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A FRAMEWORK FOR DESIGNING CO-REGULATION MODELS WELL-ADAPTED TO TECHNOLOGY-FACILITATED SHARING ECONOMIES

Bryant Cannon† & Hanna Chung††

Sharing economies, with their vast diversity of goods and services offered and rapidly evolving business models, have proven inconducive to traditional-regulatory approaches. Yet a complete laissez-faire approach or complete ban is not advisable. On the one hand, it is in the public interest to allow these new economies to continue to innovate, as they create value from unused assets, facilitate useful market transactions, and sometimes even lead to the creation of new goods and services to improve quality of life. On the other hand, some characteristics inherent in the design of sharing economies lead to negative externalities, disrupt city planning at the expense of third-parties, and sometimes even lead to inefficient market allocations or protections. Countering the vulnerabilities of government and industry requires co-regulation, but co-regulation itself is not a panacea. Designing a co-regulatory model that works effectively—addressing the blind spots in the market, properly identifying where to intervene or refrain, and increasing feasibility by relieving regulatory burden and building in flexibility where possible—requires careful consideration of the attributes of the sharing economy being targeted for regulation. This article identifies a framework for analyzing how to design a co-regulatory scheme that can effectively complement the inherent attributes of the sharing economies being regulated to improve effectiveness, the optimal level of protection of public interests over interest groups, and cost-effective feasibility.

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INTRODUCTION

The sharing economy is a multi-billion dollar economic force that has disrupted established markets and created new ones. Known by many names—"collaborative consumption," "asset-light lifestyle," "collaborative economy," "peer economy," and "access economy"[1]—the sharing economy refers to bringing to market goods and labor that are otherwise unutilized during certain time periods: the time a car sits in the garage or the extra time an un- or underemployed person may have to run errands. For frugal buyers, the shared economy offers goods and services in bite-sized units their budgets can stomach.[2] This economy reflects the convergence of many different types of motivations, ranging from an ethos of collaborative consumption and waste reduction to profit-seeking entrepreneurial efforts to address consumer demand for smaller units of consumption.[3]

With shared ownership and use of goods and service providers come more complicated economic relationships and dependencies. Such cooperative behavior requires well-defined rules.[4] For example,

1. Sharing-economy pioneer Rachel Botsman identifies the difficulty of defining the sharing economy. Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, CO.EXIST (Nov. 21, 2013, 7:30 AM), http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition (proposing various taxonomies and distinctions between terms used to describe the sharing economy). It is also recognized that the term "sharing economy" does not adequately capture the capitalistic focus of companies involved, but as the most recognized term for describing this phenomena it will be used in this article. *See* Brad Tuttle, *Can We Stop Pretending the Sharing Economy is All About Sharing?*, MONEY (June 30, 2014), http://time.com/money/2933937/sharing-economy-airbnb-uber-monkeyparking (critiquing the misleading altruistic connotation of the word "sharing" in the sharing economy, noting that not all network-enabled peer-to-peer transactions lead to more efficient use or more egalitarian access to resources, and that some practices seem predatory or antisocial in their exploitation of public resources).

2. *Peer-to-Peer Rental: The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy (providing examples of peer-to-peer rental putting underused assets to full use by lowering the cost of such microtransactions) [hereinafter *Rise of the Sharing Economy*].

3. *Compare* Andrew Leonard, *"Sharing Economy" Shams: Deception at the Core of the Internet's Hottest Businesses*, SALON (Mar. 14, 2014, 4:43 AM PDT), http://www.salon.com/2014/03/14/sharing_economy_shams_deception_at_the_core_of_the_internets_hottest_businesses/ (a cynical op-ed on the rhetoric of value and trust surrounding sharing economies, which, according to that writer, hides the solely profit-seeking motives of such businesses), *with* Benita Matofska, *What is the Sharing Economy?*, THE PEOPLE WHO SHARE, http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/ (last visited Sept. 20, 2014) (providing a more idealistic view of the communitarian values that supposedly define and drive the sharing economy).

4. *See* Steven C. Hackett, *Heterogeneities, Information, and Conflict Resolution: Experimental Evidence on Sharing Contracts*, 6 J. THEORETICAL POL. 495, 495–97 (1994) (noting that the interdependency arising from shared resources requires the establishment of rules, but that the more heterogeneous the group, the more difficult to agree on a sharing scheme); *cf.* Eyal

sharing-economy markets depend on a large pool of providers of goods and services[5] to meet all of the unique demands from buyers. To build this large pool of providers, they often solicit nonprofessionals to participate as providers by reducing barriers of entry, often blurring established regulatory boundaries and creating a vacuum where rules for sharing are not clear. The Internet coordinates and convenes buyers and sellers, significantly lowering the costs and barriers to aggregating supply-and-demand, as when smartphones broadcast locations and real-time availability and need.[6] However, the low costs of transaction may have a negative effect on reasoned consumer decision-making and lead to inadequate consumer protections. Although online social networks and recommendation systems help to establish trust between buyers and sellers and Internet-payment systems protect and facilitate transactions, such reputation-based systems require robust privacy protections and accuracy safeguards in order for the markets that depend on these systems to function as intended.[7]

Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 295–300 (2013) (observing, from a more macroscopic cross-national lens, that interdependent relationships arising from shared resources lead to more complex and demanding organizational design and legal mechanisms, analogizing the operation of such cooperation and the necessity for rules with the rules that govern sharing homes and sharing resources in communities).

5. DAVID EASLEY & JON KLEINBERG, NETWORKS, CROWDS, AND MARKETS: REASONING ABOUT A HIGHLY CONNECTED WORLD 449, 607 (2010) (observing that products that depend on network effects have economic value depending on how many others are also expected to use the product, and that products where the utility derives from network effects have positive externalities whenever a new user joins the network); Richard S. Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMMLAW CONSPECTUS 417, 485 (2009) ("In a network-based industry like communications, the value of the network to each user increases with the addition of other users.").

6. Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1228–32 & 1228 n.73 (2002) (surveying literature that lauds or critiques the Internet's ability to lower transaction costs and warns of its dangers in overrunning participants when taking an unregulated "wild west" approach); *see* MATTHEW O. JACKSON, SOCIAL AND ECONOMIC NETWORKS § 7.3.2 (2010) (offering mathematical models emulating the diffusion of information in networks where the network structure allows for multiple connections of nodes and observing that, where network connections are structured in a way that links individuals to other individuals of the same type that could benefit from such information—using social information—would greatly improve the chances of information quickly reaching the targeted recipient for whom the information was intended).

7. *See* Amy Kristin Sanders & Natalie Christine Olsen, *Re-Defining Defamation: Psychological Sense of Community in the Age of the Internet*, 17 COMM. L. & POL'Y 355, 356–57, 365 (2012) (referring to other literature likening the spread of information over the Internet to the spread of an epidemic and noting the unique potential of the Internet in spreading defamatory or inaccurate information over a wider audience).

From the perspective of a governmental entity entrusted with ensuring public safety, determining if and how to regulate new industries and business models can be difficult. Because collaborative consumption frequently possesses qualities of both amateur and traditional corporate provision of goods and services, the decision whether to apply or extend existing regulations to this new activity often devolves into semantic disputes—whether a sharing activity qualifies as a taxi service, a hotel, or ownership.[8] Moreover, sharing economies, which grew out of the self-regulatory culture of Internet commerce, may chafe against the top-down, centralized regulatory approach of many government entities.[9]

This article proposes that co-regulation—a regulatory method in which government and industry work together to define and enforce standards—provides the most appropriate framework for responding to the sharing economy's innovation and disruptive effects. After defining the sharing economy and what aspects may need regulation,[10] this article will (1) identify how existing models of co-regulation do not account for the shared economies' unique characteristics;[11] (2) articulate how previous regulatory attempts targeting shared-economy activities have been problematic or have stymied innovation;[12] and (3) propose a co-regulatory rubric that would allow regulators and sharing-economy platforms to evaluate what regulation may be necessary to support public goals.[13]

8. Andrés Martinez, *Will the Sharing Economy Make Us All Republicans?*, WASH. POST (Sept. 8, 2014), http://www.washingtonpost.com/posteverything/wp/2014/09/08/will-the-sharing-economy-make-us-all-republicans/ (arguing that squabbling over semantics to try to carve exceptions out of existing-regulatory systems detracts from the impetus to reform what is wrong about the underlying regulatory system).

9. Maureen A. O'Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?*, 14 BERKELEY TECH. L.J. 635, 636–37 (1999) (noting the general historical view of Internet governance as decentralized and early views of keeping regulation decentralized rather than top-down); Richard S. Whitt, *Critical Legal Studies & the Politicization of Intellectual Property and Information Law: Fashioning a Three-Dimensional Public Policy Framework for the Internet Age*, 31 CARDOZO ARTS & ENT. L.J. 689, 698–99 (2013) (chronicling the development of the Internet and its increased decentralization and characterizing informal rules and the loose values and norms of group members as the "pillars of Internet culture"); *see* Bruce L. Benson, *The Spontaneous Evolution of Cyber Law: Norms, Property Rights, Contracting, Dispute Resolution and Enforcement Without the State*, 1 J.L. ECON. & POL'Y 269, 326, 329 (2005) (concluding that government efforts to regulate Internet activity would be futile, after chronicling the development of Internet self-policing).

10. *See infra* Part I.A.

11. *See infra* Part I.B.

12. *See infra* Part II.

13. *See infra* Part III.

I. EXPLORING THE PROBLEM: WHAT IS THE SHARED ECONOMY AND SHOULD WE REGULATE IT?

A. *What is the Shared Economy?*

The sharing economy encompasses many nuances, and the fine gradations of sharing property are perhaps better illustrated by story than by a precise definition.[14]

Suppose you are one of the lucky few to have a car and a designated place to park in San Francisco. Perhaps when you first moved to the city, you anticipated using your car every day. As time progressed, you found that the ease of public transportation and the hassle of finding parking elsewhere dissuaded you from using the car. It is now gathering cobwebs in your parking spot—while insurance costs, rent for the parking space, and the monthly payments on the car loan continue to accumulate. You consider getting rid of the car and simply renting a vehicle for those rare days when you actually need a car to travel outside the city or to transport bulky items. In fact, a friend of yours has done exactly that. Because daily rental rates at traditional car-rental services exceed your friend's budget, she asks to use your car the next time she goes shopping, in exchange for handling your groceries as well. You happily agree—the arrangement is certainly better for you than having the car just sit there. A one-time exchange has occurred and she "shares" your car for the day.

Is this a "sharing economy"? Not quite: there is "sharing" occurring between individuals who already know each other, but no real market-facilitated negotiation. Now suppose that your friend begins to use the car more regularly. She pays you $20 each time she uses the car and keeps the gas tank full. The arrangement works well—she uses the car only when you are not, and you are now converting the time the care would have otherwise remained unused to a modest, if sporadic, source of income. Some time later, your friends—and even their friends—hear about this convenient arrangement and ask to borrow your car as well. Although you are happy to accommodate your friends, you are not so sure about their friends of friends. Your friends, however, vouch for their driving skills and you agree to the arrangement in exchange for charging a higher price—you need the money after all.

14. *But see* Botsman, *supra* note 1 (describing the taxonomies of collaborative economy, categorizing sharing economy as a type of such a collaborative economy, and depicting in an abstract, big-picture way what social changes and pressures enable these economies).

Now that you are sharing your car with a larger circle of friends and following an established exchange arrangement to generate income, have you entered the "sharing economy"? It is hard to tell: there are some arm's-length transactions with strangers, but the bargaining and the transactions still occur by word-of-mouth and a close-knit friend network. Suppose you venture one step further. Eventually, you become skilled at managing this lending system. You maintain a shared calendar online so that your friends and acquaintances know when the car is available. You track payments on a spreadsheet. Occasionally, your car is towed or ticketed for parking violations, but pressure from your mutual friends keeps people honest. After finding that this lending arrangement has worked without hiccups so far, you begin to think entrepreneurially. You discover an online car-sharing marketplace that allows you to lend your car exactly as you have been doing already, except that it manages your calendar and your payment schedule and provides you with additional insurance coverage. You still rent the car to your friends from time-to-time, but now you also rent it to total strangers through this car-sharing marketplace. Instead of relying on your friends' referral, you rely on online ratings of hundreds of other users regarding problem borrowers. You now charge more competitive prices because you noticed that most other users on this marketplace charge much higher rates than you had charged your friends. Just as borrowers compete with each other to rent your car, you compete with other lenders by offering your car to this larger market. This, by most definitions, qualifies as an example of shared economy, but at what point did we cross the line?

For the purposes of this article, we look at "shared economies" that fit within the following contours: (1) lenders retain permanent ownership over the good or labor involved in the service (self-employed service providers, as opposed to service providers tied to a single employer); (2) borrowers pay for the limited use of a good or service without purchasing exclusive ownership over the entire good or the exclusive right to the service provider's labor as an employee; and (3) facilitated by a digital market-mediating platform, allowing both the sellers' side and the buyers' side of the market to enjoy low barriers of entry such that individuals, however inexperienced in entrepreneurship, may easily exchange unused units of capacity with other individuals.[15] While the first and second points differ only in

15. Although some "sharing economy" definitions include data sharing, *see, e.g.*, Gene Marks, *The Other 'Sharing' Economy That's About to Change the World*, FORBES (August 18, 2014, 10:47 AM), http://www.forbes.com/sites/quickerbettertech/2014/08/18/the-other-sharing-

degree from the borrowing and lending exchanges that existed in earlier eras, the presence of a digital platform is what distinguishes the modern-shared economy. For example, while consumers have engaged in condo timesharing or the subleasing of apartments for decades,[16] the rise of online marketplaces with low barriers to participation and independent reputational safeguards ushered the development of a widespread alternate economy for the exchange of ordinary consumers' excess capacity in almost casual, day-to-day transactions.[17] Online platforms connect large numbers of lenders and borrowers at a single virtual location. Search functions connect parties that match one another's time, location, and price requirements. These platforms provide much-needed information-brokering that the lenders and borrowers cannot obtain easily on their own: they tabulate lenders' and borrowers' reputation feedback in real time, offer a baseline of insurance and customer service to protect against the largest risks to transacting with strangers, and maintain a level of quality control in the market pool by filtering out participants with bad ratings.[18] Thus these

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economy-thats-about-to-change-the-world/ (describing how personal data and preferences has become an in-demand commodity), or redistributive markets such as eBay as a method of "sharing" and reducing overconsumption, *see*, *e.g.*, Rachel Botsman & Roo Rogers, *Beyond Zipcar: Collaborative Consumption*, HARV. BUS. REV., Oct. 2010, at 30, 30, *available at* http://hbr.org/2010/10/beyond-zipcar-collaborative-consumption/ar/1 (including redistributive markets in the overview of types of sharing), we narrow our focus to address only economic relationships in which multiple parties share access to a good or service while one party retains ownership. Such interwoven relationships introduce unique legal concerns involving the *coexistence* of rights, rather than the *transfer* of rights associated with redistributive markets and the traditional purchase-sale transaction. We see this coexistence as a key point for capturing the legal challenges unique to the shared economy. For a more comprehensive definition and categorization of "collaborative economy," including those economies beyond the scope of the focus of this article, see Botsman, *supra* note 1.

16. Ellen R. Peirce & Richard A. Mann, *Time-Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment*, 59 NOTRE DAME L. REV. 9, 9–11 (1983) (reviewing the development of timesharing arrangements up to the 1980s and the regulations that have formed to govern these sharing arrangements).

17. *See* TEXAS A&M TRANSP. INST., REAL-TIME RIDESHARING (2014), http://mobility.tamu.edu/mip/strategies-pdfs/travel-options/technical-summary/real-time-ridesharing-4-pg.pdf (explaining how smartphone applications facilitate pairing riders and drivers for ridesharing, noting that these real-time sharing applications expand what people had already coordinated in a smaller scale without technology); Sanders & Olsen, *supra* note 7, at 358 (describing how the rise of the Internet has linked users across geography and spreads information about reputation outside the confinement of limited circles); Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 307 n.8, 344 (2008) (noting the low barriers to entry in online business to consumer markets but also noting the increased competition and difficulty of creating a traditional-established presence, such as brand recognition).

18. *See* SELMAR MEENTS, THE INFLUENCE OF SELLERS AND THE INTERMEDIARY ON BUYERS' TRUST IN C2C ELECTRONIC MARKETPLACES 73–75, 86–89 (2009) (describing the risks of online transactions and the prerequisites of seller trust and intermediary trust for an online

online platforms fulfill dual-roles: they expand the market to include ordinary unsophisticated lenders and borrowers while countering the usual disincentives for dealing with strangers by creating risk-reducing and trust-building mechanisms such as a reputation-ratings system and an insurance net.[19] Such platforms include product-service systems that facilitate timesharing of goods (e.g., car sharing, golf club rentals, piano practice-time rentals, or even currency), real-estate sharing systems (e.g., parking space, workspace, commuter bedrooms), and collaborative service-sharing systems (e.g., babysitting, tutors, other private contractors).[20]

B. Why Regulate? Challenges Unique to a Sharing Economy

The digital-sharing economy generally facilitates more efficient allocation of existing resources. In theory, a well-functioning shared economy reduces overconsumption of goods and, by recycling unused goods and labor, reduces prices and scarcity of these goods and services in the consumer market. Solving social problems associated with overconsumption and allowing access to goods and services at a lower cost clearly benefits consumers.[21]

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consumer-to-consumer marketplace to function); Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013, 7:00 AM), http://www.forbes.com/sites/tomiogeron/2013/01/23/%20airbnb-and-the-unstoppable-rise-of-the-share-economy/ (explaining how this new economy "allows everyone to be both consumer and producer" by monetizing microunits of capacity that were not originally marketable, connecting individual buyers and sellers).

19. Erica Swallow, *The Rise of the Reputation Economy*, FORBES (Oct. 9, 2013, 8:15 AM), http://www.forbes.com/sites/ericaswallow/2013/10/09/reputation-economy (outlining efforts of sharing-economy companies to build reputation markers to assure its market participants of the safety of the transaction); Jason Tanz, *What Makes or Breaks Startups in the Sharing Economy? Insurance Rates*, WIRED (Apr. 28, 2014, 6:30 AM), http://www.wired.com/2014/04/sharing-economy-insurance/ (describing the process by which companies recompense users upfront for negative experiences to minimize risk, then negotiate with insurance companies in bulk behind the scene based on these compensation, all in the name of building consumer trust in their platforms and their facilitated peer-to-peer sharing). One startup seeks to create trust reputations transferable across platforms. *See Measure Trust*, TRUSTCLOUD, https://trustcloud.com/measure-trust (last visited Sept. 21, 2014) (explaining and summarizing graphically how the company consolidates data from multiple online-community sources to give an individual's consolidated-online identity a trust profile).

20. Other taxonomies of the sharing economy exist. *See, e.g.*, JEREMIAH OWYANG WITH CHRISTINE TRAN & CHRIS SILVA, ALTIMETER, THE COLLABORATIVE ECONOMY 7 (2013), *available at* http://www.slideshare.net/Altimeter/the-collaborative-economy; Jeremiah Owyang, *Framework: Collaborative Economy Honeycomb*, WEB-STRATEGIST BLOG (May 5, 2014), http://www.web-strategist.com/blog/2014/05/05/framework-collaborative-economy-honeycomb-osfest14/.

21. For example, ride sharing has the potential of reducing traffic congestion when it puts unused-car space to good use by increasing carpooling, *see* Henry Grabar, *How to Save America from Cars: Start Sharing Them*, SALON (Sept. 7, 2014, 6:00 AM PDT), http://www.salon.com/2014/09/07/how_to_save_america_from_cars_start_sharing_them/, and it may reduce the

Self-regulation proponents argue that companies and industries will implement protective standards and the pitfalls of government regulation are avoidable.[22] Industry members are uniquely positioned to identify the most effective and efficient means of protecting the safety of their consumers.[23] Furthermore, regulatory updating is more efficient under this model because industry members are better able to predict future technologies and business developments and to design standards that can accommodate changes.[24] Finally, industry tends to comply more readily with rules designed and imposed by their peers.[25]

However, sharing economies may exacerbate two types of inefficiencies. First, from a resource-allocation perspective, sharing economies incentivize market participants into purchasing unused capacity for the purpose of renting them in smaller allotments.[26] This

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amount of space that a city uses for parking. *See* TEXAS A&M TRANSP. INST., CARPOOLING 1 (2014), http://mobility.tamu.edu/mip/strategies-pdfs/travel-options/technical-summary/Carpooling-4-Pg.pdf. But, by that same logic, if ride sharing were to function in such a way that it simply increased the number of cars functioning as taxis on the road, carrying one customer at a time, then the sharing is illusory and the overconsumption and congestion problems remain.

22. *See*, *e.g.*, Arun Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/ (summarizing common reasons given for keeping the sharing economy free from regulation, including the argument that reputation–incentives remedy market failures common to the non-sharing counterpart business models and that industry-policing private institutions can do the job better than government regulators).

23. *Id.* (finding group sanctions and group monitoring more informative, more revealing, and therefore more effective than government regulation).

24. Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?*, 34 SEATTLE U. L. REV. 439, 458 (2011) (reporting that proponents of industry self-regulation contend that industry members are better able to predict future technologies and business developments and that industry is better poised to design standards that can remain flexible to changes); Arun Sundararajan, *Trusting the 'Sharing Economy' to Regulate Itself*, N.Y. TIMES ECONOMIX BLOG (Mar. 3, 2014, 12:01 AM), http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/?_php=true&_type=blogs&smid=tw-share&_r=0 (discussing the built-in real-time mechanisms that help sharing-economy companies monitor developments and adjust to market failures with relative ease, whereas the same kind of oversight and responsiveness would place a heavy strain on government resources); *see* Scott Shane, *Tread Lightly on Regulating the Sharing Economy*, ENTREPRENEUR (May 13, 2014), http://www.entrepreneur.com/article/233812 (arguing that traditional companies operating under nonsharing-business models are calling for regulation out of protectionist motives, that consumers are not voicing such demands, and that government regulators should not cave into these companies' pressure).

25. Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 716 (1999) ("It is thought that if rules are developed by the industry, industry participants are more likely to perceive them as reasonable. Companies may be more willing to comply with rules developed by their peers rather than those coming from the outside.").

26. For example, critics have blamed home-sharers in San Francisco for converting a percentage of the limited supply of full-time single-family housing in the city into part-time hotels.

trend could deplete the supply of the goods in question for those other market actors interested in complete ownership or control. This may lead to price increases, inefficient overconsumption, and the selection of alternatives whose opportunity cost presents broader negative externalities.[27] For example, landlords and housing advocates complain that home-sharing platforms like Airbnb allow entrepreneurs to purchase multiple homes and apartments in cities such as San Francisco or New York City where a high demand for full-time housing coexists with a high demand for tourist lodging. They allege that Airbnb incentivizes the conversion of a city's limited supply of housing into day-by-day rentals, resulting in more housing lying unused overall.[28] The data suggests that most Airbnb rentals appear to be for entire units rather than spare bedrooms. The users with the most properties listed are property-management companies with multiple house and apartment listings, hotels, and supposed "individuals" who have posted multiple properties.[29] As another example, consider the possibility that employers may elect to hire services on a per-task basis rather than creating more full- or part-time jobs with stability and benefits. Under

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See Natalie Rodriguez, *4 Flashpoints in SF's Plan to Regulate Airbnb, Others*, LAW360 (August 06, 2014, 9:22 PM ET), http://www.law360.com/articles/563982/4-flashpoints-in-sf-s-plan-to-regulate-airbnb-others (relating San Francisco Planning Commission's concern that home-sharing will drive up property costs and reduce housing availability); Lydia O'Connor, *Landlords Accused of Kicking Out Tenants to List on Airbnb*, HUFFINGTON POST (Apr. 25, 2014, 12:59 PM EDT), http://www.huffingtonpost.com/2014/04/24/airbnb-ellis-act-lawsuit_n_5202038.html (accusing landlords of evicting long-term residents to list their properties as short-term rentals and exacerbating long-term housing shortage in city).

27. *See id.*

28. Dara Kerr, *Vexed in the City: The 'Sharing' Economy's Hidden Toll on San Francisco*, CNET (Aug. 20, 2014, 4:00 AM PDT), http://www.cnet.com/news/vexed-in-the-city-the-sharing-economys-hidden-toll-on-san-francisco/ (reporting that most rentals on Airbnb are of entire houses and apartments and that many users list multiple properties, suggesting that such "sharing" platforms are taking from available permanent housing stock and converting them to short-term use, exacerbating the housing shortage).

29. Carolyn Said, *Window into Airbnb's Hidden Impact on S.F.*, S.F. CHRONICLE, http://www.sfchronicle.com/business/item/Window-into-Airbnb-s-hidden-impact-on-S-F-30110.php (last visited Sept. 21, 2014) (reporting statistics released on the types of San Francisco-postings offered on Airbnb); Carolyn Said, *S.F. Planners Support, Toughen 'Airbnb Law,'* S.F. GATE (Aug. 9, 2014, 7:02 AM), http://www.sfgate.com/realestate/article/S-F-planners-support-toughen-Airbnb-law-5677368.php#photo-6702358 (reporting on housing advocates' concerns that the shared economy for temporary housing has reduced permanent-housing supply and discussing negotiations to legalize house-sharing platforms in exchange for tighter regulation on remitting hotel taxes and limiting the conditions under which renting out one's home is possible); David Streitfeld, *Companies Built on Sharing Balk When It Comes to Regulators*, N.Y. TIMES, Apr. 22, 2014, at A1, *available at* http://www.nytimes.com/2014/04/22/business/companies-built-on-sharing-balk-when-it-comes-to-regulators.html?_r=0 (detailing the controversy of apartment-sharing companies, the large number of professional "sharers," and their impact on the scarcity of New York housing).

such a hiring model, service providers in the sharing economy may spend hours bidding for one-off gigs and becoming dependent on unpredictable sources of work, at the opportunity cost of searching for more substantive, reliable employment.[30] The sharing economy may incentivize service-ready employees to break up the time they would otherwise have available for full-time jobs, pursuing gigs and leaving long periods of nonworking time in between.[31]

Second, the increased availability of goods and services comes with significant externalities. While low-transaction costs create low barriers of entry and permit high market participation, the higher number of participants in the new market comes at the price of shedding market safeguards. The low safeguards, in turn, make act-now-and-ask-for-forgiveness-later strategies prevalent among sharing-economy companies.[32] Borrowers in the shared economy, like consumers in any market, may underestimate their risk exposure and demand less than the optimal amount of market safeguards.[33] For example, a person offering her apartment on Airbnb may check that the platform offers some level of vouching and background-checks to ensure the trustworthiness of the guest, but she may not think to inquire into the property-damage insurance coverage. The offeror may neglect the possibility that even well meaning, trustworthy guests may inadvertently create damage. Moreover, both the offeror and the renter

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30. Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES, Aug. 17, 2014, at BU1, *available at* http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html (reporting on the daily working routines of sharing economy workers who look for gigs on a day-to-day basis and work long hours to make ends meet in lieu of the predictable income of a full-time job).

31. Andrew Leonard, *Why Uber Can't Be Stopped*, SALON (Jan. 13, 2014, 11:07 AM PST), http://www.salon.com/2014/01/13/uber_and_the_neo_luddites (noting that along with capitalists catering to consumer demand and innovating to improve quality of life comes the lowering of labor costs and, if taken to the extreme, a culture where "everyone is a part-timer").

32. Jason Clampet, *Sharing Homes, Cars—and Lawsuits*, BBC (May 1, 2014), http://www.bbc.com/travel/feature/20140501-sharing-homes-cars-and-lawsuits (characterizing the initial attitudes of sharing-economy businesses as "sin-first, ask-forgiveness-later"); J.B. Wogan, *How Will the Sharing Economy Change the Ways Cities Function?*, GOVERNING THE STATE AND LOCAL AUTHORITIES (Oct. 2013), http://www.governing.com/topics/urban/gov-how-sharing-economy-will-change-cities.html (describing the norm of setting-up shop and negotiating with regulators later, given the ambiguous legality landscape); *cf.* Whitt, *supra* note 5, at 483 (connecting low barriers of entry to increase of competitors).

33. Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 505–20 & n.91 (2002) (providing an overview of common-consumer irrationalities, such as optimism bias, desirability bias, the illusion of control, underestimation of indirect effects).

of the apartment may altogether ignore the effects of their transactions on third-parties.[34]

The confluence of low barriers to entry, inexperience, and discrete on-the-spot transactions results in an "incentives gap." The gap refers to the insufficiency of the natural incentives that inexperienced market actors—the weekend-entrepreneurs and one-time borrowers—have to self-impose an optimal level of forethought and safeguards: that is, to address failed sharing relationships, manage risk, address externalities, and build-in minimum consumer protection and labor baselines in a way that maintains the long-term viability of the alternate economy.[35] This is where the actors who *do* have long-term incentives—the marketplace platform developers and government regulators charged with protecting the public—must step-in to correct the externalities and information asymmetries that yield inefficient outcomes and insufficiently protect the participants of the market.[36]

34. Margie Shafer, *Uber, Lyft Announce Insurance Policy Changes Following Fatal Crash Involving Rideshare Driver*, CBS BAY AREA (Mar. 14, 2014, 1:44 PM), http://sanfrancisco.cbslocal.com/2014/03/14/uber-lyft-announce-insurance-policy-changes-following-fatal-crash-involving-rideshare-driver/ (reporting that ride-sharing company initially denied insurance liability for accidents incurred while drivers are not carrying customers but later addressed "insurance gap" after receiving public criticism for fatal accident involving third-party pedestrian).

35. *See All Eyes on the Sharing Economy*, ECONOMIST (March 9, 2013, 4:08 PM), http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items (stating that insurance questions, legal liability, theft and destruction of property, fatal-car accidents were all snags for sharing enterprises or unexpected consequences for sharing-service customers); Video, *Sharing Economy Participants Often Unaware of Risks—VRMA*, REUTERS VIDEO, (July 31, 2014, 6:49 AM), http://www.reuters.com/video/2014/08/01/sharing-economy-participants-often-unawa?videoId=330813074 ("Mark McSweeney, Executive Director of the Vacation Rental Managers Association," lists a "guest-turned-squatter" among "cautionary tale[s] to the sharing economy").

36. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 43–47 (5th ed. 2008) (describing four types of market failures that may require correction, including externalities and severe-information asymmetries); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 23–37, 83–86 (2008) (cataloguing irrational-human behavior that affects economic choices, leading to market imperfections and a possible need for market intervention and "choice architects"—those who engineer the environment in which people make decisions to affect their choices).

C. *Addressing the Incentives Gap and Resulting Market Inefficiencies*

1. Customer Protection and Liability Allocation

The incentives gap introduces potential market inefficiencies in four areas. The first is in customer protection and liability allocation.[37] Because the spot transactions may occur at near instantaneous speed—in the click of a mouse or the tap of a smartphone screen—most consumers will underestimate the optimal level of safeguards they need against unintended consequences.[38] The low barriers to entry and exit result in a large number of non-professional participants with no ongoing obligation to remain active in the marketplace.[39] Such participants have an incentive to supply whatever level of protection the consumers demand at the time, without looking ahead to unanticipated risks beyond the current transaction. For example, an amateur masseuse may see little harm in practicing his hobby on a willing purchaser of his services—until a dissatisfied customer unexpectedly sues him for allegedly aggravating her injury. The amateur service-provider might not have thought to set ground rules governing his relationship with the customer in advance, either because he overestimated his abilities or underestimated the risks and consequences of a negative experience. However, the online platform

37. Molly Cohen & Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B. J. 6, 7 (2014) (providing an overview of major-legal issues and including consumer protection, insurance, and taxation as among them); M.P. McQueen, *Beware the Liability of Sharing Your Car with Strangers*, FORBES (Oct. 15, 2013, 2:20 PM), http://www.forbes.com/sites/investopedia/2013/10/15/beware-the-liability-of-sharing-your-car-with-strangers/ (focusing on inadequate liability protections as an area where a major gap exists between consumer needs and company willingness to offer).

38. *See, e.g.*, Carolyn A. Lin, *Interactive Media Technology and Shopping*, *in* COMMUNICATION TECHNOLOGY AND SOCIAL CHANGE: THEORY AND IMPLICATIONS 215, 217 (David J. Atkin et al. eds., 2014) (stating that online shoppers form underdeveloped sense of self-regulation and can take under-informed risks due to the utility and speed of online transactions); *see also* Wogan, *supra* note 32 (describing how smartphones provide near-instantaneous potential commercial matchups between buyers and sellers).

39. *See* Jeff Altheide, *Share and Share Alike*, G&S BUS. COMMC'N (Nov. 25, 2014), http://www.gibbs-soell.com/news_article/?id=94&news=share_and_share_alike (comparing levels of sharing, in economy, to the three physical states, solid, liquid, and gas, with gaseousness being too unpredictable to be sustainable, implying that transience of economic participants could be problematic); *cf.* Adam Fish et al., *Birds of the Internet: Towards a Field Guide to the Organization and Governance of Participation*, 4 J. CULTURAL ECON. 157, 160–62 (2011) (stating that organizations and their members, as opposed to publics made up of non-members not belonging to organizations, have been assumed to decrease uncertainty and reduce transaction costs, but the internet causes organizations to be more "ephemeral" with the increase of "freelance work, serious amateurs, casualized labor forces," and "[s]ocial entrepreneurialism and Free Software/Free Culture movements").

that facilitated the transaction may have a long-term incentive to build in mediation processes, manage expectations, or enforce some level of quality control as a part of its business model. Indeed, part of the appeal of the shared economies burgeoning online are the low transaction costs—someone else has thought of the details, so that the consumer may have instant gratification in obtaining a local good or service and the lender may have instant gratification in procuring a "taker" as soon as she offers her spare time or resources to the public.[40]

2. Labor Restrictions

Second, the incentives gap may also account for non-optimal levels of labor regulation. On the one hand, the transparency and comparative bargaining flexibility of an online marketplace may justify a *Lochner*-era aversion to overly paternalistic labor regulations,[41] and participants focused on short-term transactions may opt for the minimum level of labor restrictions.[42] On the other hand, not all labor restrictions are purely protectionist or rent-seeking. Just as trucking regulations cap truckers' driving hours in the interest of public safety, labor regulations that limit hours may help the market correct market participants' biases undervaluing the harm to third-parties.[43] As a society, we may also seek to enforce certain baseline restrictions on selling personal services on online-sharing platforms as a matter of public policy. For example, we may wish to enforce child-labor restrictions, regardless of whether a particular child voluntarily offers

40. *See Rise of the Sharing Economy*, *supra* note 2 (noting that technology has cut transaction costs, making asset sharing much easier); *see also* Maureen Conway, *The Downside to Lower Labor Costs in the Sharing Economy*, ASPEN INST. (August 29, 2014), http://www.aspeninstitute.org/about/blog/downside-lower-labor-costs-sharing-economy (shared-economy companies can circumvent usual-labor costs such as benefits, unemployment insurance, workers' comp, and wages, and avoid business risks by shifting them to those who are sharing the service or good).

41. *See* People v. Lochner, 198 U.S. 45, 56 (1905) (holding that, according to the aversion to economic paternalism in vogue in that era, placing limitations on permissible- commercial agreements from consenting individuals is beyond the scope of the state's police powers).

42. Singer, *supra* note 30 (relating the story of a working mother's herculean effort to work long-hours in the unpredictable-gig economy to make ends meet but also reporting that the net earnings may average out to be less than minimum wage and preclude a career or decrease the supply of full-time employment).

43. *See, e.g.*, Fed. Motor Carrier Safety Admin. v. Distribution LTL Carriers Ass'n, 374 F.3d 1209, 1218 (D.C. Cir. 2004) (criticizing as a safety hazard new laws that increase maximum hours driving permitted); HASKEL D. HARRISON ET AL., SPARKS BUREAU OF BUS. AND ECON. RESEARCH, LABOR MARKET IMPACTS OF COMPLIANCE, SAFETY, AND ACCOUNTABILITY (CSA) ON THE TRUCKING INDUSTRY: SUPPLY AND DEMAND ISSUES FOR THE FUTURE (2012), www.memphis.edu/ifti/pdfs/cifts_labor_impacts_of_csa.pdf.

to do marathon hours of babysitting on a job board like Care.com or TaskRabbit.[44]

3. Reliability of Online Reviews and Trust-Building Mechanisms

Third, the incentives gap may introduce imperfections into the feedback and trust-building mechanisms that constitute the very backbone of the shared economy. The marketplace generally benefits from honest and frequent reviews, including prompt reports of bad experiences. Consumers, incentivized by a soapbox-effect and a desire for community building and recognition, may gladly post positive and negative reviews of restaurants, hotels, and companies.[45]

But what happens when both suppliers and consumers depend on one another for reviews? A lender, borrower, buyer, or seller depends on his online reputation. Because a negative review may have a devastating effect on one's ability to fetch the best prices, each market participant has the power to blackmail others with the threat of a negative review.[46] Rather than face mutually assured destruction, participants are incentivized to soften their negative reviews, even though the community as a whole would benefit from flagging negative experiences honestly.[47] In a real-life variant of the ultimatum game, a participant who dares to post a negative review may be punished by a reciprocating negative review, even if the reciprocator has nothing to gain by sabotaging the other reviewer.[48] Other disincentives for expressing negativity exist, including recent attempts to sue negative

44. *See generally* Gordon Betcherman et al., *Child Labor, Education, and Children's Rights* (Soc. Protection Discussion Series Paper No. 0412, 2004), http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0412.pdf (child labor discouraged as a matter of social policy).

45. Edward F. McQuarrie, Shelby H. McIntyre & Ravi Shanmugam, *What Motivates Consumers to Produce Online Reviews? Solidarity, Status, and the Soapbox Effect* 13–15 (Social Science Research Network, Working Paper Series, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210707.

46. *See* Tom Slee, *Some Obvious Things About Internet Reputation Systems*, WHIMSLEY (Sept. 29, 2013), http://tomslee.net/2013/09/some-obvious-things-about-internet-reputation-systems.html#fn.5; Jeff Bercovici, *Uber's Ratings Terrorize Drivers And Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014, 12:31 PM), http://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/; Chrysanthos Dellarocas et al., *Self-Interest, Reciprocity, and Participation in Online Reputation Systems* (MIT Center for eBusiness, Paper No. 205, 2004), http://ebusiness.mit.edu/research/papers/205_dellarocas_ebay participation.pdf.

47. Gary Bolton, Ben Greiner & Axel Ockenfels, *Engineering Trust: Reciprocity in the Production of Reputation Information*, 59 MGMT. SCI. 265, 268 (2012).

48. *Id.*

reviewers for libel.[49] These disincentives against negative reviews may result in market inefficiencies because users' ratings understate the negative experiences and risks associated with the transaction and slow the reporting of all but the most egregious unacceptable behavior.[50] Some low-risk activities, such as sharing tools or a parking space, may allow for enough trial-and-error so that participants may be willing to rely entirely on the community feedback to decide whom to trust. But other more high-risk activities, such as finding a babysitter or loaning out a more expensive item long-term, may involve such low margins for error that supplemental screening mechanisms, free-speech protections, and liability-insurance minimums should be enforced to compensate for the incentive gaps that lead to such skewed data and the increased risks introduced by inaccuracies in the data.

On the other extreme of bias, an unfortunate early negative review could sabotage an otherwise viable market participant because viewers may make early and lasting judgments based on the limited sample that is readily available and visible. For example, a market participant who receives an early bad review, such as when a just-opened restaurant receives a negative review as its first review, may struggle to gain future customers or good reviews, even though he or she makes significant improvements.[51] As several studies have noted, individuals will give bad reviews for counterintuitive motives, introducing misinformation into the market.[52] Although market participants have a strong incentive to root out dishonest reviews—indeed, some communities allow participants to flag posts that offend the community at large or do not fit the purpose of feedback in that community (e.g., spam, disguised advertising)—they are ill-equipped to judge the reliability of a targeted bad review purportedly grounded on personal experience (e.g., a bad review based on a peer-to-peer transaction, of which only the participants have direct knowledge). Market inefficiency results: those with retaliatory motives can taint the information that drives market dynamics, where the average participant, though sufficiently incentivized to filter out bad information,

49. *See* Adam Cohen, *Online Reviewers Beware: You Can Get Sued*, TIME (Jan. 7, 2013), http://ideas.time.com/2013/01/07/yelp-reviewers-beware-you-can-get-sued/.

50. *See, e.g.*, Kevin Roose, *Uber Anxiety: When Your Car Service is Judging You Back*, N.Y. MAG. DAILY INTELLIGENCER (June 4, 2014, 9:45 AM), http://nymag.com/daily/intelligencer/2014/06/uber-anxiety.html.

51. WEIJIA DAI, GINGER JIN, JUNGMIN LEE & MICHAEL LUCA, OPTIMAL AGGREGATION OF CONSUMER RATINGS: AN APPLICATION TO YELP.COM (2014), http://www.people.hbs.edu/mluca/OptimalAggregation.pdf.

52. *See, e.g.*, Eric T. Anderson & Duncan I. Simester, *Reviews Without a Purchase: Low Ratings, Loyal Customers, and Deception*, 51 J. MARKETING RES. 249 (2014).

does not have the proper knowledge or authority to do so. At the same time, platform providers may have their own profit-driven incentives to manipulate user reviews, especially if they profit from these skewings.[53] As participants' income, community involvement, and ability to transact becomes increasingly dependent on online reputation, safeguards may be necessary to ensure that a few individuals or competitors do not have the ability to destroy others' reputations.

4. No Reason for Market Participants to Consider Externalities

Fourth, participants may lack an adequate incentive to consider the disruptive economic effects of their conduct, especially on traditional areas of taxation and revenue generation for local governments (in particular ones that go to social or municipal services).[54] Granted, not all forms of taxation survive a shift in economic activity. Regulators, upon noticing the demise of revenue streams from horse and buggy taxes, would not ban automobiles—they would impose a motor vehicle tax. Similarly, the rise of disruptive economies may force existing companies to make room for competition

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53. *See* Galen Moore, *Small Businesses Say Yelp Skewed Reviews to Punish Non-Advertisers*, BOS. BUS. J. (Jan 25, 2013, 8:37 AM EST), http://www.bizjournals.com/boston/blog/mass_roundup/2013/01/yelp-reviews-skewed-for-advertisers.html (reporting many complaints to the Federal Trade Commission from small businesses claiming that Yelp purposely manipulated reviews it allows on display based on whether the business agrees to advertise with them); Brad Tuttle, *Guess Who's Getting Some Pretty Awful Reviews: User Review Sites*, TIME (Sept. 21, 2013), http://business.time.com/2013/09/21/guess-whos-getting-some-pretty-awful-reviews-user-review-sites/ (reporting on accusations that Yelp and other review sites manipulate the visibility of positive reviews or page location based on whether the business is willing to pay extra or pay for advertising, and noting the stakes when business revenue is correlated with major user-review sites). *But see* Sudhin Thanawala, *Court Rules for Yelp in Suit Over Online Ratings*, SAN JOSE MERCURY NEWS (Sept. 4, 2014, 11:24 AM PDT), http://www.mercurynews.com/california/ci_26467676/court-rules-yelp-suit-over-online-ratings (reporting appellate court's decision to uphold dismissal over an extortion lawsuit, holding that even if Yelp were sorting or dropping businesses based on whether they agreed to advertise on Yelp, it does not amount to extortion).

54. *See* Dean Baker, *Don't Buy the 'Sharing Economy' Hype: Airbnb and Uber are Facilitating Rip-offs*, GUARDIAN (May 27, 2014, 7:30 EDT), http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation (characterizing sharing-economy companies as tax evaders or facilitators of scofflaws). *But see* Adam Ozmiek, *Is the Sharing Economy Just a Scam to Dodge Good Regulations?*, FORBES (June 23, 2014, 11:53 AM), http://www.forbes.com/sites/modeledbehavior/2014/06/23/is-the-sharing-economy-just-a-scam-to-dodge-good-regulations (offering to distinguish between antisocial evasion of socially beneficial law and ability to dodge outdated laws propped up by regulatory capture, based on whether the new business models are innovating in a way to eliminate the externalities and to show that the law is not needed).

because the old ways of enforcing artificial monopolies or collecting taxes no longer apply. Whatever the traditional reasons for taxing a given economic activity (e.g., compensation for usage of public resources, licensing fees for maintaining safety and quality controls, or simply a revenue stream), regulators and platform developers must work together to negotiate a clear course of action for the individual market participants. The market participants themselves, however, are too diffuse to negotiate on a concerted front or advocate for the long-term legitimacy of the economic activity. Therefore, regulators (who have in mind the solvency of the government) must work together with platform developers (who have a long-term interest in building legitimacy for their activity, reassuring participants of the legality of their investment into the platform, and streamlining a process for handling inevitable government relations questions such as taxable activity).

The existence of incentive gaps and market inefficiencies help to explain why shared-economy enterprises may benefit from some level of intervention into the market, beyond what a shared-economy community consisting of market participants may naturally do to self-regulate. The next section explores what sort of intervention attempts that governments have made to date.

II. AN OVERVIEW OF CURRENT ATTEMPTS TO REGULATE THE TECHNOLOGY-FACILITATED SHARING ECONOMY

Given the previous section's exploration of the market shortfalls that may necessitate regulatory intervention, it is not surprising that regulators have increasingly targeted the sharing economy's major players with litigation or bans addressing the activity's impact on consumer safety and diminishing tax revenue. California, a state that has served as an incubator for many of the new sharing-economy companies, has played a central role in developing new regulatory approaches. In September 2013, California became the first state to issue decisions that recognized ride sharing as a legitimate-transportation service.[55] The regulations presage a similar evolution at

55. Decision Establishing Rules and Regulations for Transportation Network Companies, Decision No. 13-09-045 (Cal. Pub. Utilities Comm'n Sept. 19, 2013), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF; Alistair Barr, *'Sharing Economy' Gets a Boost in California*, USA TODAY (Sept. 19, 2013, 3:06 PM EDT), http://www.usatoday.com/story/tech/2013/09/19/sharing-economy-california/2838343/; Tomio Geron, *California Becomes First State to Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES (Sept. 19, 2013, 3:40 PM), http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/.

the local level as cities that previously may have sought to ban or eliminate sharing-economy companies from operating in their jurisdiction re-evaluate their regulatory options. In April 2014, the President of San Francisco's Board of Supervisors introduced a proposed ordinance that would govern short-term housing-rentals platforms like Airbnb. The law, developed in collaboration with Airbnb as well as others in the house-sharing industry, applies to short-term housing rentals and was ultimately passed in October 2014.[56] Similarly, in September 2014, California enacted legislation establishing minimum insurance requirements for ride-sharing companies like Lyft and Uber.[57]

Sharing-economy companies did not always entertain the applicability of regulations to their business models. Historically, their approach had been to act first and ask for forgiveness later. For example, Airbnb once argued that existing laws, such as room taxes typically applicable to hotels, were "outdated" and did not apply to sharing-economy companies.[58] More recently, Airbnb started to change its philosophy.[59] The company worked with San Francisco city officials to draft new legislation and agreed to collect room-taxes.[60] In the case

56. S.F., CAL., ORDINANCE 218-14 (2014), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf (amending regulation of short-term residential rentals and establishing fee); Joshua Sabatini, *Chiu Introduces Legislation Seeking to Restrict Use of Short-Term Housing Rental Services Such as Airbnb*, S.F. EXAMINER POLITICS BLOG (Apr. 16, 2014, 4:00 PM), http://www.sfexaminer.com/PoliticsBlog/archives/2014/04/16/chiu-introduces-legislation-seeking-to-restrict-use-of-short-term-housing-rental-services-such-as-airbnb (describing rationales behind the proposal, such as preventing hotelization and collecting local taxes, and noting some of the proposed regulations); Joshua Sabatini, *Amid Protest, SF Mayor Signs Into Law Airbnb Legislation*, S.F. EXAMINER (Oct. 28, 2014), http://www.sfexaminer.com/sanfrancisco/amid-protest-sf-mayor-signs-into-law-airbnb-legislation/Content?oid=2910424.

57. Act of Sept. 17, 2014, [2014] Cal. Stat. ch. 389 (codified at CAL. PUB. UTIL. CODE §§ 5430–43), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2293; Jeremy B. White, *Ride-Sharing Companies Agree to California Deal on Regulation*, SACRAMENTO BEE (Aug. 27, 2014, 12:59 PM), http://www.sacbee.com/2014/08/27/6658915/ride-sharing-companies.html (reporting that major ride-sharing companies had agreed to minimum-insurance legislation and had mostly debated over amount rather than the right to legislate, itself).

58. Verne Kopytoff, *Airbnb's Woes Show How Far the Sharing Economy Has Come*, TIME (Oct. 7, 2013), http://business.time.com/2013/10/07/airbnbs-woes-show-how-far-the-sharing-economy-has-come/ (reporting on company's official statement expressing willingness to submit to certain types of regulation, commenting that such cooperation may be in the long-term interests of the viability and business opportunities available to the company).

59. Notably, however, Airbnb's initial steps toward compliance are occurring only after a near $10 billion valuation. Alex Konrad, *Airbnb Cofounders to Become First Sharing Economy Billionaires as Company Nears $10 Billion Valuation*, FORBES (Mar. 20, 2014, 6:39PM), http://www.forbes.com/sites/alexkonrad/2014/03/20/airbnb-cofounders-are-billionaires/.

60. Kopytoff, *supra* note 58 (reporting on company's official statement expressing willingness to submit to certain types of regulation, commenting that such cooperation may be in

of Airbnb, the change of policy came only as a result of significant prodding from local governments.[61] And pushback from sharing-economy proponents remains. For example, SPUR, a California-based urban think tank and planning organization, criticized inappropriate regulations and fear-mongering techniques employed by established companies for causing unnecessary delays to the development of the sharing economy.[62] We provide an overview of how the battle has developed in some of the major areas of regulation below.

A. Transportation

It's expensive to be a taxi driver. In Seattle, for example, a city-mandated English-proficiency exam, a written test on knowledge of local geography, municipal regulations, and appropriate driver-conduct; liability insurance (which can average around $7,000 per-year); annual criminal-background checks; a driving-record review; and a physical exam are required before a prospective driver can legally sit in the driver's seat.[63] Taxi laws cap the profits companies can make from their passengers in exchange for caps on the number of taxis and for-hire vehicles allowed in the area.[64] It was not until March 2014, however, that Seattle passed regulations that revealed the power of entrenched industry: the regulations capped the number of cars that can be on the road for any ride-sharing company at 150, establishing quotas without setting public safety requirements, even though the latter were the ostensible reason for proponents' outcry for regulation.[65] Though it

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the long-term interests of the viability and business opportunities available to the company).

61. *See, e.g.*, *All Eyes on the Sharing Economy*, *supra* note 35 (describing Airbnb's scuffles with local city regulators in Amsterdam, San Francisco, and California prior to engaging with governments and hiring Yahoo's head of government relations as their new head of public policy); Craig Karmin, *Airbnb Finds Little Hospitality in New York Market*, WALL ST. J. (Oct. 20, 2013), http://online.wsj.com/news/articles/SB10001424052702304384104579141790931429948.

62. Gabriel Metcalf & Jennifer Warburg, *A Policy Agenda for the Sharing Economy*, SPUR (Oct. 9, 2012), http://www.spur.org/publications/article/2012-10-09/policy-agenda-sharing-economy (identifying how peer-to-peer car sharing was held back for years because California insurance regulations did not allow it and emphasizing the challenges to car sharing and dynamic ride sharing due to the threats they pose to car and taxi companies).

63. Wogan, *supra* note 32.

64. *Id.* (describing Seattle's policies to illustrate a cause of the tension between traditional businesses and the disruptive sharing-economy companies).

65. SEATTLE, WASH., ORDINANCE 124441 (Mar. 19, 2014); Ryan Lawler, *Seattle Deals a Blow to Uber and Lyft by Limiting the Number of Ride-Sharing Drivers on the Road*, TECHCRUNCH (Mar. 17, 2014), http://techcrunch.com/2014/03/17/seattle-hates-ride-sharing (describing how the Seattle City Council initially sided with the taxi interests, linking to a live blog covering the council's hearing, and reporting on reactions from affected companies); *Remove the Roadblocks*, ECONOMIST (Apr. 26, 2014), http://www.economist.com/news/leaders/21601

was the first city to place operating caps on alternative for-hire services like Uber, Lyft and Sidecar, it quickly backtracked from its position by passing compromise regulations on July 2014 that lifted caps on ride-sharing vehicles in exchange for higher insurance requirements and a concession to the taxi industry to issue more taxi licenses.[66]

The D.C. City Council was considering similar restrictions, causing companies such as Uber to worry about its continued business in the nation's capital, but the fight was settled (albeit temporarily) through an agreement in 2012 that codified the companies' rights to operate.[67] This foreshadowed likely future scuffles, such as whether these ridesharing companies, though technically allowed to exist by city law, would have to comply with D.C. Taxicab Commission regulations that effectively disqualified current users from participating in the ride services market in the city.[68] Miami, Houston, Portland, Austin, and New Orleans have refused to allow companies like Uber and Lyft to operate.[69] Minneapolis, St. Paul, Milwaukee, and Detroit have required the companies operate like taxicabs.[70] Illustrating some the complicated dynamics of the regulatory process, in Chicago, Uber mobilized consumers in retaliation against what it deemed unfavorable city regulation while also attempting to directly recruit cabbies to reduce the cab companies' power base.[71]

257-too-many-obstacles-are-being-placed-path-people-renting-things-each-other-remove.

66. SEATTLE, WASH., ORDINANCE 124524 (July 15, 2014) (repealing Ordinance 124441 and adding and amending various sections of SEATTLE, WASH., MUNICIPAL CODE ch. 6.310); Lynn Thompson, *Seattle Approves New Regulations That Satisfy Ride-Share and Taxi Drivers*, GOV'T TECH. (July 15, 2014), http://www.govtech.com/local/Seattle-Approves-New-Regulations-That-Satisfy-Ride-share-and-Taxi-Drivers.html.

67. Public Vehicle-for-Hire Innovation Amendment Act of 2012, D.C. Law No. 19-631, 60 D.C. Reg. 1717–23 (2013) (adding provisions for "digital dispatch," *id.* sec. 2(i)); Mike DeBonis, *Uber Triumphant*, WASH. POST (Dec. 4, 2014), http://www.washingtonpost.com/blogs/mike-debonis/wp/2012/12/03/uber-triumphant (commenting on Uber's efforts to lobby city council members and its success in obtaining laws permitting the operation of these ridesharing vehicles); Travis Kalanick, *DC Council Clears Path for Uber's Future*, UBER BLOG (Dec. 4, 2012), http://blog.uber.com/2012/12/04/dc-council-clears-path-for-ubers-future (lauding the passage of the city regulations as a way of ensuring Uber's future legality and thanking the consumers who participated in the campaign to pressure city council).

68. *See* Mike DeBonis, *Uber Wars Threaten to Reignite over New Regulations*, WASH. POST (May 17, 2013), http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/05/17/uber-wars-threaten-to-reignite-over-new-regulations (reporting company reactions to Taxicab Commission regulations that require ride payments to be processed via payment service providers that are integrated to on-board meter systems of cars).

69. *See* Reid Wilson, *Seattle Becomes First City to Cap Uber, Lyft Vehicles*, WASH. POST (March 18, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/03/18/seattle-becomes-first-city-to-cap-uber-lyft-vehicles/.

70. *Id.*

71. Ted Cox, *Uber Rallies Voters Against Pro-Taxi Bill, Recruits Cabbies to Convert*,

Nearly every week, the media reports on car-sharing companies strategizing to improve their market share and accommodate the variety of jurisdictions they operate in without provoking binding regulations. Despite the desires of these companies to fly under-the-radar, it has proven difficult to do so in light of how disruptive they can be to existing transportation economies. Ride-sharing services have sparked protests by taxi drivers. In turn, these protests have led cities to crack-down on car-sharing companies, claiming the vehicles are unlicensed and illegally operating a "for-hire" service.[72] Some protests orchestrated by the drivers of existing transportation companies, such as those in Paris, have turned violent.[73] New York City has even set up sting operations to stop people from using the new car-sharing companies.[74] One commentator has gone so far as to characterize these attempts at Luddite retrenchments.[75] In Austin, Texas, the city council similarly refused to accommodate their unique characteristics and recommended that ride-sharing services using mobile technologies be "required to work within the current City Code."[76] German cities have attempted bans of ride sharing, resulting in at least one administrative court reviewing a challenge to the ban.[77]

DNAINFO CHI. (Apr. 10, 2014, 4:48 PM), http://www.dnainfo.com/chicago/20140410/west-loop/uber-rallies-voters-against-pro-taxi-bill-recruits-cabbies-convert (showing the consumer-mobilizing tactics of Uber in retaliating against what it deemed unfavorable city regulation and its attempts to reduce the cab companies' power base by recruiting cabbies away).

72. Brian X. Chen, *A Feisty Start-Up is Met with Regulatory Snarl*, N.Y. TIMES (Dec. 2, 2012), http://www.nytimes.com/2012/12/03/technology/app-maker-uber-hits-regulatory-snarl.html (describing Uber's track record in obtaining concessions or sparking ire in various cities with its operate-first, ask-permission-later approach and its staunch opposition to what it views as regulatory bodies captured by protectionist interests); Tod Newcombe, *City Taxi Systems Struggle with Change*, GOVERNING THE STATE AND LOCALITIES (July 31, 2013), http://www.governing.com/columns/urban-notebook/gov-city-taxi-systems-struggle-with-change.html (describing perceptions of entrepreneurs who see the taxi monopolies and scarcity of new licenses as protectionist and outdated policy).

73. Carol Matlack, *Paris Cabbies Slash Tires, Smash Windshields in Protest Against Uber*, BLOOMBERG BUSINESSWEEK (Jan. 13, 2014), http://www.businessweek.com/articles/2014-01-13/paris-cabbies-slash-tires-smash-windshields-in-protest-against-uber (last visited Sept. 22, 2014); *see also* Carol Matlack, *Europe's Cabbies, Fed Up With Uber, Plan a Day of Traffic Chaos*, BLOOMBERG BUSINESSWEEK (June 10, 2014), http://www.businessweek.com/articles/2014-06-10/europes-cabbies-fed-up-with-uber-plan-a-day-of-traffic-chaos (reporting on tentative plans for cabbies to arrange a general protest against ridesharing companies in cities across Europe).

74. Newcombe, *supra* note 72.

75. Leonard, *supra* note 31 (critiquing attempts at outright bans as futile, though acknowledging that collective bargaining by riot was effective on occasion in history, and flagging a more dire problem that this new technology may result in race-to-the-bottom labor conditions for the individuals participating in the ridesharing economy over the long term).

76. Newcombe, *supra* note 72.

77. Karin Matussek, *Uber Wins Court Ruling Stopping Hamburg From Service Ban*,

Cities both in the United States and internationally have demonstrated significant uncertainty and variability in regulating these new types of transportation companies. Los Angeles issued a cease-and-desist order to Uber, Sidecar and Lyft.[78] Philadelphia went so far as to impound a few ride-share vehicles for unlicensed operation.[79] Officials at the San Francisco International Airport claim to have actually arrested drivers for ride sharing because they did not meet airport regulations for cabs or limousines.[80] In mid-August 2013, the taxicab commission in Washington, D.C. adopted strict new-sedan regulations tailored to keep Uber and its ride-sharing competitors out of the local market.[81] This prompted the Federal Trade Commission to weigh in via a letter addressed to the commission advising against its regulatory

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BUSINESSWEEK (Aug. 27, 2014), http://www.businessweek.com/news/2014-08-27/uber-wins-court-ruling-stopping-german-city-from-enforcing-ban (reporting that Hamburg's ban is under a review and the court has ruled in the interim that the city cannot enforce the ban while it is under review).

78. Brian Frank, *LA Sides With Taxi Companies, Sends Cease-and-Desist Letters to 3 Ride-Sharing Startups*, *89.3 KPCC*, S. CAL. PUB. RADIO (June 24, 2013), http://www.scpr.org/news/2013/06/24/37904/la-sides-with-taxi-companies-sends-cease-and-desis/#doclink.

79. Brad Tuttle, *Rideshare Battle Shifts to L.A.: City Tells Uber, Lyft, SideCar to Stop Picking Up Riders*, TIME (June 27, 2013), http://business.time.com/2013/06/27/rideshare-battle-shifts-to-l-a-city-tells-uber-lyft-sidecar-to-stop-picking-up-riders/ (reporting on city's cease and desist letters issued to ride-sharing companies, allegedly for safety and lack of licensing reasons, and the pushback of companies who continued to operate, arguing that their drivers are not commercial-transportation providers who transport passengers for hire); Anna Almendrala, *LA Cease-and-Desist Letter to Ride-Sharing Apps Highlights Legal Gray Area*, HUFFINGTON POST (June 25, 2013, 9:51 pm EDT), http://www.huffingtonpost.com/2013/06/25/la-cease-and-desist-ride-sharing_n_3498782.html (noting the jurisdictional tensions between the state-run Public Utilities Commission, which has acknowledged the legality of these companies, and city regulators); *see also* Jon Healey, *State to L.A.: Hands off Uber, Lyft, Sidecar and InstantCab*, L.A. TIMES (July 30, 2013), http://articles.latimes.com/2013/jul/30/news/la-ol-uber-lyft-sidecar-california-public-utilities-commission-20130730 (reporting on the state Public Utilities Commission's turf battle against cities' attempts to extend their taxi regulation authority to these "transportation network companies," arguing that these networks should be regulated by the state agency).

80. Marcus Wohlsen, *Why the Sun is Setting on the Wild West of Ride-Sharing*, WIRED (Aug. 2, 2013, 6:30 AM), http://www.wired.com/2013/08/airport-arrests-uber-lyfts (reporting on arrests and the San Francisco International Airport's explanation that they believed that picking up passengers unlicensed would be unsafe); *see also* Tim Worstall, *This is Why We Can't Have Nice Things: Uber and Lyft Drivers Being Arrested*, FORBES (Aug. 3, 2013, 11:14 AM), http://www.forbes.com/sites/timworstall/2013/08/03/this-is-why-we-cant-have-nice-things-uber-and-lyft-drivers-being-arrested/ (editorializing on these arrests being protectionist by preventing delivery of old services in new ways).

81. Perry Stein, *D.C. Cab Commission Says New Regulations Not About Uber*, WASH. CITY PAPER (Aug. 21, 2013, 1:46 PM), http://www.washingtoncitypaper.com/blogs/citydesk/2013/08/21/d-c-cab-commission-says-new-regulations-not-about-uber/ (reporting on new regulations from the D.C. Taxicab Commission, which, by defining "sedan" narrowly, thus categorizing Uber cars under cab regulation instead of luxury sedan-service regulation).

approach.[82] In Dallas and D.C., undercover police have cited Uber drivers for violating City Code.[83] In a tale of two cities, Lyft and Uber began operating only in the St. Paul half of the Twin Cities.[84] Minneapolis would not allow them to operate without registering as a taxi service. This split puts in stark contrast the range of policy decisions available to local governments deciding what and how to regulate.

Cars are dangerous, and in the car-sharing economy, insurance is a recurrent concern for regulators and participants. By now, peer-to-peer car-rental services regularly provide insurance as part of the deal. Even within this subtopic of regulation, the divergent policies of taxis and the self-regulation of car-sharing companies can be surprising. Grey areas exist regarding whether a car-owner's insurer is liable in the event of an accident.[85] The insurance requirements for taxis vary based on city and state: in New York City, taxis must carry $100,000/$300,000 of liability insurance,[86] while in D.C., taxis must

82. FTC, STAFF COMMENTS BEFORE THE DISTRICT OF COLUMBIA TAXICAB COMMISSION CONCERNING PROPOSED RULEMAKINGS ON PASSENGER MOTOR VEHICLE TRANSPORTATION SERVICES (June 7, 2013), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf (expressing "concern[]" at rules that may "unnecessarily impede competition" and exhorting the commission to reconsider their regulatory framework in order to "allow new and innovative forms of competition to enter the marketplace unless regulation is necessary to achieve some countervailing pro-competitive or other benefit, such as protecting the public from significant harm").

83. Martin De Caro, *Uber and DC Taxicab Commission Battling Again*, WUSA9 (Sept. 4, 2014, 8:50 p.m. EDT), http://www.wusa9.com/story/news/traffic/2014/09/04/uber-dc-taxicab-commission-tickets/15092983/ (reporting that Uber drivers were ticketed for picking up passengers in what the commission believed to be "illegal hires"); Robert Wilonsky, *Update: Rawlings to Lead Investigation Into Crafting of Uber Ordinance; Uber Dallas Manager Says, 'This Isn't Over Yet,'* DALLAS NEWS: CITY HALL BLOG (Aug. 28, 2013, 8:56 AM), http://cityhallblog.dallasnews.com/2013/08/live-blog-city-council-debates-proposed-ordinance-intended-to-park-app-ordered-car-service-uber.html/ (mentioning, as part of coverage on contentious last-minute city council convening, that 31 Uber-certified drivers received 61 citations).

84. *Car-Sharing App Raises City Ordinance Questions, Irks Taxi Drivers*, CBS MINNESOTA (Aug. 31, 2013, 11:05 PM), http://minnesota.cbslocal.com/2013/08/31/car-sharing-app-raises-city-ordinance-questions-irks-taxi-drivers/ (reporting that Minneapolis's requirement that driving for fares requires a meter prevented ridesharing company Lyft from operating there, while remaining free to operate in St. Paul, and noting city councilmember's willingness to create a separate category of regulation for share-vehicle companies in order to allow them to operate without changing existing taxi laws).

85. Ron Lieber, *Fatal Collision Makes Car-Sharing Worries No Longer Theoretical*, N.Y. TIMES (Apr. 13, 2012), http://www.nytimes.com/2012/04/14/your-money/relayrides-accident-raises-questions-on-liabilities-of-car-sharing.html?pagewanted=all&_r=0 (noting that no matter how much coverage there is, there will be battles between whether the sharing company's insurance pays or the individual sharer's insurance pays, and who pays the excess beyond the covered liability).

86. Daniel M. Rothschild, *Ridesharing, Insurance and Regulation*, R STREET (Apr. 10,

carry only $25,000/$50,000 policies.[87] In D.C.'s example, this amount is actually less than regular drivers in neighboring Maryland are required by law to carry.[88] In contrast, ridesharing companies Lyft and Uber insure drivers with $1 million policies.[89] Uber was the first to add coverage for accidents that might happen while a driver is in-between rides.[90] Other companies have followed this lead.[91] In an attempt to stave-off regulation, Lyft has publicized that it voluntarily self-regulates liability and safety protections that exceed New York City's requirements for its taxis and for-hire vehicles.[92]

California moved beyond one-size-fits-all regulatory schemes and established comprehensive regulations for ride-sharing. After an attempt at blunt regulatory control through cease-and-desist letters, the California Public Utilities Commission (CPUC) altered its approach to evaluate a regulatory response capable of balancing the risks and benefits of ridesharing services.[93] In late 2013, CPUC issued a decision

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2014), http://www.rstreet.org/2014/04/10/ridesharing-insurance-regulation/ (reporting on how various states' insurance requirements compare with major ridesharing companies' insurance coverage).

87. *Id.*

88. *Id.*

89. *Id.*

90. Ingrid Lunden, *Following Lyft, Uber Offers Coverage to Its U.S. Drivers to Close the "Insurance Gap,"* TECHCRUNCH (Mar. 14, 2014), http://techcrunch.com/2014/03/14/following-lyft-uber-offers-insurance-gap-coverage/ (showing competitive reactions to fatal accident that prompted ridesharing companies to consider whether to cover gaps in insurance between lifts, including Uber's race to preempt Lyft's announcement to cover the insurance gap).

91. Ryan Lawler, *On-Demand Ridesharing Startup Lyft Adds Insurance Between Rides*, TECHCRUNCH (Mar. 13, 2014), http://techcrunch.com/2014/03/13/lyft-insurance-between-rides/ (reporting Lyft's decision to cover the insurance gap between rides, but characterizing it as "additional protection" and stating its expectation that personal carriers will cover the time between rides); *Insurance & Guarantee*, SIDECAR, http://www.side.cr/policies/insurance/ (last visited Sept. 23, 2014) (stating Sidecar's policy to insure at the $1 million coverage rate, which puts them on par with their competitors' insurance offerings and in compliance with later California regulations).

92. *Lyft Will Launch in Brooklyn & Queens*, LYFT BLOG (July 8, 2014), http://blog.lyft.com/posts/2014/7/8/lyft-launches-in-new-yorks-outer-boroughs (displaying graphical checklist that compares Lyft side-by-side on safety protections against taxi cab companies, for-hire companies, and Craigslist).

93. Michael Cabanatuan, *Putting Brakes on Ride-Sharing Apps*, S.F. GATE (Feb. 2, 2014, 9:21 AM), http://www.sfgate.com/bayarea/article/Putting-brakes-on-ride-sharing-apps-3927193.php (recalling the initial round of cease-and-desist letters in 2012 from CPUC and regulators' concerns about unaccounted liabilities); *see also* Press Release, Cal. Pub. Util. Comm'n, *CPUC to Evaluate Ridesharing Services* (Dec. 20, 2012), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M039/K594/39594708.PDF (declaring that it will reconsider its original stance opposing ridesharing services and evaluate how to regulate them, with a period for public comment); *see also Carrier Investigations*, CAL. PUB. UTIL. COMM'N, http://www.cpuc.ca.gov/PUC/transportation/Passengers/CarrierInvestigations/ (last modified Dec. 17, 2014) (listing press releases documenting the development of the CPUC's handling of

on the issue.[94] CPUC's decision required ride-sharing companies like Sidecar, Lyft, and Uber to undergo vehicle-safety checks and audits by state authorities.[95] Other regulations include insurance requirements for ride-sharing companies in addition to regulations such as criminal-background checks, driver-training programs, zero-tolerance for drugs and alcohol, and 19-point vehicle inspections.[96] CPUC required $1 million per incident insurance coverage for ride-sharing vehicles.[97] In line with the CPUC's regulation of the car-sharing companies, ride-sharing companies created a Peer-to-Peer Rideshare Insurance Coalition.[98] Most recently, California passed Assembly Bill 2293, which mandates "transportation network companies" or their participating drivers to carry certain thresholds of minimum insurance.[99]

Two other states (Oregon and Washington) passed laws relating to car sharing. These states placed required that the car-sharing services and their insurers be liable for incidents during the rental period.[100] GEICO has further sought to clarify its policies and in 2012 rewrote them to withdraw accident coverage for cars that have been rented to others in states that permit it.[101] How the regulations further unfold in California and other early-adopter states could determine how other cities and states will regulate the industry and whether cities that have pushed out ride sharing—including Philadelphia, New York, and Austin—will change their minds.[102]

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ride-sharing companies, from initial citations to evaluations to operating agreements to formalized rules).

94. Decision Establishing Rules and Regulations for Transportation Network Companies, Decision No. 13-09-045 (Cal. Pub. Utilities Comm'n Sept. 19, 2013), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF; Press Release, Cal. Pub. Util. Comm'n, Docket No. 12-12-011, *CPUC Establishes Rules for Transportation Network Companies* (Sept. 19, 2013), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K132/77132276.PDF (publicizing in a press release that new regulations require licensing, minimum liability-insurance thresholds, and other safety-related safeguards).

95. CPCU Decision, at 40.

96. *Id.*

97. *Id.*

98. *California Welcomes Insurance Coalition for Ride Sharing, Uber Joins In*, GOV'T TECH. (Feb. 10, 2014), http://www.govtech.com/state/California-Welcomes-Insurance-Coalition-for-Ride-Sharing-Uber-Joins-In.html (reporting on establishment and official government recognition of Peers, a coalition of ride-sharing companies, insurance companies, and government regulators seeking to support the growth of peer-to-peer ridesharing).

99. Act of Sept. 17, 2014, [2014] Cal. Stat. ch. 389 (2014) (codified at CAL. PUB. UTIL. CODE §§ 5430–43).

100. *All Eyes on the Sharing Economy*, *supra* note 35.

101. *Id.*

102. Already some of the ice seems to be thawing between private companies and city

B. Housing

California is at the forefront of progressive regulation of the house-sharing economy. In San Francisco, Airbnb's birthplace, the president of the city council announced a new approach to regulating home-sharing companies with the primary goal of creating a legal basis for home-sharing companies that otherwise had placed hosts in violation of local laws.[103] The legislation allows individuals to rent-out their primary residences as long as they live at the property at least three-quarters of the year (275 days).[104] Anyone who lives in a building with two or more units and wants to list their place on a website will have to apply to be in the city's registry of approved hosts;[105] to remain in that database, the person must keep records showing that their property is insured for at least $500,000 and that they collected taxes from their guests,[106] which go into city coffers just like hotel taxes do. And they will have to reapply, paying a $50 application fee, every two years.[107] Landlords can object to a tenant's short-term listings, and the city could prohibit listings that are currently in violation of city codes.[108] Airbnb supported these efforts to codify home sharing in the city's laws, and at one point offered to collect and remit San Francisco's 14% hotel tax as a way of facilitating its users staying compliant,[109] although the legislation places legal responsibility for this requirement on the host.[110]

In contrast, the experience of home-sharing companies in New York has followed a much more challenging path where, as sharing-

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regulators. In New York City, Lyft agreed to adhere to much stricter standards and a business model that looks much more like a traditional taxi service in exchange for the right to do business in the city. Julia Marsh & Rebecca Harshbarger, *Ride-Sharing Service Lyft Gets Green Light in NYC*, N.Y. POST (July 25, 2014, 12:11 PM), http://nypost.com/2014/07/25/ride-sharing-service-lyft-gets-green-light-in-nyc/ (reporting that Lyft conceded with demands to comply with licensing and car color requirements and plans to take a more long-term approach to introduce its full business model, including submitting a pilot proposal for peer-to-peer ridesharing).

103. Katy Steinmetz, *San Francisco Cracks Down on Airbnb 'Abuses,'* TIME (Apr. 15, 2014), http://time.com/63810/san-francisco-airbnb-crackdown/ (explaining Supervisor David Chiu's proposal to carve out an exception that permits occasional rentals to help "struggling families").

104. S.F., CAL., ADMIN. CODE § 41A.5(g)(1) (2014).

105. *Id.* § 41A.5(g)(3).

106. *Id.*

107. *Id.*

108. *Id.*

109. Steinmetz, *supra* note 103 (reporting Airbnb's announcement, weeks before the bill was unveiled, that it would ask residents to add a 14% tax and that Airbnb would pay the amount to the city).

110. S.F., CAL., ADMIN. CODE § 41.A.5(g)(1)(C) (2014).

economy companies have grown, they have faced numerous regulatory obstacles. In May 2013, a New York administrative judge found one Airbnb host in violation of the city's occupancy code and a 2010 state law that bans apartment rentals shorter than 30 days.[111] The ruling seemed to outlaw Airbnb from operating in New York, but with limited enforcement, its actual impact has been unclear.[112] The New York State Attorney General also subpoenaed Airbnb's records to determine whether hosts have been paying their fair share of taxes.[113] After initial resistance, Airbnb complied with requests and claimed that it has self-monitored to block users abusing its platform to conduct illegal activities.[114] It also indicated that it would seek a regulatory carve-out that would allow it to collect New York's hotel taxes and permit their users to rent their space for short-term stays.[115]

Elsewhere the sharing economy and facilitated-sublets as provided by Airbnb, Wimdu, 9Flats and HouseTrip have prompted regulatory responses from local governments around the world. Those regulations identified rising housing prices and shortages in the housing market as justification for significantly limiting sharing-economy opportunities for owners and residents.[116] Berlin, Paris, and

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111. *See New York City vs. Airbnb*, CNN MONEY, http://money.cnn.com/interactive/technology/nyc-airbnb/ (last visited Sept. 23, 2014) (reproducing May 2013 decision from City of New York Environmental Control Board noting tenant's rental of condo via Airbnb, which ruled the rental illegal and a violation of the city's occupancy code because it permitted "transient occupancy" in housing designated for permanent use).

112. *See, e.g.*, Julia Marsh & Kevin Fasick, *Judge Nixes Airbnb Subletter's Eviction*, N.Y. POST (June 18, 2014, 4:20 AM), http://nypost.com/2014/06/18/judge-nixes-illegal-airbnb-subletters-eviction/ (noting that, although subletter violated the Multiple Dwelling Law and breached her contract with her landlord, she could not be evicted because it is a curable violation).

113. Kaja Whitehouse, *Airbnb Aims to Start Taxing Renters by July 1*, N.Y. POST (Apr. 14, 2014, 5:46 AM), http://nypost.com/2014/04/14/airbnb-aims-to-start-taxing-renters-by-july-1/.

114. Letter from Eric T. Schneider, N.Y. Attn'y General, to Belinda Johnson, General Counsel, Airbnb Inc., Agreement Regarding Compliance with Subpoena (May 20, 2014), http://www.ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf (memorializing agreement that Airbnb will turn over anonymized data set redacting user-specific data); Bruce Golding, *Two-Thirds of NYC's Airbnb Rentals Are Illegal Sublets*, N.Y. POST (Apr. 21, 2014, 3:25 AM), http://nypost.com/2014/04/21/two-thirds-of-citys-airbnb-rentals-are-illegal-apartments-state/.

115. Polly Mosendz, *Face-Off: NYC Lawmakers Grill Airbnb on Illegal Hotels*, NEWSWEEK (Jan. 21, 2015, 1:26 PM), http://www.newsweek.com/face-nyc-lawmakers-grill-airbnb-illegal-hotels-301060 (describing ongoing lobbying efforts); Whitehouse, *supra* note 113 (noting Airbnb's incentives to settle ambiguities about illegality in anticipation of its going public and the hotel industry's opposition that, tax-compliant or not, the activity should be deemed inherently illegal).

116. Ben Woods, *Is the Clock Ticking for the Sharing Economy?*, NEXT WEB BLOG (Nov. 23, 2013, 3:38 PM), http://thenextweb.com/insider/2013/11/23/clock-ticking-sharing-economy/#!sqj1J (reporting Berlin regulators' rationales for attempting to limit holiday rentals on grounds of maintaining affordable housing prices, but characterizing these rentals as a drop in the housing market bucket).

several Spanish regions are developing regulatory systems of control.[117] In contrast, adopting a co-regulatory approach, Amsterdam has appointed a social travel specialist to work with rental platforms.[118]

It remains to be seen whether Airbnb has unlocked new economic value by bringing underutilized housing to market on a global basis and boosting tourism versus simply detracting from existing hotel stock. In an early 2014 round of fundraising, the company was valued at more than $10 billion.[119] Cities with a housing shortage and requiring a transient occupancy tax for hotel and hotel-like rentals want a cut of that money, claiming that such house-sharing economies are flourishing at the expense of city planning, residents who depend on lower-cost housing, and traditional revenue streams that help offset the costs of hotel-like activity.[120] The hotel market in general has not seen a significant downtrend, although the effects are measurable.[121] Recent release of San Francisco data revealed that Airbnb had listed over 4,500 properties, with about 6% of listings suggesting frequent rentals.[122] The data does not clearly capture the kind of splash-over effects the rentals have had on the surrounding long-term housing market, however.

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117. *Id.* (surveying attempts to regulate in Berlin, Paris, and four regions in Spain and noting the different regulations favored based on the traditional strength of the local hotel industry or the players in the local economy).

118. Harrison Weber, *After a Rough Few Months, Airbnb Receives Amsterdam's Blessing. Will Other Cities Follow?*, NEXT WEB BLOG (June 7, 2013, 5:41 PM), http://thenextweb.com/eu/2013/06/07/four-months-after-its-hunt-for-illegal-hotels-amsterdam-lightens-restrictions-on-airbnb-rentals/ (tracing evolution of Amsterdam's stance toward home sharing, going from treating them as illegal to treating them as permissible with permits to even welcoming them, subject to limitations—whether the hosts live in the rented residence, whether the renting will cause a nuisance, and other safety-related concerns); David Hantman, *Good News from Amsterdam*, AIRBNB (June 10, 2013), http://publicpolicy.airbnb.com/good-news-from-amsterdam/ (lauding as progressive Amsterdam's recognition of the legality of these short-term rentals and expressing confidence that other cities that also conduct their own independent study will find these policies ultimately beneficial to the city).

119. Sydney Ember, *Airbnb's Huge Valuation*, N.Y. TIMES DEALBOOK (April 21, 2014, 7:58 AM) http://dealbook.nytimes.com/2014/04/21/morning-agenda-airbnbs-10-billion-valuation/ (marveling, as a point of comparison, that the $10 billion valuation would place Airbnb at a higher value than established hotel chains such as Hyatt).

120. Steinmetz, *supra* note 103 (explaining the rationale why cities tax hotels—to help support the extra strain on city services from out-of-town visitors—and that short-term renters may be expected to collect the same tax because the same rationale applies to their visitors).

121. GEORGIOS ZERVAS, DAVIDE PROSERPIO & JOHN W. BYERS, THE RISE OF THE SHARING ECONOMY: ESTIMATING THE IMPACT OF AIRBNB ON THE HOTEL INDUSTRY 17–18 (Bos. University School of Management, Research Paper Series No. 2013-16, Jan. 22, 2014), http://people.bu.edu/zg/publications/airbnb.pdf (publishing empirical data suggesting that, for average economy hotel, expected yearly revenue gain from eliminating Airbnb entire-apartment rentals would be around $56,000 and gain from limiting renters to a single property would be about $11,000).

122. Said, *Window into Airbnb's Hidden Impact on S.F.*, *supra* note 29.

C. Moving Forward

Sharing economy companies often violate existing laws and policies. Understandably governments are worried about consumer safety and diminishing tax revenue. Although PEERS, the sharing economy's nascent association and lobbying arm, was formed to facilitate interaction with regulators, it has yet to achieve significant success in this regard.[123] As discussed above, the regulatory response to sharing-economy firms has been inconsistent across the range of jurisdictions involved.[124] Sharing-economy companies have largely left it to their users to navigate whether and how to pay taxes or what sort of risks to undertake. The complexity of the tax implications may lead users faced with managing these requirements to improperly report or underreport taxable income.[125] While support services for facilitating tax answers are developing, such as the new 1099.is, which is designed to help people figure out their tax obligations in freelance and sharing economies, companies have varying attitudes with regard to how much burden they are comfortable putting on goods and service providers.[126] Part III proposes how to select a co-regulatory approach that picks feasible battles and suits the unique attributes of the market being regulated.

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123. *See* Adrian Glick Kudler, *Airbnb-Affiliated Lobbying Group Defeats Venice's Attempt to Regulate Vacation Rentals in Los Angeles*, CURBED L.A. (Nov. 25, 2013), http://la.curbed.com/archives/2013/11/airbnbaffiliated_lobbying_group_defeats_venices_attempt_to_regulate_vacation_rentals_in_los_angeles.php (reporting that Peers was able to block an attempt in Venice, California to regulate short-term vacation rentals); *Action Alert! Protect Ridesharing in California!*, PEERS BLOG (Aug. 20, 2014, 9:22 PM), http://blog.peers.org/post/95329448124/action-alert-protect-ridesharing-in-california (calling members to mobilize to protest against California ridesharing legislation, which later passed with compromise agreements of its member companies).

124. *See, e.g.*, Karla Zabludovsky, *NYC is Battling Airbnb, BUT the Home-Sharing Firm Got a Green Light in Amsterdam*, NEWSWEEK (May 1, 2014, 6:04 AM), http://www.newsweek.com/nyc-battling-airbnb-home-sharing-firm-got-green-light-amsterdam-249256 (summarizing various reactions to Airbnb-type home rentals across multiple cities in the world).

125. Sara Horowitz, *How Do You Pay Taxes in the Sharing Economy? A Live Q&A*, FREELANCERS UNION BLOG (Mar. 19, 2014), https://www.freelancersunion.org/blog/2014/03/12/peers-freelancersunion-sharing-taxes/ (providing transcript of Q&A session sponsored by Peers fielding questions from sharing entrepreneurs about filing their taxes); Nancy Scola, *Don't Worry, the 'Sharing Economy' Even Confuses CPAs*, NEXT CITY (Apr. 1, 2014), http://nextcity.org/daily/entry/dont-worry-the-sharing-economy-even-confuses-cpas (noting that, because of diversity of sharing economy business models, there is no one clear answer to how one files taxes—the answer depending on subtle distinctions such as whether the good or service is in exchange for money or whether the money is used to raise funds to generate a product or pay for a service).

126. 1099.IS, http://1099.is/ (last visited Sept. 23, 2014) (providing a question-and-answer website for those earning income through online entrepreneurism).

III. SELECTING A MODEL OF REGULATION THAT FITS SHARING ECONOMIES

Determining how to regulate is a challenging first step when governmental actors are confronted with new commercial activity. Several years into the evolution of the technology-enabled sharing economy, government entities are still struggling with effective approaches for its regulation. Previous commentary identifies that agencies have a number of choices on how to proceed: inaction, rulemaking, negotiation, and litigation.[127] If markets delivered all desired outcomes and consumers are protected from harm, then inaction may be appropriate. As explained in section I.B, however, market pathologies and gaps between incentives and needed protections make inaction an unattractive option for governments seeking to encourage healthy development of this new economy.[128] Litigation comes as a last resort, given the strain it places on an agency's resources and the risk of chilling industry innovation and economic productivity. Negotiation may naturally occur as a part of the rulemaking process or prior to litigation when attempting to bridge the gap between industry and agency perspectives.

A. The Need for Balanced, Negotiated Co-Regulation

Academics have argued that there are no pure modes of self-regulation or command-and-control regulation and that in reality different regulatory regimes offer varying roles for public and private actors.[129] Negotiated co-regulation involves some mix of shared responsibility between government and industry entities, with different allocations of responsibility for setting goals, formulating standards and rules, and enforcement.[130] On one extreme of formality, lawmakers can provide an explicit legal grant of authority to a self-regulatory organization, subject to the government's oversight. In securities law,

127. Andrew P. Morriss, Bruce Yandel & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 185–210 (2005) (reviewing the risks, benefits, and safeguards against common pitfalls for the four possible responses of government).

128. *See supra* text accompanying notes 21–36.

129. *See, e.g.*, Tony Prosser, *Self-Regulation, Co-Regulation and the Audio-Visual Media Services Directive*, 31 J. CONSUMER POL'Y 99, 106 (2008) (characterizing the space between command-and-control self-regulation and pure-industry regulation as a continuum and noting that sectors can differ, based on the unique attributes of the market, in the exact shape of the co-regulation).

130. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547–549 (2000) [hereinafter Freeman, *Private Role*] (exhorting readers not to assume a "center of decision making" and proposing "'aggregate' accountability" instead where private and public entities harness one another's capacities).

for example, the Financial Industry Regulatory Authority (FINRA) regulates securities transactions subject to the oversight of the Securities Exchange Commission.[131] On the other extreme, the government might refrain from issuing specific rules or mandating a course of action, instead negotiating voluntary commitments from key-industry leaders to address certain problems or engage in certain activities. For example, federal and state law-enforcement authorities have cooperated with high-profile technology companies to develop technological tools that obtain useful data for unearthing online human trafficking.[132]

In between these two poles of formal organizational oversight and informal voluntary cooperation lies a gradient of power-sharing possibilities. Government and industry may perform distinct roles. For example, a government agency may devise goals and desired outcomes, but leave the industry with the task of implementing particular solutions to achieve those outcomes and industry standards.[133] Or the government entity may devise rules specific to the point of defining what technologies companies must use and in what manner, with industry representatives limited to consultation and comment.[134] Or government and industry could collaborate throughout each step of governance and perform every task with the other's input. For example,

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131. *See About FINRA*, FINRA, http://www.finra.org/AboutFINRA/ (last visited May 22, 2014).

132. CAL. OFFICE OF THE ATTN'Y GENERAL, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 65–66, 82, 88 (2012) (noting that companies such as Microsoft and Yahoo, in partnership with federal and state law enforcement agencies, have voluntarily offered services to help track down trafficked victims, including trigger responses in search engines when certain keywords are entered and photo-matching technology available for law enforcement). Privacy self-regulation often takes this form. *See generally* Ira S. Rubinstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 J. L. & POL'Y FOR INFO. SOC'Y 355 (2010).

133. *See, e.g.*, Heather Jarvis & Wei Xu, *Comparative Analysis of Air Pollution Trading in the United States and China*, 36 ENVTL. L. REV. 10234, 10238 (2006) (contrasting United States' "cap-and-trade" pollution regulation against a command-and-control environmental regulatory approach, noting that the former looks at overall pollution reduction goals for a given area, rather than control over the individual polluter's behavior, such that the polluter is given some freedom to devise its own ways of meeting pollution reduction goals and even selling off its unused pollution allotment in the market).

134. *See* Daniel H. Cole & Peter Z. Grossman, *When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887, 890–891 (1999) (challenging the commonly held view that market-enabling loose regulation achieves outcomes more efficiently than command-and-control regulation, noting that empirical success often depends on budget and legal constraints); *see also id.* at 920 (noting that command-and-control regulation, such as defining precisely what technological installations to mandate, made sense during an era where outcome-oriented measurement of overall air-pollution reduction and continuous monitoring would have been infeasible).

a governmental entity and an industry trade association might negotiate the proper regulatory goals, collaborate on the drafting of standards, and work cooperatively to enforce the standards against specific firms that violate them. Scholars refer to this type of co-regulation as "collaborative governance" or "contractual regulation."[135]

Co-regulation is by no means a new mode of governance, but it is being increasingly utilized as an important instrument for achieving regulatory objectives.[136] It is not uncommon for administrative agencies to engage in negotiated rulemaking or to bring agency representatives and stakeholders together to approve consensus-based rules.[137] Various levels of co-regulation have been used in a wide range of sectors, such as banking, securities,[138] insurance,[139] environmental protection,[140] and technical standardization. For example, the Environmental Protection Agency ("EPA") sometimes negotiates compliance agreements that fit the circumstances of a firm or site location.[141] Another common co-regulation strategy involves drawing upon existing industry guidelines as a common starting point for agencies seeking to develop safety or product standards.[142] The

135. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 21–33 (1997) ("co-regulation"); *see* Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 68–80 (2001) (collaborative governance using the terms "micro contracts" and "macro contracts").

136. LEADING ISSUES IN COMPETITION, REGULATION AND DEVELOPMENT 159–60, 207–08 (Paul Cook, Colin B. Kirkpatrick, Martin Minogue, & David Parker eds., 2004); Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 J. L. AND SOC'Y 56, 57, 59–67, 75–76 (2002).

137. *See* Freeman, *Collaborative Governance in the Administrative State*, *supra* note 135; Freeman, *Private Role*, *supra* note 130, at 654–55; Philip J. Harter, *Collaboration: The Future of Governance*, 2009 J. DISP. RESOL. 411, 423 (2009).

138. Edward J. Balleisen & Marc Eisner, *The Promise and Pitfalls of Co-Regulation: How Governments Can Draw on Price Governance for Public Purpose*, *in* NEW PERSPECTIVES ON REGULATIONS 127, 143–45 (David Moss & John Cisternino eds., 2009), http://www.tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch6_Balleisen_Eisner.pdf.

139. *See* Stephen C. Pirrong, *The Self-Regulation of Commodity Exchanges: The Case of Market Manipulation*, 38 J. L. & ECON. 141 *passim* (1995) (for applications in the banking, stock exchange, and insurance sectors).

140. For examples from the field of environmental protection, see, *e.g.*, Eric Hysing, *From Government to Governance? A Comparison of Environmental Governing in Swedish Forestry and Transport*, 22 GOVERNANCE 647, 658–61 (2009); VIRGINIA HAUFLER, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 4, 9, 31–41, 107–23 (2001); Madhu Khanna, *Non-Mandatory Approaches to Environmental Protection*, 15 J. ECON. SURV. 291, 293–307 (2001).

141. *See* Freeman, *Private Role, supra* note 130, at 657–64; *see also* Stewart, *supra* note 135.

142. Freeman, *Private Role, supra* note 130, at 638–40. For example, Section 551 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b)(1)(w)(1), 110 Stat. 56 (1996) (codified at 47 U.S.C. § 303 (2006)), gives the FCC authority to promulgate ratings for violent,

California Occupational Health and Safety Administration, for example, worked with management and labor union to develop construction safety standards.[143]

The application of co-regulatory approaches to the sharing economy would only be an extension of its increasing application to Internet-based services. From consumer protection to the promotion of effective competition, a variety of regulatory goals are being pursued through co-regulation.[144] The desire for a co-regulatory approach in shared-economies has become increasingly apparent, in light of the development of PEERS and similar organizations for lobbying and targeted advocacy.[145] More targeted sub-segments within the sharing economy, such as the Carsharing Association,[146] also have lobbyists. While there are extreme positions on the need for regulation—from an insistence that no regulation is necessary or appropriate for the sharing economy[147] to a desire to regulate in an identical manner to the existing industries that it displaces[148]—regulators and firms are increasingly coming to agree that that they have a mutual interest in promoting innovation while ensuring consumer protection.

Finding the right balance of regulatory intervention requires appreciating the risks of erring too far on either direction. Firms left unchecked, so the argument goes, will put their own profits ahead of the public interest, and self-regulatory standards will inevitably prove too lenient.[149] Consumers, in turn, will not always vote with their feet because many of the sharing economies function as networked industries, where moving from one service provider to another requires

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sexual, or other material that parents may find objectionable for their children to watch. But it first offers the broadcasting and movie industries a chance to develop "voluntary standards." *Id.* § 551(e)(1)(A). If the FCC finds these standards to be acceptable, it is to use them instead of developing its own. *Id.*

143. *See* Freeman, *Private Role, supra* note 130, at 651–53.

144. Florian Saurwein, *Regulatory Choice for Alternative Modes of Regulation: How Context Matters*, 33 L. & POL'Y 334, 337–41 (2011).

145. *See, e.g.*, *Start and Win Campaigns for the Sharing Economy*, PEERS, https://campaigns.peers.org/ (last visited Feb. 3, 2015).

146. CARSHARING ASSOC., http://carsharing.org/ (last visited Dec. 27, 2014) (The challenges of forming industry groups is demonstrated by the limited membership of CSA, which does not include the major car-sharing companies such as zipcar, relay rides, or others).

147. Arun Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), http://www.wired.com/opinion/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/.

148. Avi Asher-Schapiro, *Against Sharing*, JACOBIN (Sept. 19, 2014), https://www.jacobinmag.com/2014/09/against-sharing/ (noting favorably, in leftist magazine, the taxi unions and Teamsters' particularly vocal opposition to ride sharing).

149. Balleisen & Eisner, *supra* note 138, at 145.

forfeiting a personal investment into building a reputation in a particular community, moving to another service provider with fewer participants, and losing any nontransferable personal data that the initial service provider could use to cater to user-specific preferences or needs.[150] Businesses thrive on predictable regulatory environments, and some level of self-imposed limitations and cooperation with the government is necessary in order to build stability so that funders and market participants will invest in the market activity and have some assurance that the business will remain legally and economically viable.[151] Moreover, government involvement has the potential to increase transparency. Because the industry has no requirement to report back to the public on all feedback received, the public may not receive positive reinforcement that rewards providing feedback or advocating for change by working through industry channels.[152] Without opportunities to provide input, the public is dis-incentivized, even where an awareness of issues exists, to expend significant efforts in mobilizing to provide feedback to industries.[153] Finally, industry representatives, who do not hold governmental authority to fine or otherwise penalize scofflaws, may not possess sufficient power or incentives to enforce industry standards against their peers. A

150. *See* Daniel H. Kahn, *Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms*, 11 COLUM. SCI. & TECH. L. REV. 176, 182–186 (2010) (identifying the problem of scattered identities across the Internet, where the hard-built reputation in one subcommunity is not transferable to another); *cf.* Bruce L. Benson, *The Spontaneous Evolution of Cyber Law: Norms, Property Rights, Contracting, Dispute Resolution and Enforcement Without the State*, 1 J.L. ECON. & POL'Y 269, 282–284 (2005) (documenting the emergence of reputation maintenance and dispute resolution because of the high stakes that come within managing online reputations and their significant effect on the ability to transact).

151. AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 6–9 (1994) (introducing the theory explaining how companies seeking to invest deal with uncertainty of reward, noting that irreversible bad investments can occur as a result of unanticipated-government regulation as well, and describing a model where such uncertainty results in a higher-cost threshold for investors to keep that option open); *see* Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 109–113 (2013) (observing, in another technology-heavy context, that legal uncertainty deters development of new business models or investment into potentially lucrative and helpful ideas); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG. 279, 279–280 (1986) (noting how legal uncertainty creates under- and over-compliance incentives, resulting in externalities).

152. Anya Kamenetz, *Is Peers the Sharing Economy's Future or Just a Great Silicon Valley PR Stunt?*, FAST COMPANY (Dec. 9, 2013, 3:25 PM), http://www.fastcompany.com/3022974/tech-forecast/is-peers-the-sharing-economys-future-or-just-a-great-silicon-valley-pr-stunt (observing the tension in maintaining independence and credibility for a nonprofit coalition where funding and most influential members are for-profit businesses).

153. CARY COGLIANESE, HEATHER KILMARTIN, & EVAN MENDELSON, TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS v–vii, 18–21 (2008), http://www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf.

legitimate regulatory threat acts as a vital factor for ensuring industry coordination and compliance.[154] Ultimately a company is legally accountable to its shareholders rather than the public, and the profit motive may not always naturally align with the incentive to improve the industry as a whole by correcting competitors' policies.[155]

On the other side of the equation, government stands to benefit from industry buy-in, as improved government-industry relations builds groundwork for future cooperation.[156] The industry has unique knowledge of its own processes and business strategies.[157] The more cost-effective and functional standards, paving the way for policies with greater effectiveness and political practicality.[158] Collaboration also fosters accountability, allowing for shared responsibility in pursuing regulatory goals.[159] Furthermore, though hard to quantify, some believe that collaborative regulation will encourage firms to share regulatory responsibilities more freely and to adhere to them more willingly than if they were subject to a government-driven process.[160]

But that is assuming that co-regulation takes on the best of both worlds—industry expertise with government accountability and muscle. What happens when co-regulation brings out the worst of each actor? Critics claim that co-regulation leads to compromise and, ultimately, weaker standards.[161] Because collaborative discussions often take place at least partially in non-public contexts, agency "capture" lurks as a possibility.[162] Co-regulation may occur between private talks and insular industry meetings, coming at the cost of public

154. For example, the threat of regulation resulted in major compromises to Lyft's peer-to-peer business model in New York City to catch up to Uber's presence in that market. Matt Flegenheimer, *Car-Hailing Service, Lyft, Reaches Deal to Operate in New York City*, N.Y. TIMES (July 25, 2014), http://www.nytimes.com/2014/07/26/nyregion/lyft-reaches-deal-to-operate-car-hailing-service-in-new-york.html; Emily Caruthers, *Lyft's Sacrifice For the Sake of Its NYC Launch*, CNBC (July 29, 2014, 2:51 PM ET), http://www.cnbc.com/id/101876728.

155. *See* Caruthers, *supra* note 154.

156. Freeman, *Collaborative Governance, supra* note 135, at 22–24.

157. Cameron Holley, *Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning from "New" Forms of Accountability in Practice*, 35 COLUM. J. ENVTL. L. 127, 167 (2010) (discussing how firms consciously or unconsciously may exploit their own knowledge advantage).

158. *Id.* at 168–70; *see also* Freeman, *Collaborative Governance*, *supra* note 135, at 26.

159. Freeman, *Collaborative Governance*, *supra* note 135, at 82.

160. *Id.* at 22–24.

161. Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291, 318 (2014).

162. Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach*, 7 BROOK. J. CORP. FIN. & COM. L. 1, 20 (2012).

input.[163] If enforcement is left to industry self-policing or voluntary compliance, noncompliant firms may seek to free ride.[164] Established firms could also gain an unfair advantage if they help entrench standards that discriminate against new entrants.[165] These concerns over co-regulation identify the risks that greater roles for industry in the regulatory process will not necessarily yield desirable social outcomes.[166]

Two examples are of particular note. Leading up to the 2009 financial crisis, significant leverage of capital was common and both bank executives and regulators at the Securities and Exchange Commission were largely oblivious to the risks, at least in part due to a new initiative, the Consolidated Supervised Entities (CSE) Program.[167] The CSE delegated the performance of regulatory risk assessments to the banks themselves, who conducted these assessments with sophisticated internal computer models and limited transparency. Similarly, during the Bush Administration, after significant pushback from electric utilities reliant on coal power plants, the EPA even shied away from issuing recommendations for state regulation of coal ash.[168] Instead, it deferred to an organization of utilities that produce electricity from coal, Utilities Solid Wastes Activity Group (USWAG), which had devised an "Action Plan" to identify proper disposal of coal ash.[169] Utilities could voluntarily adopt the USWAG plan, which avoided any requirement for expensive precautions such as linings for storage basins and reinforced dams. These approaches were insufficient and the 2008 Kingston coal ash spill released 1.1 billion gallons of coal ash slurry and is the largest fly ash release in United States history.[170] Co-regulation is no panacea and requires goal-oriented collaboration and co-regulatory checks and balances.

Determining what is effective and appropriate regulation requires regulatory design that anticipates the potential downfalls of co-regulation. Regulators must purposefully engineer the regulatory mechanisms to guard against the lack of transparency and accountability that often accompanies a shift from public deliberation to

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163. Dennis D. Hirsch, *In Search of the Holy Grail: Achieving Global Privacy Rules Through Sector-Based Codes of Conduct*, 74 OHIO ST. L.J. 1029, 1046 (2013).

164. *Id.*

165. *Id.*

166. *Id.*

167. Balleisen & Eisner, *supra* note 138, at 127–29.

168. *Id.* at 128.

169. *Id.*

170. *Id.*

industry collaboration. In particular, regulators must avoid, the misaligned incentives that impede vigorous public advocacy, and find ways to corral nonparticipating industry members or free riders into the system.

B. Finding a Good Fit: Co-Regulation that Leverages the Attributes of the Shared Economy Landscape

Co-regulation comes at the cost of social and institutional resources.[171] In order to maximize limited resources, co-regulators must pick their battles—to decide where they can be the most effective with the least regulatory strain. This requires an evaluation of where the regulatory actors have a unique competence for addressing a certain need that the shared economy is ill-equipped to handle on its own, identifying the areas where targeted intervention may have the most impact. In section I.B, we have already identified four areas—consumer protection and liability, labor laws, speech regulation, and local tax revenue interests—where regulatory intervention seems most necessary. The next step is to consider the natural incentives and disincentives for private action to identify areas where intervention may have the greatest impact.

Florian Saurwein, in the article *Regulatory Choice for Alternative Modes of Regulation: How Context Matters*, proposes eleven contextual factors that regulators should consider when selecting the type of coordination and government intervention necessary.[172] We apply this analysis to the sharing economy below.

1. Economic Benefits for the Industry

Where the benefits of self-regulation outweigh its costs, self-regulation creates win-win outcomes for the industry, and self-regulation will arise on its own. Where transaction costs to coordination are high, however, these prohibitive costs may prevent companies from coming together and coordinating their efforts on activities that may otherwise help consumers in that industry. For example, Saurwein discusses standardization in the computer industry as one example of how creating a standard benefited the industry and helped companies

171. *See* Lesley K. McAllister, *Dimensions of Enforcement Style: Factoring in Regulatory Capacity and Autonomy*, 32 LAW & POL'Y 61, 65 (2010) (noting that maintaining regulation reflects a resource cost that is a function of an entity's regulatory capacity which requires "a certain level of staff and budget resources" and "the resources to complete the basic tasks of rule enforcement").

172. Saurwein, *supra* note 144, at 341.

capitalize on the expected growth of consumer computer use.[173] Furthermore, the market demand for coordinated information for consumers may spur the industry to create information delivery that helps consumers match more accurately with the goods and services they desire, such as the movie and game industries creating self-enforced ratings systems to help consumers select movies and games with content appropriate for them or their children.[174] As academics have noted, the creation of such environmental or social standards can have direct benefits in improving the economic performance of an industry.[175] Standardization and its ensuing network effects,[176] and the rapid growth of the computer industry, are testament to the economic incentives that may powerfully drive the industry to self-regulate or to cooperate in coordinating a regulatory response.[177]

Digital sharing economies have built-in incentives to improve information delivery to participants and maintain certain standards of consumer protection, as they rely on trust and reliable-reputational information. The most successful business models, for example, Airbnb or RelayRides, use rating systems that allow for review of products over time. However, peer user systems do have notable deficiencies. For example, product reviews, such as found on Amazon.com reveal the ability of individuals to falsely inflate or deflate the aggregate rating of a product[178] or otherwise obfuscate its actual value.[179] Similarly, the New York Attorney General's suit against companies falsifying Yelp reviews shows the lure of profit that

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173. *Id.* at 342 (describing how self-interest in industries as diverse as the computer industry, the adult film industry, and the paper industry leads to voluntary standardization and compliance to industry baselines).

174. *See, e.g.*, Anna Everett, *P.C. Youth Violence: "What's the Internet or Video Gaming Got to Do with It?*,*"* 77 DENV. L. REV. 689, 695 (2000) (explaining that media networks voluntarily instituted a self-policing strategy in response to the threat of government regulation); *cf.* Video Game Rating Act of 1994, H.R. 3785, 103d Cong. (1994) (providing an example of the type of legislation that may have constrained the industry if it had not offered viable self-regulation alternatives).

175. *See* Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. ECON. PERSP. 97, 102–110 (1995).

176. *See, e.g.*, Bryant Cannon, *A Plea for Efficiency: The Voluntary Environmental Obligations of International Corporations and the Benefits of Information Standardization*, 19 N.Y.U. ENVTL. L.J. 454, 482–83 (2012) (discussing processes and benefits of standardization).

177. Anil K. Gupta & Lawrence J. Lad, *Industry Self-Regulation: An Economic, Organizational, and Political Analysis*, 8 ACAD. MGMT. REV. 416, 417–19 (1983).

178. *See, e.g.*, Eric T. Anderson & Duncan I. Simester, *Reviews Without a Purchase: Low Ratings, Loyal Customers, and Deception*, 51 J. MARKETING RES. 249 (2014), *available at* http://web.mit.edu/simester/Public/Papers/Deceptive_Reviews.pdf.

179. *See, e.g.*, *Funniest Reviews*, AMAZON, http://www.amazon.com/gp/feature.html?docId=1001250201 (last visited Nov. 18, 2014).

comes with manipulating reputational standards.[180] Although comfort with online commerce systems has steadily expanded,[181] the addition of non-professional service or good-providers to the mix combined with market volatility make consumer evaluation more challenging. The specter of libel lawsuits and the industry's desire to make these high-trust transactions appear low-risk may disincentivize users and companies from making bad reviews or publicizing all but the most dramatic and problematic experiences. In such instances where transaction costs have crept in and have made the sharing of information difficult among participants in the economy, government regulators can leverage industry's mutual interest in establishing the trust of market participants and punishing risk-creating, undesirable behavior to advocate for higher levels of consumer protection.[182]

Though some commentators have asserted that "contract law and the power of reputation should serve to protect participants to the same, if not a greater extent, than we see in standard market exchanges,"[183] this is not universally true of all aspects of a sharing-economy business. True, sharing systems succeed precisely because they depend on creating formats that lower consumer risk and therefore require less consumer protection. Where a sharing system has a robust platform for reporting bad behavior, reputation drives success and participants are therefore automatically motivated to police their own systems and to behave within the system's norms. Nevertheless, where risk levels are high, feedback reliability and response times are low, and participants have ulterior motives, this may suggest that such reputational systems, even if sufficient for most transactions most of the time, contain gaps where there is a mismatch between the type of protection the market participants might want and the type of protection the market naturally provides.

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180. Julie Bort, *New York Attorney General Busts 19 Companies For Writing Fake Yelp Reviews*, BUS. INSIDER (Sept. 23, 2013, 4:23 PM), http://www.businessinsider.com/new-york-cracks-down-on-fake-yelp-reviews-2013-9 (describing a business model where businesses profit from offering to find people who have an established presence at Yelp to write positive reviews).

181. *Compare* Jonathan J. Rusch, *Don't Look Now*, 9 GEO. MASON L. REV. 289, 307–08, 311 (2000) (reporting, in an article written at the beginning of the last decade, that consumers who were already connected to the Internet have fostered an "extraordinary degree of faith and trust" in the Internet and that time spent online correlates with the trust they have in online interactions and data), *with* Avner Ben-Ner & Louis Putterman, *Trusting and Trustworthiness*, 81 B.U. L. REV. 523, 541–42 (2001) (referring, in another article written near the beginning of the last decade, about consumers' initial distrust of online transactions).

182. John Kuo, *How Should Government Regulate The Sharing Economy?*, NERDWALLET (Sept. 6, 2013), http://www.nerdwallet.com/blog/investing/2013/government-regulate-sharing-economy.

183. *Id.*

For example, consider how risk plays into the decision to regulate. A particular market behavior requires little or no intervention if the consumer risk involved is low or if insurance may adequately cover the risk. For example, the purse-sharing economy of Bag Borrow or Steal involves the sharing of a relatively low-risk commodity—luxury purses that cost around a few hundred to rent by the month. If a consumer damages the purse, the insurance policy anticipates the risk. A credit check limits the pool of consumers to low-risk buyers and renters, and a credit card on record provides a financially viable answer to the human tendency to forget or to walk away from a commitment. Clearly, no purse-regulating task force is necessary, and the ordinary protections for dealing with bad business practices, online transactions gone awry, or careless customers are sufficient to address risk in ways that the market participants already understand well. Similarly, where an active community base quickly and responsively reports bad behaviors (and the risk of false positives is not high), government entities may decide that intervention is necessary only to the limited extent that they may wish to protect the underlying rules that enable such self-regulating mechanisms to flourish (e.g., safe harbors for gray areas in libel, protections against reputational abuse or unfair competition). Where participants are sufficiently incentivized by their desire for good reputation and the need for repeated future transactions to behave themselves, the need for regulation becomes less dire.

Thus, for most instances most of the time, the businesses and the participants in the economy have natural economic incentives to share information accurately. The media may even keep the industry honest about dramatic, egregious failures of their system, such as when a Airbnb renter found the residence trashed by the guests or when an Uber driver killed a pedestrian while driving between lifts.[184] Similarly, the desire to minimize the appearance of risk and to invite consumers to trust the sharing economy alternative to traditional ownership may naturally encourage companies to buy adequate liability insurance to cover frequently occurring harms. For example, ride-sharing companies may purchase a standardized car insurance plan for every driver for run-of-the-mill risks associated with driving, lending cars to others, and picking up passengers. Insurance companies, in turn, will demand that these ride-sharing companies enforce a certain baseline of

184. Dan Levine & Sarah McBride, *Ride Service Uber Faces New Lawsuit After Fatal San Francisco Crash*, REUTERS (Jan. 27, 2014, 7:56pm EST), http://www.reuters.com/article/2014/01/28/us-uber-accident-lawsuit-idUSBREA0R02820140128; George Hobica, *10 Incredible Airbnb Horror Stories*, FOX NEWS (May 8, 2014), http://www.foxnews.com/travel/2014/05/08/10-incredible-airbnb-horror-stories/.

filters to ensure that participating drivers in their markets meet some threshold of safety, so that they can ascertain what kind of risks they are undertaking.

It follows from this that intervention in the areas of consumer protection and speech regulation should be limited and targeted. For example, regulators may feel that there are certain levels of risk (not extremely dramatic, but still sufficiently serious for state oversight) where the incentives of the industry align with responding by censorship rather than disciplining bad actors. For example, even if regulators trust that the reputation ratings system of a meal-sharing website will filter out hosts with a dramatic history of food poisoning or poor hospitality skills, they might also suspect that sites may generally have a positive censorship bias because new economies have an incentive to show their experiences as low-risk and to minimize bad experiences.[185]

In contrast to consumer protection or speech regulation, the industry may have relatively weak incentives to advocate strongly for labor protections or tax regulations.[186] Many market participants who offer services through sharing economy platforms do so because they are able to offer their services with low commitment or prerequisites.[187] Others may be freelancing because they depend on such alternate sources of work due to their inability to secure full-time employment or because of personal schedule requirements.[188] Because of the freelance nature of their work, their dependence on the informal working relationships, or their inability to move across platforms because of their dependence on reputation built elsewhere, the market participants in these economies either have little incentive to advocate for their own rights and organize demands and little leverage to obtain changes in their favor. And as far as tax revenue is concerned, platform providers have shown little interest in contributing to government revenue except as a bargaining chip for obtaining legitimacy or the right to operate in a jurisdiction. In such areas where no industry consensus exists and little incentive exists to spur it to action, the

185. *See* Dara Kerr, *Should Uber and Lyft Keep Passenger Ratings Secret?*, CNET (Sept. 25, 2014, 7:00 AM PDT), http://www.cnet.com/news/should-uber-and-lyft-keep-passenger-ratings-secret/ (noting the disincentive to be harsh when both parties to the transaction can see one another's ratings and small differences in rating can make the difference between successful or unsuccessful transactions).

186. Ozimek, *supra* note 54; Singer, *supra* note 30.

187. *See* Sarah Kessler, *Pixel & Dimed*, FAST COMPANY (Mar. 18, 2014, 6:00 AM), http://www.fastcompany.com/3027355/pixel-and-dimed-on-not-getting-by-in-the-gig-economy (discussing minimal prerequisite requirements, low-mandatory commitment to a sharing platform, and challenges of scaling service or good provision by new market participants).

188. Singer, *supra* note 30.

government can play a role in convening stakeholders, balancing interests, and helping a company gain legitimacy for its position while exacting concessions that ensure a baseline of protection for consumers and the public at large.

Intelligent co-regulatory design can take the natural landscape of economic incentives into account in two ways. Government may elect to pick their battles by covering ground that the industry would not cover on its own, focusing on labor or tax regulation and taking a light hand to most consumer protection or speech regulation matters. For example, the self-regulatory aspects embedded within certain sharing economy business models—from digital identity verification to reputation and credit scoring systems—may provide superior consumer protection as compared with existing regulatory modes for analogous goods or services. Government agencies may well decide to stay out of regulating such areas heavily. On the other hand, if a government entity does not have sufficient resources or political will to fight for a major reform, it may opt for targeted cooperation in areas of regulation where the industry already has significant economic incentive to self-regulate—for example, by leveraging existing consumer unrest regarding greater insurance coverage to work out an agreement with key industry players for minimum insurance floors.[189] Regardless of the co-regulatory design, an understanding of the underlying economic incentives is invaluable for sustained success.

2. Reputational Sensitivity of the Industry

Different industries may have different levels of public visibility and probability of detecting misconduct, which in turn implicate different levels of natural economic incentives to respond to negative complaints about the business. For example, the private military and security industry has a limited number of participants and its operations are nontransparent to members of the public, who are not consumers in that market. As a result, the industry has low incentives to improve the reputation of the industry itself, and the government may need to play more of a role in providing the "regulatory threat" that causes the industry to respond and to crowd the landscape with its own regulations and standards, leaving less room and incentive for the government to supply a credible competing regulatory scheme.[190]

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189. Jeremy B. White, *Ride-Sharing Companies Agree to California Deal on Regulation*, SACRAMENTO BEE (Aug. 27, 2014, 12:59 PM), http://www.sacbee.com/2014/08/27/6658915/ride-sharing-companies.html.

190. *Cf.* Stephen Erfle et al., *Regulation via Threats: Politics, Media Coverage, and Oil*

However, sharing-economy industries, in particular, have high reputational sensitivity when compared with other industries,[191] because they have strong incentives to build the legitimacy for a new form of economic activity that requires consumers to adjust their trust thresholds and to transact with strangers in a way they are not used to doing alone.[192] Organizations promoting the interests of established and trusted traditional businesses, such as taxi companies, are all too eager to push back on ride-sharing industry by pointing to unregulated risk and discouraging consumers who have yet to attempt crossing over to this new market.[193] As a result, those who provide platforms for the sharing economy have a strong reputational stake in showing the safety and low-risk nature of the industry as a whole, not just their own brand of services. Quite often, a sharing economy platform provider must first evangelize on the concept of sharing itself before they will win any converts to their particular brand of sharing. Externally validated and broadly accepted demonstrations of high performance and consumer protection will better insulate the sharing economy as a group.[194] This means that sharing economy platform providers may naturally have greater incentives to cooperate with competitors to create industry-wide protocols and baselines than those in other industries.

Pricing Decisions, 54 PUB. OPINION Q. 48, 60–61 (1990) (intensity of public opinion demanding intervention, government's capacity to react to pressure, and availability of external scapegoats affects the level of perceived threat and industry incentive to respond with action).

191. This is especially true given that, in peer-to-peer (P2P) contexts, businesses act as transactional intermediaries and depend on reputation to succeed. *See* Saurwein, *supra* note 144, at 343.

192. *All Eyes on the Sharing Economy*, *supra* note 35 (quoting founder of Airbnb's observation that this business model would not have been possible without the groundwork of sharing culture that occurred through social networks such as Facebook); RACHEL BOTSMAN & ROO ROGERS, WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION xiii, 43 (HarperBusiness, 2010) (surmising that generational differences may account for the differences in attitudes toward sharing); Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014, 6:30 AM), http://www.wired.com/2014/04/trust-in-the-share-economy/ (commenting on shift in consumer thinking and greater comfort levels with trusting strangers that made the sharing economy possible).

193. Lauren Frayer, *Uber, Airbnb Under Attack in Spain as Old and New Economies Clash*, NPR (July 29, 2014, 4:55 AM ET), http://www.npr.org/blogs/parallels/2014/07/29/327796899/uber-airbnb-under-attack-in-spain-as-old-and-new-economy-clash; *see also* Neelie Kroes, *My View on Today's Taxi Protests and What it Means for the Sharing Economy*, EUR. COMM'N (June 11, 2014), http://ec.europa.eu/commission_2010-2014/kroes/en/blog/my-view-todays-taxi-protests-and-what-it-means-sharing-economy (demonstrating that even officials of government super-entities such as the European Commission are watching carefully to see where sharing economies are failing to address the needs of the public and the collateral effects of disruption on social change).

194. Karsten Ronit & Volker Schneider, *Global Governance Through Private Organizations*, 12 GOVERNANCE 243, 260 n.7 (1999) ("[t]he translation of an external threat to internal pressures operates according to the logic of collective sanctions.").

The network effects of a sharing economy also helps marginalize free-riders who try to benefit from the improved reputation derived from the coordinated efforts of the industry without themselves submitting to the industry's self-regulated standards. Because sharing economies gain value as they gain a critical mass of participants, it functions as a networked industry that prospers with economies of scale and can usually sustain only a few large competitors.[195] For example, a ride-sharing consumer or ride-provider may have some kind of ceiling in mind regarding the number of ride-sharing networks she is willing to join. By participating in the largest network, the user maximizes their selection and speed in encountering an acceptable transaction opportunity. Fly-by-night evaders who fall outside of these largest networks have little opportunity to build a network base to compete credibly with those who have already captured the dominant network in that sector in the sharing economy. In order to compete, they must differentiate their services (perhaps there will be a separate niche of ride-sharers for those who are looking for rides equipped with car-seats, rides that facilitate illegal activities, or rides with more stable prices during peak times). In other words, they are either forced to become marginal niche operators, cut profits, or, as they become legitimate and capture greater shares of the market, they are forced to cooperate with others as they come to share a large stake in the overall reputation of the industry.

These characteristics suggest that co-regulatory design should take into account natural industry-wide incentives to boost reputation in certain areas of their business to identify potential areas for co-operation. It also helps identify particular types of economic environments, where there are high barriers to entry and only a few key players and networks, that are particularly conducive to largely voluntary industry-wide co-regulation, with low risk of a critical mass of market players opting out.

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195. *Report on the Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets* 11 (Business Innovation Observatory, Eur. Comm'n, 2013) [hereinafter *EU Sharing Economy Report*], http://ec.europa.eu/enterprise/policies/innovation/policy/business-innovation-observatory/files/case-studies/12-she-accessibility-based-business-models-for-peer-to-peer-markets_en.pdf (describing how network effects limit the number of viable competitors in a given market, the benefits of economies of scale for early entrants, and the swift emergence of barriers that prevent late entry). As an analogy, consider Facebook's prominence in the social networking world. Part of the appeal of Facebook is having all of one's friends' updates all in one place. Although one could imagine a social networking platform that provides better features or stronger privacy protections than Facebook, the nontransferability of users' investment into the existing network prevents the creation of a large number of credible competitors in that particular niche of social networking.

3. Intervention Capacity of Governmental Actors

Co-regulatory systems become more attractive and effective if there is a credible threat of government intervention or litigation—a stick-and-carrot strategy.[196] Intervention capacity is higher if government possesses appropriate knowledge, resources, and instruments to monitor, enforce, and impose sanctions.[197]

The sharing economy's characteristics—as a decentralized yet networked market dependent on trust—come with regulatory consequences. There are some types of endeavors the government is not well-equipped to handle. Firsthand policing of the market is a low-feasibility option. The peer-to-peer nature of the transactions means that going after individual actors will have little deterrence impact on the overall structure without a significant investment into law enforcement. Like peer-to-peer media sharing in the early-2000's, the most effective regulatory approach required leveraging, rather than fighting against, the networked but decentralized nature of the market.[198] Just as Netflix and iTunes were able to shift the market to legal activity in a way that law enforcement could not; by changing the concept of ownership, leveraging the network to add features such as recommendations, communities, compatibility with devices, and improving ease of use; working with the platforms that enable these peer-to-peer transactions together is the most efficient way to direct consumer behavior and push for industry-wide changes. For those networked markets where only a few key players exist, the movers and shakers are easy to identify, and the easiest way for government regulators to establish a new industry practice or standard may be to simply convene the key players and build voluntary consensus.[199]

There are other areas in which the government has an advantage over their industry partners. The government can play a mediating and vision-setting role in bringing together competitors to discuss the

196. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 43–44 (Oxford Univ. Press 1992).

197. Saurwein, *supra* note 144, at 344.

198. Press Release, *The NPD Group: Music File Sharing Declined Significantly in 2012*, NPD GROUP (Feb. 26, 2012), https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/; Victor Luckerson, *Revenue Up, Piracy Down: Has the Music Industry Finally Turned a Corner?*, TIME (Feb. 28, 2013), http://business.time.com/2013/02/28/revenue-up-piracy-down-has-the-music-industry-finally-turned-a-corner/.

199. New markets can be rapidly consolidated and the acquisition by established players can simplify the regulatory process. For example, RelayRides received significant investment from GM in 2011. In 2012, Avis acquired Zipcar. *See All Eyes on the Sharing Economy*, *supra* note 35, at 14.

overall direction of the development of the industry and advocate for the interests of the public. Because the government holds the specter of prosecution and regulation, which may either make the shared economy's business model illegal or cut into its profitability, it holds a powerful stick that can deter investors, hurt participant confidence regarding the legality and risk levels associated with the market, and favor incumbent traditional economic models over the new business models on which the shared economy depends. The government also has a distinct advantage in its ability to convene, to publicize, and to garner the public's attention through its ready access to press attention.

Moreover, there are subject areas that call for government-facilitated regulation because market inefficiencies may prevent industry participants from adequately regulating themselves. As explained earlier, individual buyers and sellers may have insufficient incentive to self-regulate regarding consumer protections, liability allocation and insurance levels, labor protections, or to help local communities replace traditional tax and revenue streams. The precise contours of how to achieve these goals calls for industry consultation, since academics have established that government intervention capacity is lower where there is a high degree of technological complexity.[200] Intervention capacity is further lowered where there is little leeway for regulatory action at the national level but a significant demand for cross-sector coordination that can cause disagreement among governmental and private actors.[201] Given the technical and rapidly developing nature of these business models, effective co-regulation will place the government in more of a general goal setting and monitoring role, rather than in micromanaging particular methods by which to obtain the desired outcomes. To the extent that the government recommends specifics, they should be tailored to the specific industry, informed by industry and consumer perspectives alike, and provide baseline protections against the extremes, consolidates public opinion, works with the industry on goal-setting, and injects public transparency by publicizing joint industry-government planning—leaving flexibility for the industry to fill in specifics.

Government entities can focus on the areas they perform best: placing pressure on industry to remain accountable to certain public

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200. Adrienne Héritier & Dirk Lehmkuhl, *The Shadow of Hierarchy and New Modes of Governance: Sectoral Governance and Democratic Government*, 28 J. OF PUB. POL'Y 1, 1–17 (2008).

201. Saurwein, *supra* note 144, at 344.

goals, monitoring their progress by the market outcomes, and building transparency into the process by becoming a conduit for public input and a publicizer of co-regulation efforts.[202] At the same time, government should intentionally refrain from areas where their institutional strengths are not a good fit. Shared economy firms, with their access to market data, algorithms for identifying manipulation or bad actors, and timely understanding of the evolution of their markets and target users, are in the best position to provide information to drive the shared decision-making between government policymakers and the industry.[203] The industry is in a better position to collect data and explain how its solutions measure up to public goals. Government oversight can hold the industry accountable to public outcomes without straitjacketing the industry's exploration of the means to achieve these outcomes, and, once a viable solution appears, promote the spread of consistent regulatory regimes across jurisdictions.

Furthermore, governments may have to decide among themselves whether, jurisdictionally, they are the best actor to affect the reforms they seek. State and local levels of government are better suited to regulating these emerging markets. Because the sharing economy is an approach to business activity based on improved access to goods and services, not limited to any specific industry or particular localities, blanket legislation at the federal level will almost certainly be incongruous. The type of rules necessary to protect the public are more likely to be good- or service-specific, rather than common to all shared-economy-type industries, and good-specific or service-specific regulation tends to depend on local conditions. Local governments may differ in the set of interest they are seeking to balance. For example,

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202. *See* Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOKLYN J. INT'L L. 665, 703 & n.128 (2010) (maintaining that no self-regulatory scheme can be truly self-regulatory and that industry efforts must be "embedded" in government regulation and oversight: regulatory engineering in which the government injects transparency and accountability to remedy the industry's natural drift away from these principles); Gillian E. Metzger, *Privatization as Delegation: Reformulating State Action in Private Delegation Terms*, 103 COLUM. L. REV. 1367, 1471–72 (2003) (concluding that, because of the government's regulatory and contractual powers as well as administrative resources, it is in the best position of ensuring accountability while privatization or regulatory delegation occurs); *cf.* RICHARD G. LIPSEY ET AL., ECONOMIC TRANSFORMATIONS: GENERAL PURPOSE TECHNOLOGIES AND LONG-TERM ECONOMIC GROWTH 521–22 (Oxford Univ. Press 2005) (noting that "[p]olicies that work well are those that are designed to operate within the institutional competencies of the organizations that will administer them" and advising, that even among governments, there are variations in administrative competencies based on how a given bureaucracy is structured).

203. Jason Tanz, *The Sharing Economy Needs to Start Sharing Its Data Too*, WIRED (May 5, 2014, 6:30 AM), http://www.wired.com/2014/05/sharing-economy-fico/ (noting immense data that sharing-economy companies collect).

hotel regulations and transportation regulations tend to derive from local government decisions.[204] Ride-sharing businesses have much greater appeal in urban areas, where a critical mass of drivers exist and a robust participant community improves the reliability of feedback and increases consumer trust in the system. Proper regulation of this service for denser urban communities may require balancing a far different set of interests—ranging from traffic congestion to the local government's involvement with licensed taxi drivers—than regulation of the same service in more suburban or rural communities.

Moreover, because many shared economies depend on highly localized delivery of goods and services—sharing tangible shared resources or personal services available within a certain radius—the jurisdictional evasion that often plagues localized regulation schemes targeting online activity does not present a problem for this type of online business. If a market is large and lucrative enough, a business will have the incentive to work with the relevant governments of that locality to operate in that market. This helps preclude a race-to-the-bottom scenario, unlike online activity where jurisdiction shopping is easy and the business's activities can have widespread effect outside of the jurisdictions where it operates.[205] At the same time, there is a limit to how idiosyncratically or restrictively local governments may impose regulation. Burdensome regulations may disincentivize businesses from setting up shop in certain jurisdictions and deter the development of useful businesses that address unmet demands and generate commerce for that community.[206]

Those who strike the wrong balance of regulatory severity may have to stand idly by while other jurisdictions with stronger industry partnerships help define the flagship standards to govern these econ-

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204. *See, e.g.*, S.F., CAL., BUS. & TAX REG. CODE ch. 7, Reg. No. 1.504-1 (setting local policy on transient occupants of hotels and the taxes for collection); S.F., CAL., TRANSP. CODE §§ 1.2, 102 (claiming local authority to regulate transportation as a part of its general-welfare powers, subject to the general state scheme under the California Vehicle Code). *See generally* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 389 (1937) (recognizing that regulation of hotel-working conditions falls within the police power of states).

205. *See* Viktor Mayer-Schönberger, *Beyond Copyright: Managing Information Rights with DRM*, 84 DENV. L. REV. 181, 191–92 & n.52 (2006) (noting that where there is no legal consensus and nothing to tie the market actors to a particular actor to a particular location, regulatory arbitrage inevitably occurs, and that companies, facilitated by the jurisdictional ambiguity of the Internet, can race to the bottom to adhere to the most permissive jurisdiction).

206. *See* Jon Brooks, *City by City, Lyft and Uber Take On Taxis, Regulators*, KQED NEWS (Mar. 3, 2014), http://ww2.kqed.org/news/2014/03/03/lyft-uber-regulation/ (surveying major cities and their stance on these ride-sharing companies and noting that currently, the companies must take a city by city policy battle).

omies. Incorporating the input of companies that span across jurisdictions can be especially helpful for governments who do not wish to create new regulation from scratch, as such companies may have experience working with other jurisdictions. Moreover, as these companies are often both highly scalable and replicate their businesses across jurisdictions with ease, a regulatory structure that emulates others will be easier to implement and more likely to have staying power the more consistent it is with other jurisdictions' approaches.

4. Cost of Regulatory Failure and the Need for Minimum Standards

Government should take a more significant role in regulating activities where a failed transaction implies irreversible high-risk consequences.[207] Some sharing economies involve low-risk goods and services and uncomplicated sharing arrangements. For example, sharing college textbooks through Chegg involves uncomplicated sharing arrangements and low or familiar risks. At worst, a renter receives a textbook in poor condition or receives the wrong edition. A dissatisfying transaction is easily corrected: a renter can return the book for a more suitable one, and anyone who has used a library before is familiar with the risk that users may have to pay for a textbook that is lost or damaged on their watch.[208] Furthermore, the sharing arrangement requires minimal ongoing interaction or interlocking rights between market participants. A renter uses the book as her own while she has it; her interactions with others who have shared claim to the book occur only when she first selects or finally returns the book. In circumstances such as these, regulators have good reason to think that the market participants are familiar with the risks they are incurring and that they are properly accounting for these risks in their expectations as they transact.[209] Furthermore, the interactions are not so high-risk that the state may feel a compelling reason to intervene. Regulators may assess that any dissatisfying interactions that result are more of a customer service for the platform providers and a trial-and-

207. *See, e.g.*, HM TREASURY, MANAGING RISKS TO THE PUBLIC: APPRAISAL GUIDANCE 11–12 (2005), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191518/Managing_risks_to_the_public_appraisal_guidance.pdf.

208. *See Chegg.com General Policies*, CHEGG, http://www.chegg.com/generalpolicies/ (last updated July 31, 2014).

209. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423, 428 (1997) (noting, in a strict products-liability context, that torts law does not anticipate that consumers require additional legal protections where the risks are common and familiar to users).

error issue for consumers than an issue requiring a regulatory safety net. There is no particular reason to think that the market is not properly incentivized to address such negative experiences and failures are not sufficiently costly to justify regulatory cost.

By contrast, other sharing economies involve higher, more unfamiliar risks. Consider the difference in risk between trading outgrown children's clothes through threadUP as opposed to hiring babysitters through TaskRabbit. The stakes of a single babysitting failure—whether because of incompetence or evil intent—are extremely high compared to the compensable risk of having poor quality children's clothing. Given that even a single failure can be disastrous and result in irreversible consequences, regulators may have an interest in creating some threshold of background checks or childcare certifications, equivalent to the type of requirements one may require for licensed child care provider in that jurisdiction. Circumstances where the stakes seem too high and too uniquely incompensable for the reputation system to do its filtering (for example, parents should not have to wait for poor ratings flagging abusive caretakers to accumulate before being alerted to a problem) may require some level of threshold-setting and preliminary safety nets imposed by governments.

This analysis suggests that a one-size-fits-all approach does not work for sharing economies; each type of sharing implicates different levels of coordination among transacting parties, different sources of friction and risk, and different areas of potential market imperfections. However, a goods-specific or service-specific regulatory scheme may create significant burdens for platforms that sell a variety of goods and services. For example, suppose a generalist site such as TaskRabbit would have to ensure proper equivalent regulations are met for diverse participants such as doctors, lawyers, and masseuses. This would occur much as a general marketplace such as eBay must police how to filter or process diverse goods, ranging from alcohol to adult material to goods hailing from restricted countries. This counsels for governments and the industry to be selective when making forays into co-regulation, leaving co-regulation only for those areas where risks associated with failures are high or where the new dependencies and interrelationships created by moving a traditional transactional activity online are unfamiliar enough for current regulatory schemes or market participants not to properly anticipate the types of risks involved.[210]

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210. For example, suppose there were a hypothetical sharing-economy platform where lawyers can offer their services for discrete tasks. Because the various state bars regulate a baseline of lawyer quality and right to practice, any effort by the sharing platform to add its own

Taxation is another area where the government needs to exercise careful discernment in when to regulate. There is much clamor over whether the tax schemes that apply to older, non-technological business models should apply to these technology-enabled sharing economy business models, with no clearly reasoned out explanation of why the technology justifies the exceptionalism.[211] In this context, two basic types of revenue generation can potentially be addressed. One type of government generation—fees[212]—involves collecting money from a given industry to offset the impact or governing cost of that industry. In the fee context, there is a direct relation between the activity regulated and the use of the money collected. If a sharing economy industry manages to skirt regulations in a way that allows it to avoid fees that otherwise would pay for some impact of that activity then this suggests that the sharing economy activity is, in essence, being subsidized by governmental activity. In such scenarios, the government has a ready policy rationale for why the fees should apply equally to old-model and new-model companies. Governments also have a rationale to exempt sharing economy companies if they do not fit the original rationales for the fees. Conversely, in a tax, no direct relationship is necessary and the government revenue generated is intended to facilitate other government functions. If the government revenue avoided has more tax-like properties, then the nature of the activity being taxed is likely less related to the purpose for the tax. In such a situation the regulator or policymaker will need to make the determination of whether extending the tax to the new industry is appropriate. This decision can be based on grounds of equitable treatment between similar enterprises, the need for government revenue, or the determination of whether additional tax burden upon a

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house regulations would be duplicative and possibly less apt than the regulations that the profession has already established for itself. This would be an instance where the sharing economy would not be the best actor to regulate.

211. *See* Andrés Martinez, *Will the Sharing Economy Make Us All Republicans?*, WASH. POST (Sept. 8, 2014), http://www.washingtonpost.com/posteverything/wp/2014/09/08/will-the-sharing-economy-make-us-all-republicans/ (arguing that squabbling over semantics to try to carve exceptions out of existing regulatory systems detracts from the impetus to reform what is wrong about the underlying regulatory system).

212. In California, a hub of new sharing-economy companies, the terms "tax" and "fees" also possess state constitutional significance. Thus, for regulators, these two categories represent the two fundamental mechanisms for the state to generate more revenue and are therefore more relevant in this context than more nuanced means of discussing revenue generation. Michael R. Johnson et al., S*tate Constitutional Tax Limitations: The Colorado and California Experiences*, 35 URB. LAW. 817, 834 (2003); Samuel D. McVey, *State Environmental Permit Fees Charged to Federal Facilities: Distinguishing Legal User Fees from Illegal Taxes*, 29 SANTA CLARA L. REV. 879, 884–89 (1989).

new firm will not outweigh its social utility and the benefits of sharing economy's superior resource allocation.[213]

5. Intensity of Regulatory Intervention Required

Regulators should consider the level of regulatory intervention required to achieve the intended outcome when assessing feasibility and cost of enforcement. The level of control required may balloon the amount of resources that regulators must invest in order to successfully control the market. For example, regulatory solutions that attempt to restrict market entry or enforce market exits will require significant control over the market and of the platform providers that are permitted to exist to ensure fair rates in return for controlled competition.[214] This sort of regulation is only feasible when the nature of the industry is highly networked, high barriers of entry exist naturally, black market duplication is difficult, and the market is capable of sustaining only a few key players.[215] The difficulty of controlling shared economy platforms to this level of intensity comes in the jurisdictional independence of the platform's nerve center. For example, despite being highly network-dependent and requiring tangible, localized delivery of goods and services, the coordination of information and transactions occurs on a platform that need not be housed in a cooperative jurisdiction. If regulators wanted to outlaw an out-of-jurisdiction platform active in the local market, they would have to find some jurisdictionally credible way to attack its assets or legality, solicit the platform's voluntary cooperation, or resort to prosecuting local market participants one at a time in order to increase perceived risk and decrease participation rates. This requires investigators and enforcers on the streets—a resource-intensive proposition.[216]

213. Keith A. Tucker et al., *Federal Taxation of Life Insurance Companies: The Evolution of a Tax Law Responding to Change*, 37 SW. L.J. 891, 939 (1984) (identifying some principles to apply when determining when to extend taxation).

214. *See* Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1 (2006) (discussing the antitrust role in enforcing laws governing market entry and exit).

215. Joseph A. Pantoja, *Desirable Economic Cooperation Among High-Technology Industries: A Look at Telephone and Cable*, 1994 COLUM. BUS. L. REV. 617, 644 (1994) (discussing such high technology industries with significant infrastructure needs). These market conditions also characterize areas with high antitrust concern. *See* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 556–58 (2012).

216. *See, e.g.*, Joseph P. Fishman, *Copyright Infringement and the Separated Powers of Moral Entrepreneurship*, 51 AM. CRIM. L. REV. 359, 380, 382 (2014) (recounting that prosecutors targeted the facilitating platform, as low-hanging fruit, rather than individual lawbreakers in enforcing copyright-infringement law because of resource limitations and the relative difficulty of effective change through the prosecution of individuals).

Interventions that regulate the quality of products and services or the imposition of local fees and taxes, by contrast, may require less market control because the regulator need not entirely obliterate a participant or prohibit a platform's existence.[217] Compromises and voluntary coordinated action are much more plausible, especially where regulators can leverage existing industry-wide incentives to improve the safety and low-risk reputation of the industry or to coordinate collective action that can result in long-term benefits and the expansion of the market. Even in regulations whose benefits inure largely to the state, such as taxes, businesses may be willing to coordinate a platform-specific response in order to save their participants the uncertainty and difficulty of navigating and complying with local laws on their own.[218]

Substantive interventions, in themselves, come with regulatory costs. Because of the volatility of the sharing economy, regulations may have a short lifespan, proving too burdensome for a regulator operating on a fixed annual budget.[219] From a purely financial perspective this favors a regulatory solution that limits the burden upon the regulator and displaces some of that regulatory cost into the anticipated cost of doing business anticipated by the prospective regulated entity. For example, depending on the specificity of the acts that the regulations target or the speed at which the business model evolves, regulators may need to update substantive regulations too frequently to maintain a formal regulatory structure, making the payoff of each costly regulatory cycle low.[220] In order to consider the effect that the

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217. As an analogy, New York's Form 1304 requires notification of the New York Department of State in order for out-of-state corporations to operate in-state. *See* DIV. OF CORP., STATE RECORDS AND UNIF. COMMERCIAL CODE, N.Y. STATE DEP'T OF STATE, *Application for Authority*, *available at* http://www.dos.ny.gov/forms/corporations/1335-f-l.pdf (last visited Oct. 11, 2014). Similarly, recognizing the sharing-economy company's right to operate in exchange for its submission to jurisdictional and registration requirements may be a compromise and first step toward mutual cooperation to accomplish the government's policy goals.

218. Thomas Barrabi, *Airbnb Legalized in Portland: New Approach Could Serve as Blueprint for Other Cities*, INT'L BUS. TIMES (Aug. 1, 2014, 3:09 PM), http://www.ibtimes.com/airbnb-legalized-portland-new-approach-could-serve-blueprint-other-cities-1646398 (showing Airbnb's willingness to facilitate tax collection in exchange for official recognition of its legality); *Lyft New York Update*, LYFT BLOG (July 11, 2014), http://blog.lyft.com/posts/2014/7/11/lyft-new-york-update (conceding to New York Supreme Court in postponing launch of Lyft's expansion into New York City and expressing willingness to modify business model to comply with city taxi and limousine regulations).

219. Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 376 (2004) (identifying that an important goal of e-rulemaking is to lower what can be high-administrative costs for developing regulations).

220. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1354 (2013) (discussing impediments to regulatory action); Lynn

nature of the market places on the cost-efficiency of the regulatory cycle, regulators would need to consider the similarity of the regulated online shared-economy activity with the offline economic activity and the extent to which the traditional regulatory schemes that applied to the offline economic activity applies to the network-facilitated online activity. Where the online activity closely mirrors the offline transactions that the traditional regulations govern and the rules are of sufficiently general applicability that they do not need to be modified, the regulatory cost is low.[221]

For example, whether purchased online or by paper order, custom taxes apply across the board. Online marketplaces such as eBay may outsource the custom tax calculations to Pitney Bowes to make the logistics of handling different jurisdictions easier for their small-time sellers and buyers.[222] No significant adjustments are necessary to apply the traditional rules to the new marketplace. Regulations such as minimum levels of car insurance required to drive in California may apply equally to single-ownership cars as with shared cars. By contrast, online marketplaces such as Airbnb may introduce new wrinkles into traditional laws because of the interlocking rights involved in closely shared ownership with strangers (e.g., simultaneously occupying the same apartment, albeit in different rooms, and sharing common space, via on-the-spot transactions), such that further regulation is necessary to govern these additional sources of friction. Changing the mix of temporary renters and permanent residents of a city and altering the mix of available housing units in each type of housing can significantly change the character of the city and the affordability of living there, such that local municipal law may seek to impose special limitations to counter the increased level of shared-economy transactions.[223]

E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1714 (2008) (discussing a theory of "regulatory ruts" to explain the difficulty in updating rules).

221. For example, regulators and platforms need not necessarily create new standards for professional services offered online if the profession itself has already created comprehensive regulations for itself (for example, the licensing requirements determined by medical, legal, or religious professionals). Any online regulation would limit itself to considerations unique to offering these services online.

222. *See eBay.com Global Shipping Program Buyer Terms & Conditions*, EBAY, http://pages.ebay.com/shipping/globalshipping/buyer-tnc.html (last visited Sept. 26, 2014).

223. *See* Steven T. Jones, *Chiu Introduces Legislation To Regulate Airbnb and Short-Term Housing Rentals*, S.F. BAY GUARDIAN (Apr. 15, 2014, 10:49 AM), http://www.sfbg.com/politics/2014/04/15/chiu-introduces-legislation-airbnb-and-short-term-housing-rentals; Steven T. Jones, *New Coalition Opposes Chiu's Airbnb Legislation*, S.F. BAY GUARDIAN (Apr. 28, 2014, 3:24 PM), http://www.sfbg.com/politics/2014/04/28/new-coalition-opposes-chius-airbnb-legislation-updated (providing reasons why regulation is necessary to maintain city housing

Regulators may seek the approach of targeting their regulations to require certain outcomes, rather than requiring certain activities, to reduce the strain of updating rules with every shift in activity that affects a particularly rapidly developing economy. That is exactly what the updated proposals to the San Francisco hotel tax regulations do: instead of targeting shared economy activities, it targets the end-problem—the frequency with which real estate lenders (both those who rent out their real estate traditionally and those who rent out using shared economy platforms) can lend out their spaces before becoming subject to the hotel tax. Similarly, regulators may require certain outcomes, such as requiring companies to provide certain disclosures, without requiring them to adopt substantive rules or particular business models.[224]

Whether deciding whether to impose regulation unilaterally, solicit co-regulatory efforts, or to leave to self-regulation, regulators should carefully consider what sort of control is within their jurisdictional and practical power and whether the unique features of the targeted shared economy require an adjustment of the traditional rules.

6. Conflicts of Public and Private Interests

The degree of conflict between public and private interests and the degree of consistency in interests between companies will hamper the emergence of self-regulation.[225] Importantly, co-regulatory efforts are generally less successful when they address distributive conflict or otherwise affect market competition.[226] Again, these factors depend on the type of regulatory control desired and the type of market activity targeted for regulation. For example, if a market is still relatively new, with widely varying business models, low barriers of entry, and no clear oligopoly of main characters, regulators may wish to rethink their timing in intervening in the market with regulation. When a market is uncertain, co-regulatory efforts with just a few early cooperative actors may have the effect of prematurely resolving competitive market dilemmas.[227] Where regulations touch key areas of market competition,

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stock, spread the tax burden equitably, and address zoning concerns).

224. Saurwein, *supra* note 144, at 345–46.

225. ANDREAS FREYTAG & KLAUS WINKLER, THE ECONOMICS OF SELF-REGULATION IN TELECOMMUNICATIONS UNDER SUNSET LEGISLATION (Hans-Walter Lorenz & Armin Scholl eds., 2004), *available at* http://www.wiwi.uni-jena.de/Papers/wpsw1704.pdf.

226. Héritier & Lehmkuhl, *supra* note 200, at 12–15.

227. However, while co-regulatory opportunities increase the fewer actors involved in a given industry, concerns remain that such efforts may shut out new entrants. *See, e.g.*, Robert Heidt, *Industry Self-Regulation and the Useless Concept "Group Boycott*," 39 VAND. L. REV.

regulators may have to weigh whether the public interest is sufficiently urgent to require early regulation as opposed to adopting a wait-and-see approach to see how the market matures.

The above discusses clashes among private entities. But different entities representing the public interest may conflict with one another as well. For example, many local and state authorities oversee consumer protection, and agencies' jurisdictional mandates may overlap. A shared economy platform's representations regarding liability coverage may interest state agencies overseeing insurance, state and local government agencies overseeing consumer fraud, and municipal agencies responsible for enforcing ordinances that govern that particular market. Co-regulation that reconciles these competing mandates may require coordinating several agencies' interests or certain agencies purposely refraining for entering certain spaces of regulation needlessly.[228]

Moreover, private and public entities may clash between each other depending on how divergent their interests may be. This may correlate strongly with whether the industry as a whole recognizes a collective interest in the reputation of the industry. For example, if the industry recognizes the collective effects of building the credibility and reducing the risk of the industry to change consumer patterns to adjust to a trust-based economy, public entities may be able to leverage this enlightened self-interest to spur the industry to agree to certain baseline consumer and liability protections. This may require the public entities to engage in vocal publicizing of deficits in the current market's protection levels in order to dispel the misplaced trust of market participants, so that the industry will have to re-earn the trust using equally publicized reforms and guarantees.[229] However, resolving clashes between private and public entities may not be as feasible if industry does not see a collective benefit to cooperating with public authorities. For example, if, notwithstanding the public entity's awareness-building efforts, a significant proportion of the consumer or labor participants do not embrace the need for threshold wage-hour

1507, 1568–74 (1986) (discussing oligopolistic mechanisms for consolidating market power and limiting competitive threats).

228. For examples of regulatory clash between agencies where jurisdictional roles are not clear, see Healey, *supra* note 79.

229. Shafer, *supra* note 34 (reporting how attitudes of the ridesharing companies changed after the media publicized the insurance gap and provoked public concern); Julie Bort, *An Airbnb Guest Held a Huge Party in This New York Penthouse and Trashed It*, BUS. INSIDER (Mar. 18, 2014, 9:24 PM), http://www.businessinsider.com/how-an-airbnb-guest-trashed-a-penthouse-2014-3?op=1 (obtaining relief for Airbnb user, whose reimbursement claims were rebuffed and calls ignored, by publicizing her horror story with one rental).

restraints or certain environmental regulations, certain private entities may sense a conflict between the public entity's regulation and the private market's preferences and decline to cooperate with regulation that does not seem to reflect their customers' preferences.

Selecting between self-regulation, co-regulation, and full-blown government-derived regulation may require an honest evaluation of whether the market participants have buy-in for the public entity's goals and whether this disconnect derives from irrationality, market pathologies, and externalities or an outdated and misguided regulatory concern. Given the limited political capital available to each public entity, government regulators may wish to prioritize pursuing only a few key policies that implicate public and private conflicts—policies that protect against public harms and externalities of the highest order. For example, if an unscrupulous online platform and an equally conscience-less subsector of the market built a profitable shared economy model based on the sale of underpriced child labor or sold illicit adult services based on trafficked victims, it would not matter that neither the platform nor the market participants were receptive to the government entity's goals of limiting child labor or forced prostitution—the government may nevertheless choose to fight the uphill battle of cracking down on users or the enabling platform, regardless of the conflict in interest.[230] But where a herculean effort may make sense for particularly pressing issues of public interest, they may not be justified for lesser priorities or markets in which the externalities are minimal and the market participants appear to have knowledgeably reached an equilibrium of protections demanded and supplied.

7. Number of Participants and Market Fragmentation

There is strong evidence that self-regulation works less in fragmented markets with a diverse range of providers since the greater number of entities involved the more difficult it is to establish standards.[231] In particular, the fragmented repair sector in Britain experienced eleven failed attempts to self-regulate over a thirty-year period.[232] The notable exception to the difficulty in establishing self-

230. *See* Nicole Norfleet, *Classified-Ads Website Backpage.com Under Fire Over Sex Trafficking*, STAR TRIBUNE (June 10, 2012, 10:16 PM), http://www.startribune.com/local/minneapolis/158383545.html (reporting on difficulty of curbing sex trafficking that occurs on Backpage and Backpage's lackluster attempts to self-regulate against this activity but also reporting that government efforts persist, nevertheless, to oppose, shame, or impede it, with significant investment of resources because of the social priority of opposing such crimes).

231. Ronit & Schneider, *supra* note 194, at 262.

232. Ed Mayo & Philip Cullum, *The Consumer Agenda on Regulation*, *in*

regulatory standards to a fragmented market is when smaller subsets of actors were organized and regulated and gradually, over time, transformed into more complex institutional arrangements.[233]

When viewed as a whole, the diversity of shared economies available online reveals a highly fragmented landscape, making global, one-size-fits-all regulation for shared economies impractical. When viewed at the level of specificity that regulations would target (e.g., regulations are unlikely to target activity common to all shared economies but rather target a particular locality and a substantive area based on the public needs concerning that substantive area, such as housing, transportation, temp services, meals, household goods, clothing), a particular market may vary in the level of fragmentation, depending on barriers to entry, the size of the market, and the importance of participating in a large network to the market participants. For example, a matured ride-sharing market is not likely to have a large number of participants in separate networks because those who seek rides have a strong incentive to join the largest, most well-established network in order to maximize selection and increase their chances of finding a suitable nearby ride quickly. The tendency toward established networks increases the barrier to entry and creates a rich-get-richer scenario where the platform providers owning the largest networks, by simple virtue of being the largest, attract most of the market participants in that locality.

In contrast, a matured clothes-sharing network will not necessarily coalesce into a few key platform-providers because items in a wardrobe are not as fungible as rides. Niche markets catering to particular tastes and quality thresholds allow for ready differentiation and reduce barriers to entry. In short, the clothes-sharing market does not benefit from network effects beyond a certain point. A consumer is just as happy to belong to a small, exclusive clothes-sharing network that caters to his or her preferences as to a larger network that offers a wider selection but provides about the same number of clothes that fit his or her preferences; there is no obvious benefit to belonging to a larger network, except perhaps in relation to peripheral bargaining advantages (e.g., perhaps the platform provider will be able to negotiate a better insurance policy to cover unsatisfactory transactions because of the number of participants insured).

COMMUNICATIONS THE NEXT DECADE 87–97 (Ed Richards et al. eds., 2006).

233. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 185–90 (James E. Alt & Douglass C. North eds., 1990).

Thus the level of fragmentation may depend on the precise nature of the good or service sold, the importance of a large network to the market participants, and the stickiness of a network in retaining participants over competitors of market share. Furthermore, if the shared good or service necessarily depends on localized delivery (e.g., housing located in a particular neighborhood, rides available within a certain radius to a consumer's current location, or people available on short notice to perform a task for which physical presence is necessary), this characteristic of that particular market may mean that regulators may be able to easily identify the key active market participants affected by a proposed local regulation.

In assessing the feasibility of co-regulating the market, regulators should therefore first identify the scope of the type of regulation they would like to implement—what precise sectors and localities they seek to encompass with the regulation—then conduct a market-specific analysis on the number of major participants within that market sector and locality they would need to engage in order to launch a successful collaborative regulation effort. Determining the number of participants a maturing market can sustain can give a plausible prediction of whether regulators will be able to engage enough participants or whether, even if all key players were to participant in the co-regulation effort, whether the potential decision-makers are too numerous and the key leaders too uncertain to forge industry-wide standards or consensus regarding self-regulation or co-regulation measures.

8. Availability of Organizations to Assume Regulatory Tasks

On a related note, the maturity of the market may affect the ease with which successful co-regulation can occur.[234] Smaller markets or industry sectors generally mature faster than larger ones and regulatory structures can converge over time to establish a consolidated self-regulatory scheme.[235] If certain market subsectors quickly become saturated with an oligarchy of dominant firms and the market has barriers of entry sufficiently large to create some stability in the roster of key players, the market naturally presents a few candidates to take up leadership in establishing standards and building market

234. Balleisen & Eisner, *supra* note 138, at 134.

235. This has been particularly noted in the convergence of voluntary initiatives for global labor standards and the development of the International Labour Organization (ILO). The UN Global Compact developed similarly. Anke Hassel, *The Evolution of a Global Labor Governance Regime*, 21 GOVERNANCE 231, 232, 247 (2008).

expectations. Self-regulation becomes more feasible when the practices of a few firms define the standard practice of the industry, requiring a number of entities to agree in order to shape a practice into an industry standard.[236] Dominant firms can cooperate for joint branding of certain certifications to promote adherence to industry-wide standards and to ostracize nonparticipants, much like realtor groups certify member realtors to combat against nonparticipant realtors and to enhance the reputation of the profession. By contrast, where widely divergent practices exist among a large number of entities, agreement on best practices and the establishment of clear norms becomes more difficult. If the market is not ready to embrace a dominant standard, a few leaders' attempts to enforce industry-wide standards, to bully others into compliance, or to campaign against nonparticipants may be seen as anticompetitive or ineffective.

Where a market transitions to maturity, self-regulatory limitations may converge. Competing models of product or service differentiation may eventually settle on certain norms; what began as features may become expected standards as market participants become accustomed to certain protections and demand them as a matter of course.[237] Because the shared economy depends so heavily on trust, reputation, and perceptions of low risk, the threat of a race-to-the-bottom or of detractors imposing low standards is less than other economies where self-regulation does not depend on such transparency and fickle, instantaneous consumer perceptions.

Furthermore, the stronger the nexus of the shared economy activity to the physical locality of the jurisdiction where the regulation applies, the lower the risk of forum shopping and regulatory evasion. Unlike illegal activities such as online gambling, platform-providers who choose to break or evade the law in shared economies cannot simply relocate to a jurisdictional haven and continue on business-as-usual from there, because the sharing usually involves the barter of a tangible, localized good or service, rather than a conceptualized online

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236. Nairi, *Eliminating Ridesharing Insurance Ambiguity*, UBER BLOG (Mar. 14, 2014), http://blog.uber.com/uberXridesharinginsurance (providing insurance coverage for the "gap" periods when drivers are available for fares but not currently carrying a passenger and characterizing the company's insurance policy as an anticipatory "step to eliminate any ambiguity while the insurance industry and state governments update policies and regulations for the new world of ridesharing transportation"); Shafer, *supra* note 34.

237. Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation*?, 34 SEATTLE U. L. REV. 439, 440 (2011) (identifying the development of customer demands as they become accustomed to greater privacy-protective mechanisms initially arising through self-regulatory efforts).

experience or asset.[238] Perhaps strategic forum shopping and placement of central offices may shield companies from becoming entirely shut down or having headquarters assets seized, and perhaps it can force regulators through the inefficient process of punishing market participants rather than the platform providers, but it cannot entirely avoid the reach of the law as long as it depends on the sharing of tangible, localized goods and services.[239]

For that reason, the diversity of local laws and the different mix of market share holders in different jurisdictions do not necessarily present an obstacle to local regulators finding a sufficiently consolidated base of leadership to assume regulatory tasks on behalf of the local iteration of the shared economy.[240] Usually the proliferation of market fiefdoms and the fragmented state of the market does not present a good environment for recognizable industry leaders to form and to create binding or highly persuasive standards. However, in the case of sharing economies, where the regulators implicated tend to be local (for example, taxi authorities seeking to regulate shared rides, housing authorities seeking to set rules on shared housing), local leadership is more than sufficient for the purpose of creating effective co-regulation relationships to govern the economic activity in that local jurisdiction. For example, it does not matter that Landshare is a major urban garden-space sharing platform in the United Kingdom and that Sharing Backyards is more popular in the United States, as long as the local land use regulators can identify whether their particular jurisdiction has a few key leaders to help shape the trajectory of that local iteration of the sharing economy. The key is to evaluate whether sufficient consolidation of power exists in the relevant market and locality to facilitate some level of industry-led or facilitated regulation.

9. Intensity of Competition

Although the empirical evidence is still in development, a theory exists that the more intense the competition the less willing firms will

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238. *See* Mark MacCarthy, *What Payment Intermediaries Are Doing About Online Liability and Why It Matters*, 25 BERKELEY TECH. L.J. 1037, 1062 (2010) (focusing on the example of banning Internet gambling, which often involves offshore companies seeking to evade jurisdiction, by enlisting the help of payment intermediaries that are within the jurisdiction of the local law and have too much at stake not to move out of the range of jurisdictional reach).

239. For example, if a ride-sharing company wishes to expand to a particular city, the cars on its network must physically traverse the roads of that city; if a room-sharing company wishes to expand offerings to a certain region, it must find participants who physically own property in that region. This gives tangible targets for government enforcers to contact and pressure to limit the company's behavior.

240. Saurwein, *supra* note 144, at 348.

be to accept any voluntary regulatory burden beyond the mandatory standards.[241] Additionally, self-regulatory programs may also increase a firm's competitive position.[242] Where no consensus exists and firms operate in a market in which flexibility in competitive strategy is key, sharing economy firms may see various strategies of self-regulation as a competitive advantage rather than an industry baseline. For example, deciding to provide more comprehensive insurance coverage for the shared economy activity than one's competitors may be a competitive decision rather than a norm to advocate among one's peers.

Whether collective decision-making trumps the drive to compete and differentiate may depend, again, on the distinct nature of the particular market in question and, specifically, whether the industry has more to gain by increasing the size of the whole pie rather than squabbling over a bigger share of the existing pie. If the type of collective action proposed stands to improve the reputation of the industry as a whole and there is still a large untapped market of potential customers that have yet to transition into participants, then the industry stands to gain by combining their efforts to woo this untapped market.[243] In such situations, the problem is not that the targeted consumer is selecting one sharing economy firm over another; the problem is that the targeted consumer is not considering that sharing economy market at all. To entice customers away from traditional markets and toward the equivalent sharing economy market, even firms locked in intense competition may agree to cooperate as an industry for the sake of increasing the customer base.[244]

Regulators considering the likelihood of success in facilitating a co-regulatory body should not only consider the level of competition

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241. HAUFLER, *supra* note 140, at 43–44 (explaining that competitive burdens only increase voluntary regulatory compliance if it can be turned into a competitive advantage, such as when reputational gains are themselves marketed as a part of branding).

242. Cannon, *supra* note 176 (identifying self-regulatory options and their benefits).

243. *See, e.g.*, *Introducing the Open Automotive Alliance*, OPEN AUTOMOTIVE ALLIANCE, http://www.openautoalliance.net/#about (last visited Oct. 12, 2014) (describing a coalition of car manufacturers and technology companies seeking to "bring[] the Android platform to cars starting in 2014"); *cf. About Us*, BEEF IT'S WHAT'S FOR DINNER, http://www.beefitswhatsfordinner.com /aboutus.aspx (last visited Sept. 26, 2014) (explaining how the National Cattlemen's Beef Association, as funded from a national government-mandated program called the Beef Checkoff, promotes generally the brand of "beef" and promotes the demand for the industry as a whole).

244. Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 420 (2011) (identifying how industries cooperate and self-regulatory motives are strongest when they the industry's collective perception of itself is as a "community of fate" with each company's future prosperity "seen as depending upon its ability to impose collective self-restraint on its members' profit-seeking activities in the name of public safety.").

among the sharing economy firms but also the extent to which the competing firms are open to the possibility of self-interested collective action. If for whatever reason, whether market conditions or historical relationships, a cooperative attitude does not exist among the firms, the government regulators may need to do the legwork in finding common ground, building bridges, and facilitating the dialogue necessary to create an environment conducive to working as a coalition to build baseline regulations. If not much potential for common ground exists or if industry interests do not align with government interests, then the government has to proceed more unilaterally by selecting priority areas to regulate and enforce certain baselines.

10. The Extent to Which Public Policy Objectives Are Supported by the Existing Industry Culture

In keeping with the theme introduced in the previous factor, an industry's preexisting sensitivity to the public interest and a desire to cooperate with existing authorities can be an especially important factor in the development of a co-regulatory solution. Government regulators, using their inherent institutional advantages in mobilizing public support and lending credibility to industry's social accountability or public-minded measurers, can help promote steps that they view as legitimate by giving positive press, actively helping build credibility to those who are trying to mobilize industry consensus for useful reforms, or adopting industry standards and enforcing the rules against free-riding noncompliant firms.

But even where the overlap between government and industry interests do not readily appear, government can leverage the reputation-dependent and perception-conscious nature of sharing economies to incentivize cooperation. Sharing economy companies frequently publicly market themselves as filling a great social role of resource allocation, and many of their claims do legitimately reflect a social good in reducing overconsumption, inefficient allocation of resources, and underutilization of existing items and services of value. This collaborative ethos provides some of the strongest means of facilitating self-regulatory measures.[245] By bringing hidden problems and inadequate protections out into the open, government regulators can force the issue by making a previously underappreciated or ignored deficiency in market protections into a highly publicized concern. In

245. RENATE MAYNTZ, FROM GOVERNMENT TO GOVERNANCE: POLITICAL STEERING IN MODERN SOCIETIES 7–8 (2003), *available at* http://www.ioew.de/fileadmin/user_upload/DOKUMENTE/Veranstaltungen/2003/SuA2Mayntz.pdf.

some cases, consumer awareness is sufficient to change firm behavior; as consumers begin to assess risk and needs accurately, they may demand levels of protection more consistent with their informed long-term interests. However, where the nature of the good or service shared creates a disconnect between the type of protection that a consumer might think about in advance and the type of protection a consumer or a third-party member of the public might want if she had perfect information, there is a potential role for co-regulation. For example, until an Uber driver's car accident resulted in death, many Uber drivers might have never thought about whether Uber's insurance policies would cover them while they are in between rides.[246]

Only where externalities exist, where the interest of the government and the public at large is not reflected among any of the market participants, might the government have a genuine conflict that chafes against industry culture, and even then, all is not lost. Realizing that death, taxes, and externality regulations are inevitabilities, companies may resign themselves to minimizing their negative effect rather than opposing the regulations outright: facilitating ease of compliance with such rules by building in compliance as an automated part of the transaction (e.g., collecting hotel taxes automatically as a part of renting out a room), publicizing their compliance to get a corporate citizen image boost,[247] and picking their battles in order to ensure a relatively unperturbed continuance of business as usual in that jurisdiction. Industry may even seek to self-regulate anticipatorily in order to crowd the regulatory space with rules of their own design, finding that pathway preferable to the alternative of accepting the unilateral regulations handed down from the government.

In any case, regulators should consider the overlaps in interests to assess the level of resistance they can expect to encounter when seeking co-regulatory cooperative efforts with industry. The fact that such obstacles exist does not necessarily doom the effort, but properly anticipating the areas of resistance is an important first step in seeking

246. Dan Levin & Sarah McBride, *Ride Service Uber Faces New Lawsuit After Fatal San Francisco Crash*, REUTERS (Jan. 27, 2014, 7:56 PM EST), http://www.reuters.com/article/2014/01/28/us-uber-accident-lawsuit-idUSBREA0R02820140128.

247. *See* David Owen, *Collecting and Remitting Taxes in San Francisco*, AIRBNB (Sept. 17, 2014), http://publicpolicy.airbnb.com/collecting-remitting-taxes-san-francisco/ (representing the company view characterizing its agreement to remit taxes to San Francisco as cooperative, progressive, and a step forward, despite the company's earlier resistance to the idea); David Hantman, *New York Update*, AIRBNB (Aug. 22, 2014), http://publicpolicy.airbnb.com/new-york-community-update/ (releasing press statement giving Airbnb's official spin on its settlement to comply with the New York Attorney General's subpoena and characterizing late efforts to provide legal disclaimers and ban bad actors in a positive light).

ways to leverage existing incentives, relationships, or the fear of becoming regulated by others if they do not participate in the regulation themselves, in order to build a cooperative co-regulatory partnership. For example, regulators must act on principled reasons for distinguishing between when a business model runs awry of regulations that still have relevant and timely public purposes, and when an obsolete business model is using outdated regulations as a protectionist measure.[248]

11. Involvement of Government Actors

The nature and capacity of governmental actors is a fundamental aspect of the co-regulatory puzzle and, again, the level of government involvement necessary depends heavily on the type of regulation sought and the type of industry targeted for regulation. According to earlier literature on co-regulation, while the manner of governmental involvement can span from encouragement to auditing, co-regulatory mechanisms require that the government must lend authority via formal approval, direct control and accreditation of organizations/norms in order to increase the likelihood of successful implementation of these jointly derived regulations.[249] Although all of the above steps—formal approval, direct control, and accreditation—are traditionally government roles, there is no prohibition against industry taking on these roles. In some cases, industry may be the best-suited actor to take on these roles.

For example, the volatility of firms in the sharing economies makes industry self-regulation between firms difficult. When firms operate leanly, with limited compliance protocols, and with unproven business models, cross-industry self-regulation is unlikely to arise organically. Co-regulators must assess the character of the economy they are trying to regulate—the diffusion of market share, the ease with which an unregulated "black market" may form and permit evasion, the strategic points at which a noncompliant "rogue" business's activity would form depends on other entities over which the government or the industry leaders exercise some control—and tailor an enforcement plan

248. For an example of how the federal government analyzes a target market to assess its suitability for various types of regulation, see OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., CIRCULAR A-4, REGULATORY ANALYSIS (2003), *available at* http://www.whitehouse.gov/omb/circularsa004a-4.

249. Tony Porter & Karsten Ronit, *Self-Regulation as Policy Process: The Multiple and Criss-Crossing Stages of Private Rule Making*, 39 POL'Y SCIENCE 41, 55–59 (2006).

that best leverages the pressure points at which a noncompliant business may be incentivized to adhere to a regulation.[250]

The above safeguards against overly evasive businesses or overly restrictive governments presume that governments know when they are being overly intrusive. Some have expressed concern regarding whether policymakers responsible for crafting the laws and requirements will not adequately understand the industries they regulate and impose impractical requirements that can needlessly undermine business competitiveness. The volatility in the market also counsels against regulatory intervention that may ossify requirements that do not keep pace with changes.[251] Likewise, rules could quickly grow out-of-date and ill-suited to their intended purpose.[252] Furthermore, although shared economies are evolving quickly enough that lawmakers should allow room for regulatory experimentation among jurisdictions, the existence of a patchwork landscape of conflicting legal expectations can add to the cost of business and produce uncertainty in the customer base.[253] Governments may not have all of the information necessary to appreciate the extent to which their regulations reduce efficiencies or quash innovation, even as businesses may underestimate the price of obtaining these efficiencies at the expense of societal costs or undervalued risk to the consumer. All of these attributes suggest that traditional legislation and the bulky notice-and-comment procedures that accompany government-run rulemaking do not provide a good fit with the type of flexible, rapidly-evolving online activity that governments are trying to regulate.[254]

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250. *See* Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. Rev. 611, 619 (2011) (identifying scenarios that favor evasion).

251. *See, e.g.*, Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1716 (2008) (identifying how regulations regarding technology under the Clean Air and Clean Water Acts periodically grow outdated).

252. *See, e.g.*, Daniel Gervais, *The Regulation of Inchoate Technologies*, 47 HOUS. L. REV. 665, 684, & n.71 (2010) (comparing the relative success of regulating radar detectors after the technology's most significant advancements versus the regulation of music piracy which has repeatedly failed to match the pace of technological change).

253. *See* Raphael Minder & Mark Scott, *Sharing Economy Faces Patchwork of Guidelines in European Countries*, N.Y. TIMES, Sept. 22, 2014, at B3, *available at* http://www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html.

254. *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959 (2008) (finding that "[a]ll but one of the ten main agencies studied here took under two years, on average, to go from an NPRM to a final rule or action," suggesting a long turnaround for official rulemaking).

Iterative regulatory engagement is vital. A co-regulatory model should aim for organizational flexibility by considering informal agreements between major players rather than formal rulemaking processes, while having safeguards to combat the tendency against transparency and accountability. The swiftness and decisiveness of working with a small team of government regulators and industry leaders must be tempered with periodic checkpoints to reevaluate whether public needs have been adequately addressed, whether the solutions proposed have had the intended effect, and whether the norms of the shared economy have since evolved, requiring a revised response.[255] The co-regulation team should also build in established and visible feedback channels to report the team's progress and solicit the public and industry members at large who are not active participants of the co-regulation team.[256] Building these feedback loops into the structure may involve a less formalized process than the notice-and-comment process, and most checkpoints may involve internal discussions rather than public vetting of policy, but frequent reevaluation is important to creating a regulatory framework that rapidly adjusts to a growing and volatile sector of the sharing economy.[257]

CONCLUSION: TOWARDS COLLABORATIVE CO-REGULATION

Given the nascent landscape of sharing economy regulation and the absence of any one dominant regulatory scheme, it is up to the current leaders of the sharing industry and local government regulators to set the tone and content of the discussion and to proactively combat the concern that sharing economy companies blatantly flout law in pursuit of business.[258] Cities competing for new economic growth

255. John Burbank, *The Rise of the "Sharing" Economy*, HUFFINGTON POST (June 5, 2014, 4:46 PM EDT), http://www.huffingtonpost.com/john-burbank/the-rise-of-the-sharing-e_b_5454710.html (discussing evolving norms from a business-strategy perspective).

256. Marian Garcia Martinez et al., *Co-Regulation as a Possible Model for Food Safety Governance: Opportunities for Public–Private Partner*, 32 FOOD POL'Y 299, 301 fig.1 (2007) (identifying steps co-regulation may adopt with specific emphasis on soliciting information on public impact).

257. Kuo, *supra* note 182.

258. David Streitfeld, *Airbnb Will Hand Over Host Data to New York*, N.Y. TIMES, May 21, 2014, at B1, *available at* http://www.nytimes.com/2014/05/22/technology/airbnb-will-hand-over-host-data-to-new-york.html (reporting one state senator's public comment that despite recent concessions with the city, "Airbnb remains a scofflaw company whose business model is at odds not just with multiple New York laws, but with the basics of the New York City real-estate market"); *see* Editorial, *Dark Side of the Sharing Economy*, N.Y. TIMES, Apr. 30, 2014, at A24, *available at* http://www.nytimes.com/2014/05/01/opinion/the-dark-side-of-the-sharing-economy.html (critiquing Airbnb's current attempts to cooperate with government regulators as seeming disingenuous and calling for more proactive self-policing and risk

opportunities should adopt a receptive, collaborative attitude toward sharing-economy companies, which in many ways function as small businesses and may decrease rates of underemployment.[259] Local governments can play dual roles as both regulator to protect public safety and meet the goals of good regulation while also serving as a collaborator and facilitator, ushering in tech talent and jobs, serving as early adopters, measuring impacts, and making public and private assets more available for residents.[260] Governments that become early adopters stand to gain, as their successful models of governance proliferate across jurisdictions, carried by companies whose activity spans across multiple markets and who will likely proselytize models they have already adopted in other jurisdictions to promote a consistent policy in each of their active markets. Local decision makers can communicate with other cities about model policies for supporting the sharing sector. The coalescing of best practices, even when embellished with local customizations to suit local conditions, would save time and resources for municipalities across the country.[261] Wise to this potential, San Francisco, Boston, and New York as well as many other cities have launched offices to apply high technology to urban governance.[262]

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disclosures to their users).

259. *EU Sharing Economy Report*, *supra* note 195, at 8 (providing some numbers and concluding that sharing economy companies create jobs—both from direct employment of staff and from creating indirect employment by matchmaking labor supply with needs); *cf.* Fabio Rosati, *The Biggest Unrecognized Opportunity in the Sharing Economy*, WALL ST. J. (Apr. 24, 2014, 3:04 PM ET), http://blogs.wsj.com/accelerators/2014/04/24/fabio-rosati-the-biggest-unrecognized-opportunity-in-the-sharing-economy/ (naming the potential of sharing time—sharing platforms that offer freelance labor—as the greatest opportunity in the sharing economy, with the potential to revolutionize small businesses and provide flexible employment).

260. *EU Sharing Economy Report*, *supra* note 195, at 16–17 (claiming that policy has yet to catch up with industry innovation and encouraging policymakers to take a light approach to regulation and to adopt policies that facilitate tech jobs and foster startups); *see* Metcalf & Warburg, *supra* note 62 (exhorting local regulators to put the sharing economy's protection as its "first and primary" role and proposing that cities become early adapters, conduct studies documenting impact, and other activities helping foster the shared transaction activity).

261. *See Sharing Economy Advisory Network Created As Resource for Cities*, NAT'L LEAGUE OF CITIES (Aug. 14, 2014), http://www.nlc.org/media-center/news-search/sharing-economy-advisory-network-created-as-resource-for-cities (announcing the establishment of the "Sharing Economy Advisory Network," comprised of business, policy leaders, and city officials in compiling best practices across jurisdictions, noting the difficulty that cities have encountered in creating such practices on their own and seeking a consistent approach across jurisdictions); Brian Heaton, *Sharing Economy Advisory Network Seeks to Develop Best Practices*, GOV'T TECH. (Aug. 15, 2014), http://www.govtech.com/transportation/Cities-Form-Sharing-Economy-Network.html (quoting a Lyft director as commenting that such a network will help communities because it is "easier for communities to take advantage of the benefits the sharing economy provides if there are consistent regulations across the board").

262. *See* BOS. MAYOR'S OFFICE OF URB. MECHANICS, http://www.newurbanmechanics

As discussed in Section I.B, certain areas of the sharing economy seem to call for regulatory intervention, while other areas are suited to self-regulation. As discussed in Section II, however, even the decision to regulate comes with many choices: whether to proceed unilaterally or with some level of industry buy-in, what activities to ban or control, what interest groups to appease. As discussed in Section III.B, discerning which battles to fight and how to fight them requires analysis that takes into account the industry's incentives for self-regulation or cooperation, the risks of foregoing regulation, the costs of implementing regulation, and the likelihood of effectiveness.

Given the current sharing economy dynamics discussed in Section III.B, we suggest that the areas of greatest unmet need lie in labor protections and third-party protections, such as using tax policy to adjust for externalities and impact on the local economy. Consumer protections and regulation of deceptive speech are probably low areas of priority, as the market already has economic and reputational incentives to make reasonable judgment calls about how safe is safe enough.[263] Although manipulation of ratings, dishonest reviews, and inaccuracies may exist, industry has incentives to crack down on the most egregious manipulations and to protect speech. Moreover, state law already provides laws relating to unfair practices for those instances where industry may be complicit in distorting users' speech deceptively, minimizing the risk of complete market failure in the absence of sharing economy-specific regulation.[264] Therefore, regulators looking to prioritize their efforts might see regulation of speech

.org/boston/ (last visited Sept. 24, 2014); S.F. MAYOR'S OFFICE OF CIVIC INNOVATION, http://innovatesf.com/ (last visited Sept. 24, 2014); Ruth Reader, *New York City Gets a Chief Technology Officer*, VENTUREBEAT (Sept. 9, 2014, 4:15 PM), http://venturebeat.com/2014/09/09/new-york-city-gets-a-chief-technology-officer/ (discussing the recently launched New York City Mayor's Office of Technology and Innovation).

263. *See* Paul Brady, *Six Tips for First-Time Airbnb Renters*, CONDÉ NAST TRAVELER (Jan. 14, 2014), http://www.cntraveler.com/daily-traveler/2014/01/six-tips-for-first-time-airbnb-renters (providing an overview of common market know-how safeguards that allow users to match expectations about what risks and benefits they are undertaking).

264. *See* Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, *supra* note 22; Sundararajan, *Trusting the 'Sharing Economy' to Regulate Itself*, *supra* note 24 (stating view that companies have significant internal incentives to self-police the accuracy of their reviews); *see also* Press Release, *A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews and Pay More Than $350,000 in Fines*, N.Y. STATE OFFICE OF THE ATT'Y GEN. (Sept. 23, 2014), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and (reporting on sting operation, investigating under state false advertising legal theory, that caught fake reviews on reputation industry sites such as Yelp and won agreements from offending companies, and noting Yelp's positive response to state law enforcement tracking down manipulators left unchecked by their own filters).

particular to sharing economies as marginal enough of a concern to pass on it. Any attempts to co-regulate in these areas need not be comprehensive or particularly intrusive. Co-regulation in this area may look more like facilitating industry self-regulation, such as promoting certification to demonstrate compliance with industry best practices or obtaining informal commitments from companies to voluntarily disclose or adhere to certain reporting standards.[265]

On the other hand, regulators are not necessarily always looking for areas of greatest need. Where there is a vacuum of preexisting consensus, industry leadership, or natural incentives to act, the government may need to take on the formidable task of identifying potential leaders, wooing over divergent interests to compromise on common ground, and building a coherent policy from the ground up that takes into account many interests. Regulators may alternatively look for low-hanging fruit, or at least meaningful reform where much of the legwork of building public attention and industry cooperation has already occurred. Already we are seeing some of this practical prioritizing in California's recent focus on the liability issue. Some companies, particularly in the ride share sector, have already made transparency in liability allocation an important part of their business and public face.[266] Because of recent high-profile accidents, particularly those occurring during "insurance gaps," sharing companies have willingly adopted increasingly progressive policies on their own.[267] Airbnb has also evolved its insurance policies.[268] What is occurring is a maturation of the market as an expectation of liability allocation is more firmly incorporated within the business models. Politicians built on the emerging trend, making explicit by law what was already fast becoming an industry practice.[269] Another area we see as practically feasible (as well as an area of need identified earlier) is in tax regulation. Companies eager to gain official recognition of their legitimacy and to reduce the appearance illegality or risk for their

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265. *See generally* Cannon, *supra* note 176, at 463–66 (discussing ways in which voluntary obligations can complement regulatory goals).

266. *See, e.g.*, Andre Haddad, *RelayRides Insurance Update*, RELAYRIDES BLOG (Nov. 13, 2013), http://blog.relayrides.com/2013/11/relayrides-insurance-update/ (describing broadly the non-confidential aspects of how their insurance policy settled an earlier RelayRides accident and promoting its safety and liability insurance features to the public in company blog).

267. *See, e.g.*, Nairi, *supra* note 236; Shafer, *supra* note 34.

268. *Airbnb's $1,000,000 Host Guarantee*, AIRBNB, http://www.airbnb.com/guarantee (last visited Sept. 24, 2014) (advertising their willingness to cover certain types of damages but cautioning that they are not insurers and describing a detailed process for claiming reimbursement).

269. *See* White, *supra* note 57.

individual users appear willing to compromise to demands of tax remittance, record-keeping, and co-enforcement against noncompliant users.[270]

Also based on the Section III.B analysis, one area of high need but challenging feasibility appears to be labor regulation. The issue of the fair treatment of labor is likely to prove the thorniest and most variable aspect of the sharing economy's maturation. Because of the fluidity of the employment relationship and the degrees to which an individual peer service or good provider can elect to work for a sharing platform, labor protections defy uniform application. While this parallels the dialogue on proper labor protections for freelancers, the sharing economy frequently involves far less experienced labor providers (in addition to the freelancers that are also moving to services as ways of supplementing or re-orienting their income). There does not appear to be strong market or government consensus on how one should approach the regulation of labor offered through online sharing platforms, partially because the market remains highly fragmented with many subsectors and variations on what kind of services and how one shares. Because of the divergent business models, types of services, and types of employees or independent service providers at stake, there is little consensus or likelihood of wholly industry-driven consensus. This leads to a lack of clearly identifiable or credible leadership, although modest attempts to "organize" have occurred, whether by traditional unions (who appear currently ill-equipped to address the needs of a more independent, diffuse online base) or internally within the online communities themselves.[271] But this does not mean that

270. *See* Barrabi, *supra* note 218; Frank Rosario et al., *Airbnb Renter Returns to 'Overweight Orgy,'* N.Y. POST (Mar. 17, 2014, 6:30 AM), http://nypost.com/2014/03/17/airbnb-renter-claims-he-returned-home-to-an-orgy/ (reporting on Airbnb's claim that it is kicking out users who abuse their platform to facilitate illegal or prohibited activity and intends to cooperate with law enforcement).

271. Maya Kosoff, *Uber Drivers Protest: 'You Can't Make a Living Working Only for Uber,'* BUS. INSIDER (Sept. 15, 2014, 4:26 PM), http://www.businessinsider.com/uber-new-york-city-office-protests-2014-9 (reporting on first attempt of freelancer ridesharing drivers, organized via Facebook, to protest their platform for cutting rates to remain competitive but passing on all costs of the cut to the drivers); Alison Griswold, *Uber Just Caved on a Big Policy Change After Its Drivers Threatened to Strike*, SLATE MONEYBOX BLOG (Sept. 12, 2014, 1:03PM), http://www.slate.com/blogs/moneybox/2014/09/12/uber_drivers_strike_they_protested_cheap_uberx_fares_uber_backed_down.html (reporting on the concessions achieved after the Uber Drivers Network strike in New York City); *see also About Peers*, PEERS, http://www.peers.org/about/ (last visited Sept. 24, 2014) (stating the purpose of Peers, a coalition of sharing-economy supporters, but showing a leadership largely representative of companies and organizations that promote sharing platforms, rather than of users or labor); *Network for New Mutualism*, FREELANCERS UNION, http://www.freelancersunion.org/network/ (last visited Sept. 24, 2014) (referring to themselves as a "network," comprised of businesses, think tanks, as well

government cannot intervene in this area. The intervention, however, must look more foundational, to identify areas of common ground or to build it from the ground up. Because there is not a strong recognition in the public or in the user base of the sharing platforms of the need for regulation in this area, labor protections are not yet a high-priority in sharing economy corporate culture. Co-regulators seeking to become active in this area must recognize that co-regulation at this stage in the game looks less like traditional lawmaking and more like community organizing: mobilizing public awareness of labor protection shortfalls, identifying and promoting potential allies or leadership in the industry or among the users, and building the groundwork for a shared culture of priorities.

In short, the negotiations and the cooperation that constitute co-regulation may look very different depending on the circumstances, and it is important to be reasoned and precise on why one selects certain priorities and approaches. Whether co-regulation looks like goal-setting or legislation, convening groups and building consensus or demanding accountability and publicizing shortcomings, or separated spheres of activity for industry and government or joint projects, government and industry leaders should assess how the natural landscape of the economies affects the need for the intervention and the feasibility of their chosen method of accomplishing policy goals. Cooperation between the government and industry, though necessary because of complementary strengths and powers, is notoriously difficult, and its relationships, fragile. Operating with clearly articulated reasons for each choice of approach and selection of goals will help partnerships stay the course, adhering to long-term outcomes and tailoring approaches to the more inherent attributes of sharing economies while remaining flexible enough to adjust co-regulatory relationships to the fast-moving circumstances and variations on a theme that the quick evolution of these economies presents.

as unions and individuals).