These listings:

> [F]irst target potential travelers on Airbnb by luring them into a potential property. Using a composite of photos and details collected from the web, they construct an ideal vacation rental in a target market and then price it very competitively . . . [w]hen users reach out to book the property or learn more, the host tries to deliver links to an external site to collect booking data. There, a credit card number is taken and the host disappears.[73]

It is also possible for people wanting to commit fraud to take control of "a current account (likely through the bulk purchase of hacked passwords) and make false listings under an unsuspecting user's name."[74]

Carolina until a regulatory determination has been made); Katherine Driessen, *Ride-Share Operators Gain Prized Access to Houston Airports*, HOUS. CHRON. (Nov. 12, 2014), http://www.houstonchronicle.com/news/transportation/article/Ride-share-operators-gain-prized-access-to-5889267.php [perma.cc/A24M-F27U]; Paul Nussbaum, *PUC Approves UberX for State, Not Philadelphia,* PHILA. INQUIRER (Nov. 14, 2014), http://articles.philly.com/2014-11-15/business/56394938_1_ride-sharing-service-uberx-uber-service [perma.cc/WQ7M-YUC6]; Andy Vuong, *Colorado Likely First to Legislatively Authorize Ride-Share Services*, DENV. POST (Apr. 29, 2014), http://www.denverpost.com/business/ci_25661374/colorado-likely-first-legislatively-authorize-ride-share-services [perma.cc/PZT4-VQ9C].

71. Rachel Weiner, *Virginia Tries to Put Brakes on Ride-Sharing Services*, WASH. POST (May 12, 2014), https://www.washingtonpost.com/local/crime/2014/06/26/65d83a3e-fc85-11e3-b1f4-8e77c632c07b_story.html [perma.cc/4DEA-P3AH].

72. *See* Sarah Perez, *Luxury Car-Sharing Service HiGear Shuts Down Due to Theft,* TECHCRUNCH (Jan. 1, 2012), http://techcrunch.com/2012/01/01/luxury-car-sharing-service-higear-shuts-down-due-to-theft/ [perma.cc/BLX7-CWA7].

73. Grant Martin, *Airbnb's Next Big Challenge Is Keeping the Scammers Away*, SKIFT (Nov. 21, 2014), http://skift.com/2014/11/21/airbnbs-next-big-challenge-is-keeping-the-scammers-away/ [perma.cc/HGA6-DCFH].

74. *Id.*

Currently, platforms deter fraud based on peer-reviews and the fact that the payments are typically only transferred to the microbusiness after a transaction is complete. However, there is no regulatory check on whether these systems are effective, and remedies for individuals hurt by sharing economy fraud are typically limited to traditional common law tort claims.

Privacy. The widespread collection and use of data helps expand the array of services available in the sharing economy and keeps prices low. Data about interactions is also what facilitates the reputational feedback mechanisms that are crucial for the development of trust among diverse and physically distant parties. As the sharing economy becomes more "embedded into how people work, travel . . . , and shop, the digital exhaust from those actions creates associations and patterns that may be mined for insight, efficiencies, or more nefarious purposes."[75]

Currently, there are no specific privacy laws related to sharing economy platforms. Therefore, contract law plays a key role, and, typically, platforms dictate the privacy terms because consumers have no individual bargaining power.[76] For example:

> Uber's privacy policy states that the app can gather and use users' geo-location data for a variety of purposes, including "internal business purposes," [even when the app is turned off]. The privacy policy, however, does not define what these purposes are. So far, the company has reportedly used it for tracking [thirty] of its most "notable users" to display an activity map at a launch party. It is

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75. Alex Howard, *The Sharing Economy: Will Self-Regulation by Startups Suffice to Protect Consumers?*, TECH REPUBLIC (Dec. 14, 2014), http://www.techrepublic.com/article/the-sharing-economy-will-self-regulation-by-startups-suffice-to-protect-consumers/ [perma.cc/HP2H-UGSC].

76. *See generally User Privacy Statement*, UBER (July 15, 2015), https://www.uber.com/legal/privacy-proposed/users/en [perma.cc/P5DE-GBF7]. Privacy experts have also explained that Uber's data collection practices are excessive. Julia Horwitz & Marc Rotenberg, *Privacy Rules for Uber*, HUFFINGTON POST (Dec. 12, 2014), http://www.huffingtonpost.com/julia-horwitz/privacy-rules-for-uber_b_6304824.html [perma.cc/74AC-RBSN]. Marc Rotenberg, the President of EPIC, and Julia Horwitz, Consumer Privacy Director at EPIC, previously warned:

> The app model is also a data vacuum, gathering detailed information about users and drivers that the company controls. Much of the data collection is excessive. For example, . . . the Uber privacy policy [] reveals that the company collects the IP addresses, manufacturers, and operating systems of users' phones. Uber collects information about the mobile web browsers used by its customers, exchanges data with advertisers, and tracks users across the internet.

Id.

> reported that these users did not know their location coordinates were being used in such a way.[77]

The Washington Post also reported that an Uber job applicant was able to access the company's internal analytics and find the records of a family member of a prominent politician in Washington, D.C.[78]

The fear of improper use of personal data is obvious and warranted. Sharing economy data about people could be used for all sorts of improper purposes, including corporate espionage and manipulation of regulators. And the only real legal limitation on platforms with regard to these one-sided terms comes from section 5 of the Federal Trade Commission Act (the "Act"), which prohibits "unfair or deceptive acts or practices in or affecting commerce."[79] Recently, a complaint was filed with the FTC under section 5 against Uber.[80] The complaint asks the FTC to investigate Uber's business practices and to stop the company from collecting unnecessary location data under claims of "unfairness."[81] However, this complaint is the first of its kind, and it is unclear whether or not the FTC will take it seriously.

Microbusiness Protections. Similar to the contracts of adhesion entered into by consumers in the sharing economy, the microbusinesses participating in the sharing economy have very little

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77. Sabreena Khalid, *Privacy Concerns in the Sharing Economy: The Case of Uber*, HARV. J.L. & TECH. DIG. (Dec. 17, 2014), http://jolt.law.harvard.edu/digest/telecommunications/privacy-concerns-in-the-sharing-economy-the-case-of-uber [perma.cc/G9X2-2YRQ].

78. Craig Timberg, *Is Uber's Rider Database a Sitting Duck for Hackers?*, WASH. POST (Dec. 1, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/01/is-ubers-rider-database-a-sitting-duck-for-hackers/ [perma.cc/4FF2-6J89].

79. 15 U.S.C. § 45(a) (2012). The FTC formalized its process for dealing with unfairness claims in its 1984 *Policy Statement on Unfairness* and noted, "[t]o justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984); *see also* 15 U.S.C. § 45.

80. Complaint of Electronic Privacy Info. Center, *In re* Uber Technologies, Inc., F.T.C. (June 22, 2015), https://cbsnewyork.files.wordpress.com/2015/06/complaint.pdf [perma.cc/3C2X-7JM4].

81. A trade practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n); *see, e.g.*, F.T.C. v. Seismic Entertainment Productions, Inc., Civ. No. 1:04-CV-00377 (Nov. 21, 2006) (finding that unauthorized changes to users' computers that affected the functionality of the computers as a result of Seismic's anti-spyware software constituted a "substantial injury without countervailing benefits.").

bargaining power vis-à-vis the platforms. Most platforms in the sharing economy do not offer benefits or protections for microbusinesses because they view micro-entrepreneurs as independent contractors.[82] This means that microbusinesses receive no paid sick or vacation days, 401(k) plans, health insurance, or life insurance. As a result, workers must pay for their own benefits or do without them. Although the Affordable Care Act does offer individuals a way to get health insurance, many benefit packages available are more costly than the options for corporations. As for protections, there are no protections for microbusinesses with regard to discrimination, on-the-job injuries, minimum wage, or collective bargaining.[83] These issues are currently being litigated in court, as many microbusinesses are trying to claim "employee" protections.

Anticompetitive Behavior. Traditional businesses that compete with sharing economy networks often argue that by avoiding the costs associated with obtaining permits and complying with other regulations that bind their competitors, sharing businesses are able to operate at lower costs.[84] In addition, some argue that the sharing economy platforms are price-fixing by telling the individual businesses within the sharing economy what price they can charge.[85] The regulatory response to these claims of anticompetitive behavior has generally involved revising state or local antitrust laws and permitting laws to apply to sharing networks.[86]

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82. Scott Kirsner, *In the Sharing Economy, a Rift Over Worker Classification*, THE BOS. GLOBE (Aug. 17, 2014), https://www.bostonglobe.com/business/2014/08/16/sharing-economy-are-workers-employees-independent-contractors/6GTpn1a735kNiM7T7k2vtO/story.html.

83. *See Sharing Economy Is Turning More and More Workers into "Independent Contractors*,*"* EMERY REDDY (Apr. 6, 2015), https://www.emeryreddy.com/2015/04/sharing-economy-turning-workers-independent-contractors/ [perma.cc/563E-LVAE].

84. *See* Lori Aratani, *Downtown D.C. Traffic Gridlocked as Taxi Drivers Protest Uber, Lyft, Sidecar*, WASH. POST (June 26, 2014), https://www.washingtonpost.com/news/dr-gridlock/wp/2014/06/25/d-c-taxi-drivers-stage-caravan-to-protest-uber-lyft-sidecar/ [perma.cc/ZC79-ZTJK]; *The Sharing Economy: Boom and Backlash*, ECONOMIST (Apr. 26, 2014), http://www.economist.com/news/business/21601254-consumers-and-investors-are-delighted-startups-offering-spare-rooms-or-rides-across-town [perma.cc/ZGU7-76LZ].

85. Jill Priluck, *When Bots Collude*, NEW YORKER (Apr. 25, 2015), http://www.newyorker.com/business/currency/when-bots-collude [perma.cc/2TVS-4C45].

86. *See, e.g.*, Andy Gavil & Chris Grengs, *Getting Around Town in the Share Economy*, FED. TRADE COMM'N BLOGS (Apr. 21, 2014), https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/getting-around-town-share-economy [perma.cc/TQ74-L9KZ].

D. Case Study: Airbnb and Uber

By far the most prominent sharing services are those based around accommodations and cars. This Part focuses on the two major sharing economy companies in these areas, Airbnb and Uber, and it outlines how the current regulatory landscape is affecting these companies.

1. Airbnb

The best-known example in the accommodation sphere is Airbnb, based in San Francisco. Airbnb was founded in 2008 and is a "trusted community marketplace for people to list and book unique accommodations around the world," either online or on a mobile phone.[87] Airbnb lists more than 2,000,000 listings in more than 34,000 cities and 190 countries.[88] People, known as hosts, can list anything from a spare bed to a castle on the site and set rental rates and house rules (such as no smoking or pets).[89] For facilitating the transaction, Airbnb takes a nine to fifteen percent commission on the rental fee.[90] At less than six years old, the company was already valued around $13 billion.[91]

To ensure safety and promote trust, Airbnb does two main things: it encourages user reviews and facilitates a Verified ID process. For reviews, hosts and guests can provide up to 500 words describing their experience.[92] After writing a review, if a host or guest has not completed her review, the person is allowed to edit it for up to forty-eight hours.[93] In addition to writing reviews, guests may also submit a star rating.[94] The number of stars displayed on a listing page is an

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87. *About Us*, AIRBNB, https://www.airbnb.com/about/about-us [perma.cc/4BLP-9C28].

88. *Id.*

89. According to its website, Airbnb lists over 1400 castles. *Id.*

90. *All Eyes on the Sharing Economy*, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items [perma.cc/84KQ-397Q].

91. *Airbnb Valued at $13 Billion as It Discusses Employee Stock Sale: WSJ*, REUTERS (Oct. 23, 2014), http://www.reuters.com/article/2014/10/24/us-airbnb-financing-idUSKCN0ID03420141024 [perma.cc/L6YH-8GR5].

92. *How Do Reviews Work?*, AIRBNB, https://www.airbnb.com/help/article/13 [perma.cc/F7A9-KAKX].

93. *Id.*

94. *How Do Star Ratings Work?*, AIRBNB, https://www.airbnb.com/help/article/1257/how-do-star-ratings-work [https://perma.cc/C74V-TXD3].

aggregate of the scores that different guests have given for that listing.[95]

Airbnb will remove or alter a review if it violates its review guidelines. Review guidelines include sticking to facts and providing constructive feedback for the host and community.[96] Airbnb discourages personal insults, opinions that are not backed up by examples, and general unsociable behavior.[97]

Verified ID works by connecting a user's Airbnb profile with other sources of information.[98] Airbnb hosts and guests say they look for a Verified ID badge before deciding to host or stay with someone.[99] During the Verified ID process, Airbnb may ask users to: take a photo or upload an image of a government-issued ID, such as a driver's license or passport; connect another online profile to the Airbnb account, such as a Facebook, Google, or LinkedIn account; or upload an Airbnb profile photo and provide a phone number and email address.[100]

Airbnb also creates a secure payment platform for booking. When submitting a reservation request to a host, the guest provides payment details.[101] If the reservation request is retracted, declined, or expires, Airbnb does not complete the charge and any authorization is released.[102] If the reservation is accepted, the payment is processed and collected by Airbnb in full. Airbnb then holds the payment until twenty-four hours after check-in, which gives both parties time to do a walkthrough upon check-in and make sure that everything is as expected.[103]

On the guest side, Airbnb provides a Guest Refund Policy if a guest has a travel issue, such as: (1) a host cancellation shortly before check-in or failure on the part of the host to provide access to the listing booked; (2) a misrepresentation of promised amenities or

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95. *Id.*
96. *What Are the Airbnb Review Guidelines?*, AIRBNB, https://www.airbnb.com/help/article/262 [perma.cc/YY72-HBFL].
97. *Id.*
98. *What Is Verified ID?*, AIRBNB, https://www.airbnb.com/help/article/450 [perma.cc/DP47-B3JD].
99. *Id.*
100. *Id.*
101. *How Does Airbnb Process Payments?,* AIRBNB, https://www.airbnb.com/help/article/51/how-does-airbnb-process-payments [https://perma.cc/2SXP-6C6G].
102. *See id.*
103. *When Will I Be Charged?* AIRBNB, https://www.airbnb.com/help/article/884/when-will-i-be-charged?topic=220 [https://perma.cc/PQ59-55HG].

items; or (3) an unclean space. The Guest Refund Policy is available to all Airbnb guests who have booked on the site, no matter the destination they are traveling to or their country of residence.[104] On the host side, Airbnb also provides a Host Guarantee, which provides protection for up to $1,000,000 in damages to an eligible property in the event of guest damages that cannot be resolved directly with the guest.[105]

Despite the measures that Airbnb has taken to ensure a safe and mutually beneficial exchange between hosts and guests, Airbnb has been met with resistance by local governments. These legal problems mostly fall directly on hosts and users, as opposed to the platforms. This is because Airbnb, like most other sharing platforms, attempts to shift the risk of liability, by contract, onto its hosts and users. As written, in all caps, in its terms of service:

> THE SITE [AIRBNB], APPLICATION AND SERVICES COMPRISE AN ONLINE PLATFORM THROUGH WHICH HOSTS MAY CREATE LISTINGS FOR ACCOMMODATIONS AND GUESTS MAY LEARN ABOUT AND BOOK ACCOMMODATIONS DIRECTLY WITH THE HOSTS. YOU UNDERSTAND AND AGREE THAT AIRBNB IS NOT A PARTY TO ANY AGREEMENTS ENTERED INTO BETWEEN HOSTS AND GUESTS, NOR IS AIRBNB A REAL ESTATE BROKER, AGENT OR INSURER. AIRBNB HAS NO CONTROL OVER THE CONDUCT OF HOSTS, GUESTS AND OTHER USERS OF THE SITE, APPLICATION AND SERVICES OR ANY ACCOMMODATIONS, AND DISCLAIMS ALL LIABILITY IN THIS REGARD TO THE MAXIMUM EXTENT PERMITTED BY LAW.[106]

Without a specific statute or regulation, regulators cannot easily punish the platform, even if the platform users are violating the law or the scale of the platform disrupts communities.[107] Regulators, therefore, must turn to regulating the hosts and address questions such as: "Are the new platforms fueling a black market for unsafe hotels? By bidding up the price of apartments in popular areas, do

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104. *What is the Guest Refund Policy?*, AIRBNB, https://www.airbnb.com/help/article/324 [perma.cc/9H8H-KLFZ].

105. *Airbnb's $1,000,000 Host Guarantee*, AIRBNB, https://www.airbnb.com/guarantee [perma.cc/MME7-QLS4].

106. *Terms of Service*, AIRBNB, https://www.airbnb.com/terms [https://perma.cc/QTG5-68VL].

107. Cities have tried to fine platforms, but with little success. *See*, *e.g.*, Edward Russo, *City Fines Uber Over Licensing Violation*, REGISTER-GUARD (Nov. 20, 2014), http://www.thefreelibrary.com/City+fines+Uber+over+licensing+violation.-a0395254414 [perma.cc/WUZ4-UXAL].

short-term rentals make metropolitan areas like New York City less affordable? Is the influx of out-of-town visitors disturbing residential neighborhoods?"[108]

New York City is a hotbed for Airbnb's challenges. Airbnb bookings in New York City saw a nearly twelvefold spike in recent years, rising from 20,808, in 2010, to an estimated 243,019, in 2014.[109] New York State asserts that seventy-two percent of Airbnb rentals in New York City are illegal.[110] This is because New York housing law prohibits an owner or renter from renting her apartment in a Class A multiple dwelling[111] to someone for less than thirty days, unless the owner or renter is also present.[112] Therefore, if a host went away for the weekend and rented her apartment through Airbnb, the host would technically be breaking the law, and no permit or license could make the behavior legal.

The purpose of this prohibition is understandable. It is designed to protect guests, ensure proper fire and safety code compliance, and protect permanent residents who would be forced to "endure the inconvenience of hotel occupancy in their buildings."[113] It is also designed to preserve the supply of affordable permanent housing.[114]

In places where it is not outright illegal to participate in Airbnb, hosts must comply with various regulations. In Austin, Texas, for example, the city is enforcing new Short-Term Rental Licensing Ordinances.[115] These ordinances require anyone who is leasing their home, apartment, guest bedroom, or couch on sites like Airbnb to obtain a license.[116] In order to obtain a license, a host is subject to an inspection and must register with the city, show proof of occupancy, prove that local hotel occupancy taxes will be paid, and pay a $285 fee.[117] However, a host may only obtain a license if the maximum

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108. OFFICE OF ATT'Y GEN. OF THE STATE OF N.Y.'S RESEARCH DEP'T & INTERNET BUREAU, AIRBNB IN THE CITY 1 (2014), http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf [perma.cc/88BH-2RJ7].

109. *Id.*

110. *Id.*

111. A "multiple dwelling" is a dwelling occupied by three or more families living independently. N.Y. MULT. DWELL. LAW § 4 (McKinney 2011). A "Class A" multiple dwelling is one that is "occupied for permanent residence purposes," which includes apartments, co-ops and condos. *Id.*

112. N.Y. MULT. DWELL. LAW § 4.

113. *See* N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, S. 6873-B, 233RD LEG. (2010).

114. *Id.*

115. AUSTIN, TEX., Ordinance 20130926-144 (Sept. 26, 2013).

116. *Id.*

117. *Id.*

number of Short-Term Rentals in the host's area has not been exceeded.[118] Those who operate without registration risk fines starting at $500 per night.[119]

The problem with regulations like the one in Austin is that Airbnb hosts are operating at such a small scale they simply cannot afford to satisfy the licensing requirements. As reported by Airbnb in Portland, Oregon, the typical Airbnb host occasionally rents out only the property in which he or she lives to help afford costs of living (sixty-five percent of Portland hosts have used Airbnb to afford their home), and the typical host earns only $6860 per year in Airbnb income.[120] Furthermore, regulation has proved evasive and has required costly proactive measures in Austin.[121] Similarly, San Francisco (which has regulations like Austin's) maintains that regulations are "unenforceable" without more cooperation from platforms.[122]

2. *Uber*

Car-sharing schemes divide into peer-to-peer car-rental services in which you pay to borrow someone else's car (Buzzcar, Getaround, Turo, etc.) and taxi-like services (Uber, Lyft, SideCar, etc.) in which people use their cars to ferry paying passengers. The most popular company in the taxi-like service realm is Uber. Uber started in San Francisco, which is notorious for spotty cab service.[123] Instead of hailing a cab the old fashion way, the Uber app originally allowed for users to request an idling commercial, full-size luxury car to pick them

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118. There is a cap on the number of short-term rentals allowed in each census tract of the city. AUSTIN, TEX., Ordinance 20130926-144; *see also Type 2 STR's by PerCent*, AUSTINTEXAS.GOV (Apr. 20, 2015), https://www.austintexas.gov/sites/default/files/files/Type_2_STR_s_by_PerCent-4-20-2015.pdf [perma.cc/2S8P-PF6S].

119. AUSTIN, TEX., Ordinance 20130926-144.

120. Molly Turner, *The Airbnb Community's Economic Impact in Portland*, AIRBNB (Apr. 22, 2014), http://publicpolicy.airbnb.com/airbnb-communitys-economic-impact-portland/ [perma.cc/5BUG-7ZVU].

121. Robert Roldan, *Other Cities Warn of Airbnb Regulation Pitfalls*, COURIER-J. (Aug. 2, 2015), http://www.courier-journal.com/story/money/2015/07/30/cities-warn-airbnb-regulation-pitfalls/30896135/?from=global&sessionKey=&autologin= [perma.cc/5ED6-AA32].

122. *See* Matier & Ross, *'No Way of Enforcing' Airbnb Law, S.F. Planning Memo Says*, S.F. CHRON. (Mar. 22, 2015), http://www.sfchronicle.com/bayarea/matier-ross/article/No-way-of-enforcing-Airbnb-law-S-F-planning-6151592.php.

123. *Uber—What's Fueling Uber's Growth Engine?*, GROWTHHACKERS, https://growthhackers.com/companies/uber/ [perma.cc/VMC3-5JXH].

up.[124] In 2012, Uber launched its "uberX" service,[125] which expanded service to any qualified driver with an acceptable vehicle.[126] UberX drivers can turn on their Uber app whenever they want and receive eighty percent of the fares.[127]

With the current version of Uber, passengers open the app and choose which kind of car service they want (from a standard car to a limousine). The app then sends the user's GPS coordinates to nearby cars. Once a driver is confirmed, which usually happens after a few seconds, the user is shown the driver's name, license plate number, and rating. The user also sees the driver's route and estimated time of arrival. Users then tell the driver where to go, and after the user is dropped off, the user's credit card is charged and a receipt is emailed to the user—no cash, not even a tip, is exchanged. Users and drivers then rate each other, as an incentive to be good customers and drivers.[128]

Uber sets the fares for each service in each city based on its own formula, which is calculated using either a per mile rate or a per minute rate, on top of a base fare of a few dollars. When demand for a car is high—during inclement weather or rush hours—customers are alerted of "surge pricing," which the company says is a way to incentivize more drivers to get on the streets to accommodate all those customers.[129]

UberX insures passenger safety and well-being in three ways. First, it conducts "rigorous screening and background checks" on drivers.[130] Second, the company "regularly reviews all feedback, meaning that we can ensure a safe and respectful environment for all parties."[131] Third, the company provides end-to-end commercial

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124. Edmund Ingham, *Start-Ups Take Note: Uber Made It Big, But Did They Get It Right?*, FORBES (Dec. 5, 2014), http://www.forbes.com/sites/edmundingham/2014/12/05/start-ups-take-note-uber-made-it-big-but-did-they-get-it-right/.

125. Since traditional Uber services like UberBlack and UberTaxi are regulated like traditional for-hire car services and taxi companies, this Article focuses exclusively on uberX, which only utilizes individuals with excess capacity.

126. UberX vehicles must be 2008 model cars or newer. *Vehicle Requirements*, UBER, http://www.driveubernyc.com/cars/ [perma.cc/4GY4-T6G7].

127. Bill Gurley, *A Deeper Look at Uber's Dynamic Pricing Model* (Mar. 12, 2014), http://blog.uber.com/dynamicpricing [perma.cc/SH7X-PUTH].

128. *Ride*, UBER, https://www.uber.com/ride/ [https://perma.cc/5N84-NBEJ].

129. Surge pricing multiplies fares during peak demand hours. *Id.*

130. Nairi Houdajian, *Expanded Background Checks*, UBER NEWSROOM, (Feb. 12, 2014), https://blog.uber.com/expandedbackgroundchecks [perma.cc/8K2G-QWYC].

131. Erin Griffith, *In a Bitter Fight for Customers, Uber and Lyft Begin to Self-Destruct*, FORTUNE (Aug. 13, 2014), http://fortune.com/2014/08/13/uber-and-lyft-self-

liability insurance.[132] For the screenings and background checks, all drivers are screened against the following:

- county courthouse records going back seven years for every county of residence,
- federal courthouse records going back seven years,
- multi-State Criminal Database going back seven years,
- national Sex Offender Registry screen,
- lifetime Social Security Trace, and
- historical and ongoing Motor Vehicle Records.

In order to pass Uber's screening test, drivers may not have any of the following:

- DUI or other drug related driving violations,
- severe infractions, hit and runs, or fatal accidents,
- history of reckless driving,
- violent crimes,
- sexual offenses,
- gun-related violations,
- resisting/evading arrest, or
- driving without insurance or suspended license charge in the past three years.[133]

As for the reviews, Uber drivers are rated on a scale of one to five stars. According to several Internet sources, Uber will deactivate drivers if the rating dips below a certain average.[134]

UberX insures driver safety by providing drivers with feedback on riders so a driver can make an informed decision about whether or not to pick up a rider. In addition, if a rider is abusive toward a driver or otherwise violates Uber's terms of service, the rider will lose access to the system.[135] UberX also provides contingent liability coverage

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destruct-first-sabotage-and-smear-campaigns-now-ratings-bribery/ [perma.cc/29CJ-355Y] (quoting Nairi Houdajian, Uber's communication chief).

132. *See Safe Rides, Safer Cities*, UBER, https://www.uber.com/safety [perma.cc/AU53-LX6U].

133. *Details on Safety*, UBER (July 15, 2015), http://newsroom.uber.com/2015/07/details-on-safety/ [perma.cc/K5QH-SCDZ].

134. *See* Griffith, *supra* note 131. The rating has to be higher than a 4.6 or 4.7 according to several online sources (Uber does not release the actual number). *See id.*; *see also* Ansel Herz, *Drivers Decry "Predatory" Uber*, STRANGER (Apr. 11, 2014), http://www.thestranger.com/slog/archives/2014/04/11/drivers-decry-predatory-uber&view=comments [perma.cc/4EWS-6XHJ].

135. *See Safe Rides, Safer Cities*, *supra* note 132.

when the Uber app is on and the driver is not on a trip, and commercial insurance when the driver is on a trip.[136]

Uber is incredibly popular. It provides over 100,000 rides per week in most major cities and has estimated revenue of between $1.5 and $2 billion each year.[137] At the same time, around the world, taxi organizations have staged protests and lobbied their local governments to more strictly regulate companies like Uber.[138] In response, cities have reacted by passing new regulations or enforcing old ones. For example, Seattle has passed legislation that will limit the number of ride-sharing drivers from Uber, Lyft, and Sidecar at any one time.[139] An ordinance passed in Chicago places a cap on surge pricing and requires drivers to complete background checks and drug tests.[140] Other municipalities, such as Philadelphia, have even gone so far as to impound cars of ride-sharing drivers in an attempt to discourage this type of activity.[141]

Some jurisdictions, like New York City, require uberX drivers to obtain special licenses.[142] Licenses are required to make sure that vehicles carrying the public are properly maintained and operated by responsible drivers. The requirements can be lengthy—for example, in order to operate as an uberX[143] in New York City, an uberX driver must provide documentation of the following:

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136. *See Insurance for UberX with Ridesharing*, UBER NEWSROOM (Feb. 10, 2014), http://blog.uber.com/ridesharinginsurance [perma.cc/R5YC-ZNE4].

137. Alyson Shontell, *LEAKED: Internal Uber Deck Reveals Staggering Revenue and Growth Metrics,* BUSINESS INSIDER (Nov. 20, 2014), http://www.businessinsider.com/uber-revenue-rides-drivers-and-fares-2014-11.

138. In June 2014, taxi drivers in London, Paris, Madrid, and Berlin organized strikes to protest against the private-hired cars offered by Uber. Mark Tran, *Taxi Drivers in European Capitals Strike over Uber - as It Happened*, GUARDIAN (June 11, 2014), http://www.theguardian.com/politics/2014/jun/11/taxi-drivers-strike-uber-london-live-updates [perma.cc/J8SY-B7FH]; *see also* ACCENTURE, *Lead the Pack or Follow the Leader* (2014), http://www.accenture.com/Microsites/insights/Documents/pdfs/Accenture-Sharing-Economy-POV-2.pdf (explaining how Chicago taxi drivers sued the City of Chicago for violating the Constitution (Fifth Amendment Takings and Equal Protection Clause) and federal statutes (42 U.S.C. § 1983)).

139. *See generally* SEATTLE, WASH., Ordinance 124441 (Nov. 30, 2014).

140. *See* CHI., ILL., MUN. CODE OF CHI. § 9-115 (2014).

141. Tom Macdonald, *Philly Parking Authority Impounds UberX Cars, Vows to Continue*, NBC 10 PHILA. (Oct. 27, 2014), http://www.nbcphiladelphia.com/traffic/transit/WHYY-Philly-Parking-Authority-Impounds-UBER-X-Cars-Vows-to-Continue-280559232.html [perma.cc/DBP6-P9B2].

142. *See* 35 R.C.N.Y. § 55-03 (2015).

143. Most taxi-like services, such as Uber, do not act exactly as taxicabs because, while the time between ordering an Uber and having the Uber arrive is short, a user

- Zero outstanding judgments to the NYC Taxi & Limousine Commission, New York State Department of Motor Vehicles (DMV) Traffic Violations Bureau, Department of Finance (DOF) Parking Violations, DOF Red Light Bureau (i.e., unpaid tickets) and Commercial Motor Vehicles Tax,
- Child support certificate,
- Current for-hire insurance certificate in the applicant's name,
- Current insurance declaration page directly from the insurance company showing the levels of insurance coverage,
- Current DMV registration, bill of sale or leasing agreement, certificate of origin or certificate of title,
- Government issued photo I.D.,
- Social Security card, and
- Business entity documents.[144]

In addition, drivers must pay a new application fee of $550, an inspection fee of $75, and a commercial motor vehicle tax of $800.[145] Only upon meeting all such requirements may drivers share their car.

For most transportation microbusinesses, the license requirements and fees are simply too much to bear. Most Uber drivers are supplementing income from other sources.[146] While they are earning some money, it is not as much as one might think. Though they receive roughly eighty percent of the fare that Uber charges, the drivers are responsible for vehicle financing, tolls, gas, car insurance, health insurance, retirement, self-employment taxes, and vehicle

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is not technically "hailing" a cab from the street. Instead, they are prearranging a for-hire service, which is often regulated differently than taxis. *See* Joe Cahill, *Why Uber Doesn't Deserve Special Treatment*, CRAIN'S CHI. BUS. (July 11, 2014), http://www.chicagobusiness.com/article/20140711/BLOGS10/140719976/why-uber-doesnt-deserve-special-treatment [perma.cc/XL9T-C9JV].

144. *See* 35 R.C.N.Y. § 55-03.

145. N.Y.C. TAXI & LIMO. COMM'N, NEW VEHICLE APPLICATION FHV, PARATRANSIT & COMMUTER VAN (2015), http://www.nyc.gov/html/tlc/downloads/pdf/vehicle_new_transfer_application.pdf [perma.cc/HG2C-GXSA].

146. *See generally* Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf [perma.cc/H4LM-X4PU].

maintenance.[147] The Uber driver nets only a few dollars an hour, according to many Uber drivers.[148]

II. DEFINING THE SHARING ECONOMY

A. Defining the Sharing Economy

The next step to develop an effective set of regulations for the sharing economy requires a clear definition of what the sharing economy is and is not. This section identifies four distinct features of sharing economy markets. These characteristics include: platforms, microbusinesses, excess capacity, and high-powered information exchange.

1. Platforms

Platforms in the sharing economy enable commercial transactions by linking sellers of products or services with buyers of those products or services. These platforms are peer-to-peer in that they are decentralized on both sides of the platform, in contrast to single-sided platforms, which follow Coasian[149] norms and offer their own products or services to potential buyers (for example, Amazon.com).[150] The intermediary for the Airbnb network runs the website.[151] The intermediaries for car services such as Uber, Lyft, and Sidecar create and manage mobile phone applications to connect drivers to passengers.[152] These platforms collect and distill

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147. *See* Peter Ashlock, *How Much Money Does an Average Uber or UberX Driver Earn in a Day?*, QUORA (July 17, 2015), http://www.quora.com/How-much-money-does-an-average-Uber-or-UberX-driver-earn-in-a-day-What-about-people-that-drive-full-time-for-Uber.

148. *Id.*; *see* Megan Rose Dickey, *Here's How Much Money You Can Really Earn as an Uber Driver*, BUS. INSIDER (June 23, 2015), http://www.businessinsider.com/how-much-you-earn-as-an-uber-driver-2014-6 [perma.cc/E9SW-64TQ] (finding that one uberX driver's wage averaged out to $4.54 an hour).

149. *See generally* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). Coase argued that people organize themselves into firms to avoid the transaction costs of using the market (e.g. search and information costs, bargaining costs, keeping trade secrets, and policing and enforcement costs). *See id.* at 394–98.

150. *See* Federal Trade Commission, Notice for A Federal Trade Commission Workshop—The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators, https://www.ftc.gov/system/files/attachments/press-releases/ftc-examine-competition-consumer-protection-economic-issues-raised-sharing-economy-june-workshop/150416economyworkshop.pdf [perma.cc/KYH5-CT8X].

151. *About Us*, *supra* note 87.

152. *Our Story*, UBER, https://www.uber.com/our-story/ [https://perma.cc/W74K-J7SJ].

information about users to make for open and transparent interactions.[153]

Platforms greatly reduce the transaction costs of doing business.[154] They standardize the terms of trade, provide a wealth of information about the markets via sophisticated websites, and facilitate payments. For example, in the Airbnb network, individual hosts have outsourced to Airbnb the tasks of determining market demand, advertising, maintaining a stable supply of customers, and facilitating payments.[155] Without the platform, supply-side users would have to perform each of these tasks on their own.[156] For many people involved in these networks, the costs of performing such tasks on their own would be unacceptably cost-prohibitive.[157] Platforms also monitor and sanction participant behavior. Platforms use technology and feedback systems to monitor and remove users who pose a threat to consumer well-being or satisfaction.

Platforms are highly involved in many aspects of sharing economy transactions. This distinguishes them from mere informational resources such as Craigslist and classified ads. They also can use *lex informatica* to control user behaviors; they are thus excellent tools for regulators.

2. Microbusinesses

In the sharing economy, platforms are coordinating intermediaries, and supply-side users are microbusinesses as opposed to employees of platforms. This distinction helps focus on new approaches to regulate platforms—as opposed to treating them as traditional firms with armies of employees.

Platforms view supply-side users as independent contractors because that classification reduces burdens related to labor and employment laws—such as unemployment insurance, workers' compensation, tax responsibilities, etc.. The independent contractor classification also absolves platforms of liability for harm caused by

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153. *Id.*

154. *See generally* Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy"* (George Mason Univ. Law & Econ. Research, Paper Series No. 15-01, 2015), http://www.law.gmu.edu/assets/files/publications/working_papers/1501.pdf [perma.cc/88WH-3GQT].

155. *See generally How to Host*, AIRBNB, https://www.airbnb.com/help/getting-started/how-to-host [perma.cc/M2AY-896P].

156. *See* Geron, *supra* note 4.

157. *Id.*

peer-to-peer interactions.[158] However, because various tests for distinguishing employees from independent contractors are often factor tests, it is sometimes unclear exactly where supply-side users fall on the employee/independent contractor dichotomy.

Pursuant to the common law "right-to-control" test, an agent is an employee, as opposed to an independent contractor, if the principal has the right to control the physical details of the work performed by the agent.[159] The principal not only directs the end result, but also controls how the employee completes the work. Applying this test to Airbnb, it is easy to argue that hosts control. The platform leaves to the hosts decisions about how to list and advertise their properties, how much to charge for rental, whom to choose as renters, the terms of rental, and even the method of payment.[160] If the result of the contracting relationship between the intermediary and the hosts is to rent properties for short terms, then this particular sharing network plainly treats hosts as independent contractors who control the means and manner of the work.

The broader Restatement test used by some courts to define the line between employees and independent contractors leads to similar conclusions.[161] Of the ten factors for consideration, factors such as

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158. *See* Kirsner Scott, *In the Sharing Economy, a Rift Over Worker Classification*, BOS. GLOBE (Aug. 17, 2014), https://www.bostonglobe.com/business/2014/08/16/sharing-economy-are-workers-employees-independent-contractors/6GTpn1a735kNiM7T7k2vtO/story.html.

159. *See* Viado v. Domino's Pizza, LLC, 217 P.3d 199, 202 (Or. Ct. App. 2009).

> Several factors [are used to determine] the extent of the right to control: (1) the independent nature of the person's business; (2) the person's obligation to furnish necessary tools, supplies, and material to perform the job; (3) the right to control progress of the work, except as to final results; (4) the time for which the person is employed; and (5) the method of payment, whether by time or by the job.

Id.; see also Poynor v. BMW of North America, LLC, 441 S.W.3d 315, 319 (Tex. App. 2013).

160. *See generally Hosting Standards*, AIRBNB https://www.airbnb.com/help/topic/206/hosting-standards [perma.cc/B2Z3-5RE8].

161. *See generally* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958). The Restatement (Second) of Agency § 220 uses ten factors for determining whether an agent is an independent contractor or an employee:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job;

control, whether the agent is engaged in a distinct occupation or business (the platform is a technology company, the other is akin to an innkeeper), the place of work, the length of time agent is employed, the method of payment (by task instead of by time), and belief of the parties all suggest an independent contractor relationship.[162]

For taxi-like services, such as Uber, the analysis is much less clear.[163] Uber remains steadfast in its claim that drivers hold independent contractor status. On the sign-up page for potential drivers to join Uber, the wording is unmistakable: "*Drive with Uber and earn great money as an independent contractor. Get paid weekly just for helping our community of riders get rides around town. Be your own boss and get paid in fares for driving on your own schedule.*"[164]

Uber spokesman, Taylor Bennett, further clarified Uber's position on driver classification when he stated: "They're independent contractors. We don't hire drivers. We're a technology company. We provide the app that they use, that connects passengers with drivers. They have the flexibility of being their own boss."[165] Uber drivers are indeed entirely flexible as to when he or she chooses to work (as long as they give at least one ride every 180 days on uberX or every 30 days on UberBlack).[166] In addition, they never have to accept any requests for rides Uber generates, and they can completely control how they get from point A to point B for the rides they do accept.[167] However, Uber does instruct drivers on how to interact with passengers, the prices to be charged (including the controversial

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> (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Id.

162. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

163. *See* Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53.

164. *Drive*, UBER, https://get.uber.com/drive/ [perma.cc/DS8G-2FCY].

165. Yani Crespo, *Uber Drivers: Employees or Independent Contractors?*, U. MIAMI BUS. L. REV. (Feb. 27, 2015), http://business-law-review.law.miami.edu/uber-employees-independent-contractors/ [perma.cc/62CR-6GAP].

166. O'Connor v. Uber Technologies, Inc., 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015).

167. *Id.*

surge pricing system),[168] the terms and forms of payment, and the type and look of their vehicles.[169] It also has a system by which passengers can rate drivers—with a consequence of "deactivation" for drivers whose ratings fall below a certain level.[170] In short, Uber manages many more aspects of the means and manner of the work performed by the drivers. Not surprisingly, many of the factors comprising the more fact-sensitive agency test also point in the direction of treating Uber's drivers as employees rather than independent contractors.[171]

Instead of classifying Uber drivers and other supply-side users in the sharing economy as either employees or independent contractors, regulators should create a new classification.[172] This new classification has been identified as "dependent contractors," or for the purposes of

168. *See generally* Annie Lowrey, *Is Uber's Surge-Pricing an Example of High-Tech Gouging?*, N.Y. TIMES MAG. (Jan. 10 2014), http://www.nytimes.com/2014/01/12/magazine/is-ubers-surge-pricing-an-example-of-high-tech-gouging.html.

169. Alison Griswold, *Are Uber Drivers Employees? The Trial That Could Devastate the "Sharing Economy*," SLATE (Mar. 12, 2015), http://www.slate.com/blogs/moneybox/2015/03/12/uber_lyft_employment_cases_juries_could_decide_the_legal_fate_of_the_sharing.html [perma.cc/6ZQF-9CFV].

170. *Id.*

171. U.S. District Court judges in San Francisco have recently ruled on two cases that could change the sharing economy landscape. *See* Griswold, *supra* note 164. These separate cases were brought in class-action status against Uber and Lyft on behalf of drivers who contend that they should be considered employees. *Id.* Both companies were hoping that the courts would issue summary judgment orders, maintaining independent contractor status for the drivers of each company. *Id.* However, both courts concluded that the law was too ambiguous for them to decide and that each case must proceed to a jury ruling within the California legal system. *Id.*

In addition, the California Labor Commission recently classified Uber drivers as employees. Alison Griswold, *A California Labor Ruling Just Said an Uber Driver Is an Employee. That's Uber's Worst Nightmare.*, SLATE (June 17, 2015), http://www.slate.com/blogs/moneybox/2015/06/17/uber_drivers_ruled_employees_by_california_labor_commission.html [perma.cc/JY6X-3PAD]. "'Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation,' the commission writes. 'The reality, however, is that Defendants are involved in every aspect of the operation.'" *Id.* The labor commission noted that Uber vets prospective drivers, maintains quality control procedures for both passengers and drivers, such as a rating system, and that Uber had "all necessary control over the operation as a whole." Berwick v. Uber Technologies, Inc., No. CGC-15-546378 (Cal. Super. Ct. Lab. Commission 2015), http://lawweb.pace.edu/library/ubercase.pdf [perma.cc/2PH2-T927].

172. Some scholars argue that using a twentieth century to test to classify workers in the twenty-first century economy is inappropriate. *See* Sprague, *supra* note 158, at 21; *cf.* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) ("The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem.").

this Article "microbusinesses"—workers who fall between clear-cut employees and traditional independent contractors.[173] This new classification would enable regulators to think differently about how to fill regulatory gaps. They might, for example, find it more useful to focus on regulating platforms because they are dependent on the supply-side users.

3. Excess Capacity

Another distinguishing feature of the sharing economy is its utilization of excess capacity.[174] Manufacturers use the term "excess capacity" to refer to "an underutilized asset that is not being fully exploited to create value, be it an idle assembly line or a factory running only one shift when it could potentially be running two or three."[175] In the sharing economy, people have excess capacity in their things, space, and time, and it is this excess capacity that supply-side users are monetizing for their own benefit.[176] For the most part, microbusiness are not acquiring new assets to leverage or sell.[177]

This excess capacity feature of the sharing economy is a fickle one, especially as more and more users of sharing economy platforms are putting new assets online and forming traditional hotels, cleaning services, etc. If supply-side users are hiring employees, purchasing space and assets, and using sharing economy platforms to sell them, they are acting more like traditional firms and should be treated as such. If platforms want a new regulatory framework to apply to them, they must carefully filter out traditional firms from microbusinesses. For example, in order to distinguish a site like

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173. Harry Williams Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89, 89 (1965) (developing the term "dependent contractor"). Other countries, including Canada and Germany, already have labor laws covering this type of employment. *See id.*

174. The definition of the sharing economy should only include people utilizing their excess capacity. Currently, "superusers" exploit sharing economy platforms to effectively operate traditional businesses. For example, a report by New York State Attorney General, Eric T. Schneiderman, found that almost half of Airbnb's $1.45 million revenue from New York City in 2010 came from hosts who had at least three listings on the site. *See* NEW YORK STATE ATTORNEY GENERAL, *supra* note 103, at 10. There were only 119 of these users, a small minority, claiming a large share of the business. *Id.* These superusers should not be considered part of the sharing economy because they are creating new capacity rather than efficiently using excess capacity, and they are unfairly competing with the non-sharing industry economy players. *Id.*

175. TRIPLEPUNDIT.COM, THE RISE OF THE SHARING ECONOMY 20 (2013), http://www.triplepundit.com/uploads/The_Rise_of_the_Sharing_Economy.pdf [perma.cc/5BY8-GQYB].

176. *See* PRICEWATERHOUSECOOPERS, *supra* note 59, at 11.

177. *See id.* at 14.

Airbnb from an online travel agent (such as Expedia), participation must be limited to microbusinesses with individual excess capacity. This is possible with technology, but this issue is by far one of the most fluid aspects of the sharing economy that needs clear definition.

4. High-Powered Information Exchange

As described above, technology is essential for high-powered information exchange in sharing economy markets.[178] Participants in the sharing economy upload information to sharing economy platforms (personal information, credit card data, product and service availability, etc.) so that supply-side users and consumers can quickly be matched for their specific transaction. With the sharing economy, there is a constant free-flow exchange of information.

The characteristics discussed in this Part define sharing businesses and demonstrate how the behaviors in the sharing economy are qualitatively different than traditional firms. To oversimplify, these features are also what current regulations ignore. While it is possible to find many businesses that are similar to sharing economy platforms (Craigslist, Tupperware, FedEx, etc.), none incorporate all four dimensions—platforms, microbusinesses, excess capacity, and technology. To the contrary, non-sharing economy firms are traditional in most respects, such as form of organization, ownership of business assets, and internalized use of information to leverage assets for a profit.[179]

B. The Sharing Economy's Current Regulatory Landscape

Periodically, our society generates "disruptive innovations" like the sharing economy.[180] Joseph Bower and Clayton Christensen introduced the idea of disruptive innovations to describe technologies that undermine and eventually displace established products, firms, or even entire industries.[181] Classic examples include automobiles,

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178. *See supra* Part I.A.II.

179. *See, e.g.*, Rauch & Schleicher, *supra* note 154, at 11–13; Boyd Cohen & Jan Kietzmann, *Ride On! Mobility Business Models for the Sharing Economy*, 27 ORG. & ENV'T 279, 283 (2014); Geron, *supra* note 4.

180. *See* Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, HARV. BUS. REV., Jan.–Feb. 1995, at 45. Bower and Christensen did not discuss the term "disruptive innovation" in their 1995 article, but Christensen's follow-up book helped introduce and popularize the term. *See* CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997).

181. *See* Bower & Christensen, *supra* note 180, at 45.

personal computing, and cellular phones.[182] The sharing economy is not only considered by many to be a disruptive innovation,[183] but it is also, in the words of Nathan Cortez, creating a "regulatory disruption."[184]

Currently, cities and towns across the United States are taking one of three general approaches to regulate the sharing economy. The first approach involves banning platforms outright. This has been particularly true for ride-sharing platforms, such as Uber and Lyft, and house-sharing platforms, such as Airbnb, in many cities throughout the United States.[185] The second approach involves authorities imposing regulatory structures designed for non-sharing economy businesses. These structures are very often ill-fitted for the specifics of the sharing economy and, as a result, regulators enforce those regulations sporadically—turning a blind eye in some instances and enforcing rules in others.[186] Authorities taking a novel approach work with platforms directly to reach some sort of common ground. For example, the California Public Utility Commission worked with several ride-sharing companies to develop new regulations for the industry.[187]

There are significant problems with each approach. The first approach—the outright ban of the platforms—cuts off the potential economic and environmental benefits of the sharing economy. The second—imposing ill-fitting regulations or turning a blind eye—is not

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182. *See id.* at 50.

183. *See* GROWTHHACKERS, *supra* note 118 (citing Uber as an example of a "truly disruptive idea[] that completely redefine[s] an industry").

184. Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175, 177 (2014).

185. *See* Kulikowski, *supra* note 11 (citing examples of cities that have banned Uber, such as Little Rock, AK; Las Vegas, NV; and Portland, OR); *see also* Robert McClendon & Katherine Sayre, *New Orleans Confronts Unlicensed Short Term Rentals: To Legalize or Keep Ban?*, TIMES-PICAYUNE (June 3, 2014), http://www.nola.com/business/index.ssf/2014/06/new_orleans_confronts_controve.html [perma.cc/5FY3-Q79S] (explaining that in New Orleans and many other cities, it is illegal to provide unlicensed short rentals).

186. *See* Ron Lieber, *supra* note 13 (explaining that in New York, Airbnb investigations appeared to only occur in apartments where neighbors have complained).

187. Press Release, Cal. Pub. Utilities Comm'n, CPUC Establishes Rules for Transportation Network Companies (Sept. 19, 2013) (on file with author), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K132/77132276.pdf [perma.cc/R56J-CDXL] (explaining that in California, ride-sharing companies are now called "transportation network companies," and they must comply with twenty-eight insurance and safety requirements in order to operate).

sustainable, puts consumers at risk, and gives supply-side users[188] an unfair advantage over traditional industries. As Airbnb founder Nathan Blecharczyk states, "we're not advocating that there shouldn't be rules. We're just saying that things have evolved and it's worth taking a fresh look from the ground up."[189] The third, novel approach is often reactionary and piecemeal, because these new regulations are not grounded in a clear conceptual understanding of what the sharing economy is. The sharing economy must be viewed as a new form of market driven by technology and be regulated as such.[190]

III. A NEW ECONOMY, A NEW FRAMEWORK

Under the traditional "public interest theory" of regulation, regulation is sought to protect consumers from structural problems known as market failures.[191] These structural problems can include inadequate competition, uncompensated negative externalities,[192] asymmetrical information,[193] and unequal bargaining power.[194] When market failures occur, regulation may be supplied as a corrective measure.[195] For example, cities in the United States have been regulating taxicabs with safety, insurance, and service standards since the 1920s in response to the early days of dangerous cars and

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188. "Supply-side users" refers to the individuals selling their excess capacity as opposed to the consumers who purchase that excess capacity. This Article argues that these supply-side users should be considered "microbusinesses" rather than employees of sharing economy platforms.

189. Greg Rosalsky, *Regulate This! A New Freakonomics Radio Podcast*, FREAKONOMICS (Sept. 4, 2014), http://freakonomics.com/2014/09/04/regulate-this-a-new-freakonomics-radio-podcast/ [perma.cc/LUR5-9PWB].

190. *See* Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 Tul. L. Rev. 241 (2015). As discussed below, this argument builds on the work of Rashmi Dyal-Chand.

191. *See* ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS VOL. 1 (1971).

192. A considerable amount of regulation is justified on the ground that the unregulated price of a good does not reflect the true cost to society of producing the good. STEPHEN BREYER, REGULATION AND ITS REFORM 23 (Harvard University Press, 1982).

193. For a competitive market to function well, buyers must have sufficient information to evaluate competing products. *See* Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 525 (1945).

194. *See* STEPHEN BREYER, *supra* note 192, at 15–35.

195. The "public interest theory" of regulation posits that regulation emerges in situations of market failure as a response to public demand. *See* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335–36 (1974). The "capture theory" of regulation posits that, over time, governmental regulation is supplied to serve the interests of the regulated industries. *See id.*

inadequate compensation for accident victims.[196] To address market failures in the new sharing economy, regulators must find a coherent path between no regulations at all and the imposition of ill-fitted regulations from the non-sharing sector.

Why should the sharing economy be permitted to play by different rules? The sharing economy serves a very positive role in society. First, the sharing economy is more efficient than traditional businesses. As described above, it allows for existing resources of individuals to be put to their best use with zero-marginal costs.[197] This is a meaningful attribute of the sharing economy because it creates a sustainable use of resources. Second, the sharing economy provides great benefits for the economy, because it allows microbusinesses to profit from existing resources. Third, allowing the sharing economy to continue to grow and evolve has the potential to bring unforeseen benefits. As argued by Sofia Ranchordas, the sharing economy needs to be regulated in an "innovation-friendly" way, meaning that it must be regulated in a transparent, consistent, and flexible way.[198] The social benefits of innovations for the growth and development of a country are indisputable.[199] In the last decade, different social and technological innovations have contributed substantially to the improvement of living standards and enhanced the diversity, quality, and safety of products in the market.[200]

Although the benefits of the sharing economy justify "special treatment," this new structure must still serve the desired ends of regulation. The section below describes the means to serve those ends by regulating platforms instead of supply-side and end-users.

A. Platform Regulation to Prevent Fraud and Promote Safety

Issues of fraud prevention and safety are of the upmost importance to regulators. However, instead of requiring a complex compliance structure for supply-side users, we should place responsibility on the platforms to ensure against fraud and unnecessary dangers. Placing non-delegable responsibilities on platforms will encourage platforms

196. *See* Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 76–77 (1996).

197. *See supra* Section I.B.

198. Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation*, 55 JURIMETRICS J. 201, 223 (2015).

199. *Id.* at 208.

200. Robert Cooter, et al., *The Importance of Law Promoting Innovation and Growth*, RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM 1–2 (Ewing Marion Kauffman Foundation ed., 2011).

to better screen participants, inspect shared assets, and regulate supply-side use.[201]

In addition, placing non-delegable responsibilities on platforms will encourage platforms to maintain accurate feedback systems so they are less likely to be improperly manipulated or hacked. If the feedback systems are accurate, then modern trust will guide user decisions and help the sharing economy naturally regulate itself... Users of the sharing economy are already operating under a system of modern trust that does not require the traditional safeguards that licensing statutes and other regulations create. For example, an Airbnb guest looking for a place to stay would likely refuse to select an unrated Airbnb host; instead, she would select a host that has been reviewed many times by the community.

Methods for keeping the feedback system accurate include: creating a consistent rating mechanism that allows for written comments, providing users with a meaningful opportunity to respond to feedback, providing a moderator to censor inappropriate or "unfair" feedback (similar to Airbnb's system), and implementing an algorithm that helps scrub the data for confederate reviews (similar to the system used by review sites such as Tripadvisor and Yelp).[202]

B. Platform Regulation to Generate Tax Revenue

Solving regulators' revenue woes is quite simple: require the platforms to collect and pay taxes. There are two reasons supply-side users of the sharing economy avoid paying taxes. The first reason is because it is easy to underreport in peer-to-peer transactions, especially for state taxes, such as sales and innkeepers taxes.[203] Second, as suggested by Airbnb founder Nathan Blecharcyk, a lot of hosts are afraid to pay taxes because they fear that if they pay the tax,

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201. For example, Uber could limit the number of hours a driver could be on the app—to prevent a driver from driving while tired.

202. *See, e.g.*, Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud* 3 (Harvard Bus. Sch. Working Paper Series, Working Paper No. 14-006, 2015), http://people.hbs.edu/mluca/Papers%20on%20RIS/FakeItTillYouMakeIt.pdf [perma.cc/5MRH-YZUU] (finding that sixteen percent of Yelp reviews are removed for inauthenticity).

203. Many platforms provide supply-side users with 1099s. For example, Uber sends drivers a Form 1099, rather than the Form W-2 used for employees. *See Sign Up To Drive With Uber*, UBER, https://get.uber.com/cl/financing/ [perma.cc/XE59-YHZH] ("We'll send you a 1099 form that you will use to report the income you made driving with Uber.").

they will give away their identity and will be punished for violating a short-term rental law.[204]

Both of these reasons for underreporting would be eliminated if platforms were required to pay appropriate taxes in addition to filing 1099s. Furthermore, it appears that platforms are willing to pay taxes. For example, Airbnb began collecting a fourteen percent Transient Occupancy Tax in San Francisco in October of 2014, and Uber collects taxes when required by law.[205]

C. Platform Regulation to Allocate Risk

Regulations designed to allocate risk in the traditional economy often fail to efficiently serve the sharing economy goals. One traditional regulatory mechanism to allocate risk—the requirement to carry insurance—presents a unique problem when applied to players in the sharing economy. When there are multiple players in the execution of the "sharing" of an asset, who should be obligated to insure against liability arising out of that sharing: the supply-side provider, the platform operator, or the user? Moreover, if a supply-side provider is using a traditionally private asset for commercial gain, does traditional insurance provide coverage?

App-based ride services have been at the center of such questions recently. In California, for example, district attorneys are complaining to state regulators that, because drivers' private insurance policies typically exclude coverage for commercial use of their vehicles, the platform essentially encourages insurance fraud.[206] In short, drivers are incentivized to lie if they get into an accident, by claiming they were driving for personal reasons. Generally, the carriers for the private drivers have no way to detect this type of fraud.[207]

Once again, the regulatory goal of risk allocation can be met in this instance by regulating the platform. Platform operators, which are already beginning to voluntarily provide insurance for platform-related liability, could be *required* to provide *primary* insurance for

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204. *See* Rosalsky, *supra* note 189.

205. *See* Dara Kerr, *Airbnb Begins Collecting 14% Hotel Tax in San Francisco*, CNET (Sept. 17, 2014), http://www.cnet.com/news/airbnb-begins-collecting-14-hotel-tax-in-san-francisco/ [perma.cc/CN3J-WHY4]; *see also Terms*, UBER (Apr. 8, 2015), https://www.uber.com/legal/usa/terms [perma.cc/7WS7-XH5K] .

206. Carolyn Said, *Drivers for Ride-App Services Accused of Fraud*, SFGATE (Mar. 22, 2014), http://www.sfgate.com/business/article/Drivers-for-ride-app-services-accused-of-fraud-5339357.php.

207. *Id.*

platform-related activity. Furthermore, the platform could be required to mandate that its users report all accidents arising out of commercial activity to the platform. Under such a structure, incentives to commit insurance fraud are eliminated, and any increase in cost to the platform can simply be accommodated in the fee/commission structure, thereby allowing the market to more appropriately allocate risk.

D. Platform Regulation to Ensure Fair Competition

From taxi drivers to hoteliers, many traditional businesses have argued that the sharing economy creates an unfair playing field.[208] Specifically, some individual supply-side-platform users are using the platforms on such a scale that they actually look like their non-sharing economy counterparts. For example, according to the office of the New York State Attorney General, Eric T. Schneiderman, almost half of Airbnb's $1.45 million in 2010 revenue in New York City came from hosts who had at least three listings on the site.[209] There were only 119 of these users, a small minority, claiming a large share of the business.[210] These "superusers" are effectively operating like traditional businesses because they are developing new capacity, as opposed to utilizing excess capacity, and are truly exploiting the system.

If, in response to these well-founded complaints, regulators simply imposed the existing regulatory structure on the sharing economy participants, the benefits of the sharing economy would be stifled. If, on the other hand, no regulations are imposed, the unfair competition precipitated by the large-scale use of the platforms will be allowed to continue. Again, the balance can be best struck by a middle road solution—rules that serve regulatory goals without compromising sharing economy benefits. In this case, to avoid the platform "superuser" problem, regulators should require platforms to limit the scale of use of their services by any individual member. For example, Airbnb could be required to limit the number of listings a single user can put online to one or two. By doing so, no single user will be able

208. Patrick Marshall, *The Sharing Economy*, SAGE BUS. RESEARCHER (Aug. 3, 2015), http://businessresearcher.sagepub.com/sbr-1645-96738-2690068/20150803/the-sharing-economy [perma.cc/9Q3P-U35U].

209. *See* OFFICE OF ATT'Y GEN. OF THE STATE OF N.Y.'S RESEARCH DEP'T & INTERNET BUREAU, *supra* note 108, at 10.

210. *See id.*

to manipulate the system by "creating" new capacity rather than efficiently using excess capacity and unfairly competing with the non-sharing economy players.

CONCLUSION

The sharing economy is here to stay. As Marcus Wohlsen from *Wired Magazine* observes, the sharing economy is reaching a point where it is becoming "too big to ban."[211] Uber and other sharing platforms have prioritized popularity over profit in order to grow, and they believe if the sharing economy gets big enough quickly enough, the political price will become too high for any elected official to try to stop it.[212] And they are not wrong; people, especially millennials, embrace the sharing economy.

The sharing economy needs to be regulated, but it needs to be regulated in a smart and novel way that allows people to share resources and utilize modern trust without compromising fraud prevention, safety, fair competition, and other regulatory goals.[213] Regulators will always be confronted with new products, technologies, and business practices that fall within their jurisdiction but do not fit comfortably within their existing regulatory frameworks. In the face of regulatory disruption, regulators should be flexible and willing to promote innovation with clear and consistent rules. In the case of the sharing economy, they must learn about and embrace the sharing economy's unique features and utilize platforms to accomplish regulatory goals.

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211. Marcus Wohlsen, *Uber's Brilliant Strategy to Make Itself Too Big to Ban*, WIRED (July 8, 2014), http://www.wired.com/2014/07/ubers-brilliant-strategy-to-make-itself-too-big-to-ban/ [perma.cc/4MYT-JXDQ].

212. *Id.*

213. Other concerns of regulators not specifically addressed in this Article, such as protecting protected classes from discrimination and promoting community order and organization (especially through regulations such as zoning laws and affordable housing laws), still need to be analyzed and addressed.