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## Article

### The Law of the Platform

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The best way to predict the future is to invent it. —Alan Kay<sup>1</sup>

## INTRODUCTION

The web is the ultimate matchmaker, capitalizer, and economizer. New digital technologies are turning everything into an available resource: services, products, spaces, connections, and knowledge, all of which would otherwise be collecting

1. Alan C. Kay, *Predicting the Future*, 1 STAN. ENGINEERING 1, 1–6 (1989), <http://www.ecotopia.com/webpress/futures.htm>.

dust. It's been called "the sharing economy,"<sup>2</sup> "the disaggregated economy,"<sup>3</sup> "the peer-to-peer economy" (P-2-P),<sup>4</sup> "the human-to-human economy" (H-2-H),<sup>5</sup> "the community marketplace,"<sup>6</sup> "the on-demand economy,"<sup>7</sup> "the App economy,"<sup>8</sup> "the access economy,"<sup>9</sup> "the mesh economy,"<sup>10</sup> "the gig economy,"<sup>11</sup> and also, "the Uberization of everything."<sup>12</sup> Each of these terms represents an aspect of the digital platform revolution, but none completely captures the entire scope of the paradigmatic shift in the ways we produce, consume, work, finance, and learn. A new wave of start-ups, relying on digital platform technology, are connecting people and transforming behavior and relationships outside of the digital world, tapping into underutilized human, social, and real capital. This new economy dramatically extends the lifecycle of products, shortens time of use, and exponentially expands connectivity and access. These new business models are generating billions of dollars annually and show overwhelming rates of growth.<sup>13</sup> Most importantly, the

2. *The Rise of the Sharing Economy*, ECONOMIST (May 9, 2013), <http://www.economist.com/node/21573104>.

3. Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 917 (2015).

4. *The Rise of the Sharing Economy*, *supra* note 2.

5. Tom Lowery, *Human to Human (H2H) – Collaboration Is the New Competition*, HUFFINGTON POST (Jan. 31, 2014), [http://www.huffingtonpost.com/tom-lowery/human-to-human-collaborati\\_b\\_4696790.html](http://www.huffingtonpost.com/tom-lowery/human-to-human-collaborati_b_4696790.html).

6. Carrie Melissa Jones, *Uber, Mint, and Square Investor Rob Hayes Shares What He Looks for in Community-Driven Startups*, VENTURE BEAT (Mar. 14, 2015), <http://www.venturebeat.com/2015/03/14/uber-mint-and-square-investor-rob-hayes-shares-what-he-looks-for-in-community-driven-companies>.

7. Kashmir Hill, *Meet the Lawyer Taking on Uber and the Rest of the On-Demand Economy*, FUSION (Apr. 16, 2015), <http://www.fusion.net/story/118401/meet-the-lawyer-taking-on-uber-and-the-on-demand-economy>.

8. Robinson Meyer, *The App Economy Is Now 'Bigger Than Hollywood'*, THE ATLANTIC (Jan. 27, 2015), <http://www.theatlantic.com/technology/archive/2015/01/the-app-economy-is-now-bigger-than-hollywood/384842>.

9. Steve Denning, *Three Strategies for Managing the Economy of Access*, FORBES (May 2, 2014), <http://www.forbes.com/sites/stevedenning/2014/05/02/economic-game-change-from-ownership-to-access>.

10. See LISA GANSKY, *THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING* 15–19 (2010).

11. Rauch & Schleicher, *supra* note 3, at 925.

12. Sunny Freeman, *'Uberization' of Everything Is Happening, but Not Every 'Uber' Will Succeed*, HUFFINGTON POST CAN. (Apr. 1, 2015), [http://www.huffingtonpost.ca/2015/04/01/uberization-uber-of-everything\\_n\\_6971752.html](http://www.huffingtonpost.ca/2015/04/01/uberization-uber-of-everything_n_6971752.html).

13. See generally *The Sharing Economy – Sizing the Revenue Opportunity*, PRICEWATERHOUSECOOPERS: U.K., <http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue>

platform economy is radically changing the traditional equilibria of supply and demand, blurring the lines between owners and users, producers and consumers, workers and contractors, and transcending the spatial divides of personal and professional, business and home, market and leisure, friend and client, acquaintance and stranger, public and private. Companies are introducing that which was non-commodifiable to the market—whether it is a ride share, a spare bedroom, a spot on a waitlist, or a loan for a lawnmower. What has previously been relegated to the realm of personal property is shifting to the realm of access: instead of installing clunky rabbit-ear antennae, people pay to access thousands of tiny antennas;<sup>14</sup> instead of purchasing a bicycle, users pick up and drop off bicycles at hubs all around the city;<sup>15</sup> and instead of owning a vacation home, hosts swap houses during the holidays.<sup>16</sup>

Unsurprisingly, then, the platform economy defies conventional regulatory theory. Millions of people are becoming part-time entrepreneurs, disrupting established business models and entrenched market interests, and challenging regulated industries, all while turning ideas about consumption, work, risk, and ownership on their head. Paradoxically, as the digital platform economy becomes more established, we are also at an all-time high in regulatory permitting, licensing, and protection. The battle over law in the platform is, therefore, both fundamentally conceptual and highly practical. New business models such as Uber, Airbnb, and Aereo have received massive amounts of support from venture capitalists, but have also received strong pushback from incumbent stakeholders, regulators, and courts. The spectrum of responses is dramatically broad. While some jurisdictions such as the United Kingdom and San Francisco are positioning themselves as champions of the platform by introducing policies that will aid its expansion,

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-opportunity.html (last visited Oct. 14, 2016) (describing the scale and growth of businesses within the sharing economy).

14. Aereo allowed individuals to record live over-the-air television without the costs associated with cable television. *See infra* text accompanying notes 55–58.

15. *See generally Two Distinct Ways To Utilize Decobike*, DECOBIKE, <http://www.decobike.com/sandiego/how-it-works> (last visited Oct. 14, 2016) (describing the process for using the bike sharing service, Decobike).

16. One such service is HomeExchange, which allows individuals to swap homes with other individuals for short periods of time. *Here's How Home Exchange Works*, HOMEEXCHANGE, <https://www.homeexchange.com/en/how-it-works> (last visited Oct. 14, 2016).

other legal regimes such as those in New York, Nevada, Florida, and Germany are introducing new policies to constrain the platform. Around the United States, class actions against Uber, Lyft, and other platform apps are underway.<sup>17</sup> The scholarly debates are schismatic, either celebrating the platform economy as a utopic shift from capitalism to communal sharing, or decrying the dystopian effects of the platform evading existing regulations and protections.

Despite the tremendous interest that the platform is attracting from regulators and scholars, the literature has thus far failed to offer a comprehensive account of law in the new platform economy. Are companies like Uber and Lyft digital clearinghouses connecting independent drivers-for-hire with customers, or rather are they employers violating wage-and-hour laws? Are zoning laws parsing parts of town for short-term rentals still relevant when residential property owners list their homes on Airbnb? Was Aereo, which went bankrupt following its recent Supreme Court defeat, a digital antenna rental company, or a service that streams broadcasted content, thereby infringing copyright? Is TaskRabbit just an app to connect people searching for odd jobs, or a manpower agency that should withhold taxes? Companies such as Uber, Lyft, Airbnb, Aereo, and TaskRabbit have been running against existing regulations and the legal battles often turn on how to define the platform business: Are these digital companies service providers or brokers of individualized exchanges? Should they be viewed as merely enabling intermediaries or robust corporate infrastructures?

This Article argues that the platform economy is presenting not only a paradigmatic shift for business, but also for legal theory. Consumer protection laws, safety and health regulations, business permits and licenses, property and zoning laws, and financial services regulations have all risen dramatically in the past few decades. The reasons for this surge range from public welfare and quality control to less benign goals, such as entry restrictions, lobbied for by incumbent industry actors.

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17. See Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FASTCOMPANY (Feb. 17, 2015), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> (describing a class-action lawsuit against the platform app, Handy); Marcus Pringle, *California Court Addresses Employee Status of Uber, Lyft Drivers*, ROETZEL (Feb. 3, 2015), <http://www.ralawemployment.blogspot.com/2015/02/california-court-addresses-employee.html> (noting the initiation of class-action lawsuits against both Uber and Lyft).

Each body of law is increasingly at odds with bottom-up online platform businesses that offer new models of connectivity and exchange. The platform economy does not only disrupt regulated industries but also demands that we inquire into the logic of their correlated regulations. It requires that we go back to first principles about public intervention and market innovation, or, what I term, the regulation-innovation nexus.

The Article uncovers the ways in which digital platform-based businesses challenge the internal logic of regulated industries. By unpacking the economic and social impetuses for the rise of the platform economy, the Article develops a new framework for asking whether digital disruptions comprise loopholes akin to regulatory arbitrage, most prominently studied in the tax field; circumvention akin to controversial copyright protection reforms; or innovation-ripe negative spaces akin to design-around competition in patent law. This Article, by bringing together these different bodies of law, offers a contemporary account of the relevance of regulating new business models. Providing a new framework for understanding the regulation-innovation nexus, the Article argues that the legal disruptions created by the platform economy should be viewed as a feature, rather than a bug of regulatory limits.

The Article proceeds as follows: Part I introduces the spectrum of conceptual challenges presented by third-generation digital business models, Web 3.0. The literature about the platform is binary. There are feel-good stories about the revolutionary power of sharing and the easy rise of micro-entrepreneurs and grassroots exchanges contrasted against dystopian predictions about the platform subverting established protections and unraveling the checks and balances historically placed to correct the market-produced unfairness. Transcending this utopian/dystopian binary, Part II analyzes the technological, economic, and social reasons for the rise of the platform economy and the ways the platform is changing each stage and aspect of market transaction costs. First, taking a Coasean perspective, Part II.A develops a novel taxonomy of ten distinct principles of the platform that together hold the potential to systematically reduce transaction costs: uber-scale, resurrection of dead capital, tailoring the transactional unit, the commodification of everything, deal customization, access over ownership, overhead elimination, reduced barriers to entry, pricing precision, and dynamic feedback systems. Next, in Part II.B, the Article shifts beyond the classic transaction-cost economic analysis to a be-

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havioral perspective, explaining how the platform shapes preference. The Section asserts that part of the value produced by the platform lies in its differentiation from traditional, offline exchanges. In other words, it reveals how the platform economy is not simply competing efficiently over the same markets of regulated industries but also constituting new markets, norms, and behaviors.

Building upon these understandings of the internal logic informing the platform economy's rise, Part III offers a new framework for understanding the range of laws and regulations that platform companies currently face. The Article shows that the regulatory challenges are divisible into easy and hard cases. On one end of the spectrum are regulatory restrictions that operate as barriers to entry, including permitting, occupational licensing, and rate controls. These are the easy cases—regulatory controls that regulators should not impose on the platform because they are largely designed to prevent entry. On the other end are taxation requirements. These are equally easy because they should be extended to the platform in a straightforward manner, and existing tax law lends itself to direct application on these new digital market exchanges. The hard cases encompass what lies in the regulatory spectrum between barriers to market entry and the taxation of revenues, namely laws for zoning, consumer protection, employment and labor, and intellectual property. These regulatory fields each have public welfare goals challenged by the shifts in market models, emerging social norms, and unstable preferences. Moreover, many of these regulatory goals are achievable through utilizing the technological advances of the very same business models that are disrupting established structures. Therefore, any inquiry into the regulation-innovation nexus requires an understanding of the comparative advantages of public intervention and the platform's self-regulation. Part IV maps those latter shifts onto concepts based in innovation theory and policy—an interdisciplinary inquiry examining the role of law and regulation in the diffusion of technology and ideas. Integrating insights from different fields of law about regulatory disruption, it considers the continued necessity of certain protections and examines the rise of self-regulatory practices. The Article demonstrates that the platform economy is still very much evolving, frequently comes with built-in regulatory devices, and thrives because of definitional defiance. By offering a first schematic treatment of law and the platform econo-

my, this Article aims to provide scholars and policymakers a framework that identifies the conditions under which new business models transform economic structures and how law maps onto those shifts.

## I. CECI N'EST PAS UN TAXI: DISRUPTION & DEFINITIONAL DEFIANCE

In the interest of eliminating bureaucracy, overhead, middlemen and waste, I turned myself into a corporation. —Joel Stein, *Time Magazine*<sup>18</sup>

### A. WEB 3.0: THE PLATFORM REVOLUTION

Platform companies defy traditional regulatory theory the same way they defy traditional definition—by varying the products, services, and methods they employ to connect buyers and sellers, workers and those in need of services. For this reason, the platform economy is easier to explain by way of function: a platform company is launched as an online intermediary between buyers and sellers of goods and services—the ancient role of the middleman—enhanced with the modern power afforded by cloud computing, algorithmic matching, pervasive wireless Internet access, scaled user-networks, and near-universal customer ownership of smartphones and tablets. While earlier companies such as eBay and Amazon have served as a model for new platform companies, those companies mainly focused on retail of goods as well as online connectivity. More recently, the new wave of digital companies is based on the logic of multi-sided markets that disrupt traditional offline interactions by reshaping the ways individuals transact. Thus, while the timeline is not set in stone, it is useful to mark 2008, with the founding of Airbnb as the rise of the new wave of the platform—a stunning number of fast-growing of algorithm-enabled cyber-places where constituents transact. Before that, there were some important developments in digital connectivity and sharing, including the launch of Napster in 1999, the rise of Wikipedia in 2001, and the spread of social networks, primarily Facebook and LinkedIn in 2004.<sup>19</sup> These companies, however,

18. Joel Stein, *Baby, You Can Drive My Car, and Do My Errands, and Rent My Stuff...*, TIME (Jan. 29, 2015), <http://www.time.com/3687305/testing-the-sharing-economy>.

19. For a useful timeline graphic on the rise of the sharing economy, see Collaborative Consumption Infographic Timeline Chart, COLLABORATIVE CONSUMPTION, <https://wiki.p2pfoundation.net/images/Collaborativechart.jpg>

created multi-sided connectivity that, for the most part, existed solely in the digital world. Therefore, as I will describe below, these developments are best understood as a prelude to the rise of the platform economy, an earlier generation of online innovation. The new generation of platform business is increasingly challenging conventional industries in every realm. You don't need to open a restaurant to host cooking events; you don't need to become a taxi driver to sell rides; you don't need to open a hotel to lodge guests; you don't need to start a moving company to get paid for helping someone relocate.

Industries affected by the platform economy include hotels (Airbnb; Couchsurfing; Homeaway; VRBO); office space (Liquid Space; ShareDesk), parking spaces (ParkingPanda; Park Circa); transportation (Lyft; Sidecar; Uber); restaurants (EatWith; Feastly; Blue Apron; Munchery); used clothing (ThredUp); household tools (Open Shed); outdoor gear (Gearcommons); capital (Zopa; Prosper; Kickstarter; Bitcoin; Kiva); broadcasting (Aereo; FilmOn.com); legal services (Upcounsel); medical services (Healthtap; Teledoc; CrowdMed); academic services (Uguru); everyday errands, such as grocery shopping and laundry (TaskRabbit; Instacart; Airtasker; Washio); and specialized errands, such as flower delivery (BloomThat), dog walking (DogVacay), and package delivery (Shyp). Over 10,000 new platform companies have sprouted and mushroomed in less than a decade, and they continue to pop up daily.<sup>20</sup> The platform economy, while not easy to define or quantify, was valued at \$26 billion in 2013, with predictions of exponential growth up to \$110 billion in the next few years.<sup>21</sup> A recent PricewaterhouseCoopers (PwC) report predicts that global revenues from the platform sectors could hit \$335 billion by 2025.<sup>22</sup> “[L]ike Uber but for \_\_\_” pitches for venture capital funding are a daily occurrence.<sup>23</sup>

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(last visited Oct. 14, 2016).

20. Stein, *supra* note 18.

21. Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), <https://www.hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators>.

22. *The Sharing Economy – Sizing the Revenue Opportunity*, *supra* note 13.

23. Kate Cox, *Nobody Really Knows What To Do About Regulating the Sharing Economy*, CONSUMERIST (June 10, 2015), <https://www.consumerist.com/2015/06/10/nobody-really-knows-what-to-do-about-regulating-the-sharing-economy>.

As noted, the platform economy's offerings are so diverse that neatly describing its scope is impractical. There are various ways to slice it. It includes the delivery of services, the sharing of assets, and the recirculation of goods, yet its rise must be understood in relation to its digital genealogy. First-generation Internet companies introduced search engines like Google and Yahoo, which connected us to information and knowledge. Tim Berners-Lee, best known as the inventor of the World Wide Web, described the original essence of the Web as a space to collaborate, communicate, and share information.<sup>24</sup> The second generation, Web 2.0, extended search and communication, forming online marketplaces like Craigslist, eBay, and Amazon, as well as digital file sharing services like Napster and iTunes. These online companies disrupted the publishing, traditional news media, music, and most broadly, retail industry at large. Amazon transformed and constricted the bricks-and-mortar bookstores, and file sharing, coupled with digital music and film, changed the entertainment industry, effectively killing record and video stores. Moving beyond retail, the rise of the platform signifies the third generation of the Internet, Web 3.0, in which technology is transforming the service economy, allowing greater access to offline exchanges for lower prices.<sup>25</sup> In turn, the physical infrastructure of offline markets is itself transformed by the technological infrastructure.

Founded in San Francisco in 2008, Airbnb allows private individuals—named *hosts*—to rent out their homes or individual rooms to visitors for a short amount of time.<sup>26</sup> Within just a few years, Airbnb has grown dramatically; and is valued at \$10 billion<sup>27</sup> with 2,000,000 properties listed in more than 190 countries.<sup>28</sup> Analysts estimate that in 2015, Airbnb made \$6 billion in gross bookings.<sup>29</sup> It now offers more bookings than major ho-

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24. *Web's Inventor Gets a Knighthood*, BBC NEWS (last updated Dec. 31, 2003), <http://news.bbc.co.uk/2/hi/technology/3357073.stm>.

25. See *infra* Figure 1; see also Stein, *supra* note 18 (noting that technology has “come after” the service economy, with increased consumer access and lower prices).

26. Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Feb. 11, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy>.

27. Cannon & Summers, *supra* note 21.

28. *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Oct. 14, 2016).

29. Rafat Ali, *Airbnb's Revenues Will Cross Half Billion Mark in 2015, Analysts Estimate*, SKIFT (Mar. 25, 2015), <http://www.skift.com/2015/03/25/airbnbs-revenues-will-cross-half-billion-mark-in-2015-analysts-estimate>.

tel chains, such as Marriott and Hilton.<sup>30</sup> At the same time, Airbnb defines itself very differently than a hotel chain, and, as it disrupts the hotel industry, it faces legal attacks on both legislative and judicial fronts. In response to these vigorous attempts to limit the platform's operation, Airbnb has argued that existing laws simply neither capture its new business model, nor even fit the new economy.<sup>31</sup> Airbnb describes its business model as a matching platform for private homes, connecting private individuals to other private individuals, while collecting a six percent to twelve percent booking fee.<sup>32</sup> Airbnb owns no property and provides no services outside the digital realm.<sup>33</sup> Similarly, in the commercial real estate rental market, Loosecubes, Regus, and DeskWanted have carved out the shared office space market, matching people who have an extra desk, studio, or office space with independent freelancers and entrepreneurs.<sup>34</sup> Following a similar business model to Airbnb, Loosecubes charged a ten percent fee for each transaction, offering spaces in 535 cities throughout sixty-six countries.<sup>35</sup>

Valued at over \$40 billion, Uber is perhaps the best-known example of a disruptive digital platform business.<sup>36</sup> Founded in 2009, the company coordinates over one million rides a day and is now valued higher than rental car giants Hertz and Avis.<sup>37</sup>

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30. Julie Weed, *Airbnb Grows to a Million Rooms, and Hotel Rivals Are Quiet, for Now*, N.Y. TIMES (May 11, 2015), <http://www.nytimes.com/2015/05/12/business/airbnb-grows-to-a-million-rooms-and-hotel-rivals-are-quiet-for-now.html>.

31. David Streitfeld, *Companies Built on Sharing Balk When It Comes to Regulators*, N.Y. TIMES (Apr. 21, 2014), <http://www.nytimes.com/2014/04/22/business/companies-built-on-sharing-balk-when-it-comes-to-regulators.html>.

32. *What Are Guest Services Fees?*, AIRBNB, <http://www.airbnb.com/help/article/104/what-are-guest-service-fees> (last visited Oct. 14, 2016).

33. Rob Preston, *Digital Disruption: It's Not What You Think*, FORBES (Apr. 20, 2015), <http://www.forbes.com/sites/oracle/2015/04/20/digital-disruption-its-not-what-you-think>.

34. See *About DeskWanted*, DESKWANTED, <https://deskwanted.wordpress.com/about> (last visited Oct. 14, 2016) (describing the service that DeskWanted provides and how the company works); *Company Profile*, REGUS, <http://b.regus.com/investors/company-profile> (last visited Oct. 14, 2016) (providing a general company profile for investors regarding Regus's activities).

35. *7 Start-Ups Inspired by Craigslist*, AABACO SMALL BUS., <https://www.aabacosmallbusiness.com/advisor/7-start-ups-inspired-craigslist-210000849.html> (last visited Oct. 14, 2016).

36. PRICEWATERHOUSECOOPERS, CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY 14 (2015), <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf>.

37. Ellen Huet, *Uber Says It's Doing 1 Million Rides per Day, 140 Million in Last Year*, FORBES (Dec. 17, 2014), <http://www.forbes.com/sites/ellenhuet/2014/12/17/uber-says-its-doing-1-million-rides-per-day-140-million-in-last>

Lyft, the second largest transportation platform company and Uber's competitor, has raised over \$500 million in funding and has tens of thousands of service-providers in over sixty-five cities.<sup>38</sup> Other platform competitors have been established around the world, such as BlaBlaCar, a France-based transportation company, which raised \$100 million in 2014 and recently expanded into India, its fourteenth market.<sup>39</sup> Other new companies focus on long-distance transportation, such as Tripda, while still others focus on servicing particular markets, such as universities (Zimride), women (Chariot for Women), and children (Kidz Kab). Each of these companies offers a creative take on traditional markets and uses a variety of disruptive technologies to shake up their respective industries. These new transportation businesses match drivers and passengers via smartphone technology and sophisticated matching algorithms.<sup>40</sup> Unlike taxicabs and limousines, these companies do not position themselves as common carriers, and most do not seek the regulatory licensing traditionally required for such services.<sup>41</sup> Uber asserts it is not a taxi business, but rather merely an app and network. It argues that it owns no cabs and the cab drivers are not employees, but rather independent contractors.<sup>42</sup> In public statements, Uber stresses that it "sees itself as a technology company" that "connects riders" with independent contractors who it considers to be true "high-quality transportation providers."<sup>43</sup> The taxicab industry and some

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-year; Will Oremus, *Silicon Valley Uber Alles*, SLATE (June 6, 2014), [http://www.slate.com/articles/technology/technology/2014/06/uber\\_17\\_billion\\_valuation\\_it\\_s\\_now\\_worth\\_nearly\\_as\\_much\\_as\\_hertz\\_and\\_avis.html](http://www.slate.com/articles/technology/technology/2014/06/uber_17_billion_valuation_it_s_now_worth_nearly_as_much_as_hertz_and_avis.html).

38. See Mark Sullivan, *Lyft Has Raised a New \$530M Round, Reaching a Valuation of \$3B*, VENTUREBEAT (Mar. 11, 2015), <http://www.venturebeat.com/2015/03/11/lyft-has-raised-a-new-530m-round-reaching-a-valuation-of-3b-report>.

39. Noyan Ayan, *BlaBlaCar Expands Beyond Europe, Launches in India*, WEBRAZZI (Jan. 14, 2015), <http://en.webrazzi.com/2015/01/14/blabla-car-launches-in-india>; Lora Kolodny, *French Company BlaBlaCar Raises \$100M To Make Ride-Sharing Easy*, WALL ST. J. (July 2, 2014), <http://blogs.wsj.com/venturecapital/2014/07/02/french-company-blabla-car-raises-100m-to-make-ride-sharing-easy>.

40. Stephanie Francis Ward, *'App' Me a Ride: Internet Car Companies Offer Convenience, but Lawyers See Caution Signs*, A.B.A. J., Jan. 2014, at 13.

41. *Id.*

42. Aswath Damodaran, *A Disruptive Cab Ride to Riches: The Uber Pay-off*, FORBES (June 10, 2014), <http://www.forbes.com/sites/aswathdamodaran/2014/06/10/a-disruptive-cab-ride-to-riches-the-uber-payoff>.

43. Ward, *supra* note 40, at 14.

regulators argue otherwise.<sup>44</sup> Is Uber one big business? Is each driver a small enterprise? Are Uber drivers workers, independent contractors, or franchisees?

These questions are far from theoretical. They are acute and pervasive. These services are available in over 1000 cities, and new models continue to develop rapidly. For example, other companies—still within transportation—are disrupting the car rental industry. Car2Go and ZipCar offer short-term use of a smart car in a designated zone.<sup>45</sup> DecoBike offers the use of bikes throughout the city, and returns at designated locations.<sup>46</sup> Getaround, founded in San Francisco, allows car owners to rent out their vehicles.<sup>47</sup> While these companies use different levels of platform connectivity, they are each presenting innovative tools to match physical services with those who need them. Disrupting the service and staffing industry, TaskRabbit, similarly founded in San Francisco, allows users to list errands they need completed, including handyman jobs and personal assistance.<sup>48</sup> Taskers, the people who have been certified by the site, bid to work on the tasks, and TaskRabbit, the company, typically takes a fifteen percent to thirty percent fee from the offered price.<sup>49</sup> Need a dog walker? DogVacay will link you to one.<sup>50</sup> Need a teacher? Skillshare will connect you.<sup>51</sup> Need a programmer to update a Wikipedia entry? Fiverr will find you one.<sup>52</sup>

Disrupting the restaurant market by directly connecting foodies and chefs using digital technologies, EatWith aggregates offerings of secret suppers and pop-up restaurants, hosted in an individual's home or other private spaces, where chefs prepare food in a noncommercial kitchen without formal per-

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44. *Id.*

45. CAR2GO, <https://www.car2go.com> (last visited Oct. 14, 2016); ZIPCAR, <http://www.zipcar.com> (last visited Oct. 14, 2016).

46. DECOBIKE, *supra* note 15.

47. *How It Works*, GETAROUND, <https://www.getaround.com/tour> (last visited Oct. 14, 2016).

48. *What Does TaskRabbit Offer?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411410-What-does-TaskRabbit-Offer> (last visited Oct. 14, 2016).

49. *What Is the TaskRabbit Service Fee?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411610-What-is-the-TaskRabbit-Service-Fee> (last visited Oct. 14, 2016).

50. DOGVACAY, <https://www.dogvacay.com> (last visited Oct. 14, 2016).

51. SKILLSHARE, <https://www.skillshare.com> (last visited Oct. 14, 2016).

52. FIVERR, <https://www.fiverr.com> (last visited Oct. 14, 2016).

mits of city health and code enforcement officials.<sup>53</sup> Some of these culinary events are set up through less specialized online sites and instead come together using existing social media platforms such as Facebook, Twitter, and Instagram.<sup>54</sup>

Disrupting network broadcasting and cable providers, Aereo was a start-up founded in 2012 that allowed subscribers to watch and record live TV over the Internet for a monthly fee.<sup>55</sup> It maintained a bank of miniature, dime-sized antennas within each city it operated, and, much like old rabbit ears, pulled down local TV signals broadcast over-the-air.<sup>56</sup> Every time a subscriber wanted to watch or record a show, Aereo assigned them an antenna.<sup>57</sup> Anticipating the copyright challenges that it would face, Aereo took separate recordings for every single person watching and provided the user full control over what content they wanted to save and play.<sup>58</sup> Despite these efforts to use technological innovation to avoid such a ruling, the company went bankrupt when, in 2014, the United States Supreme Court held that the digital platform was illegally disrupting the broadcasting industry.<sup>59</sup>

The common pattern that emerges is a definitional one. Platform companies adamantly endeavor to be defined first and foremost by what they are not. These companies are not selling the thing itself: the service, the product, the content. Rather, they are selling access to the software, the matching algorithms, and a digital system of reputation and trust between their users.<sup>60</sup> In turn, the platform breaks down traditional in-

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53. Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16, 17 (2015) (noting the non-regulated “pop-up” nature of underground dining); *Who We Are*, EATWITH, <https://www.eatwith.com/about> (last visited Oct. 14, 2016) (describing EatWith’s purpose and mode of operation).

54. Schindler, *supra* note 53, at 18.

55. Jacob Kastrenakes, *Aereo Loses to Broadcasters in Supreme Court Fight for Its Life*, THE VERGE (June 25, 2014), <http://www.theverge.com/2014/6/25/5801052/aereo-supreme-court-ruling>.

56. *Id.*

57. *Id.*

58. See Aereo, *Aereo Announces \$20.5M Series A Financing Led by IAC; New Technology Platform Allows Consumers Access to Live TV over the Internet*, MARKETWIRED (Feb. 14, 2012), <http://www.marketwired.com/press-release/aereo-announces-205m-series-a-financing-led-iac-new-technology-platform-allows-consumers-nasdaq-iaci-1619629.htm>.

59. Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), [http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?\\_r=0](http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?_r=0).

60. Darcy Allen, *What Is a Taxi? Regulation and the Sharing Economy*,

dustry categorizations and, as a result, presents a challenge when labeling the nature of the business by creating an ambiguous relationship between the provider and user; employer and employee; and owner and consumer.

**Figure 1: Start-Ups & Regulated Corollaries**

Airbnb VRBO HomeAway	Hotel
Loosecubes Regus Desk Wanted	Commercial Rental
ParkingPanda ParqEx	Parking Sites
Uber Lyft	Taxi Industry
Zipcar	Car Rentals
JustShareIt	Car Dealers
EatWith	Restaurants
TaskRabbit AirTasker Zaarly	Manpower Agencies
DogVaycay	Pet Services
Aereo FilmOn	Broadcasting/Cable

#### B. THE EVERYTHING PLATFORM: CHALLENGING LABELS AS A FORM OF INNOVATION

The staggering rise of online networks and digital service companies raises questions about the nature of platform businesses and how they generate their value; yet, the platform economy defies simple definitions. The platform economy is a system characterized primarily by what it's not: conventional

and static. The most important aspect of the platform economy is that it includes an ecology of continuously evolving business models. The initial inquiries about their essence and character point to the very challenge of classification—we are in uncharted territories, a new zone of economic relations. Law and language attempt to chart boundaries, and yet they are inherently limited to covering the existing forms of life and bounds of human imagination. Innovation is always disruptive in that regard. When it comes to new industries and embryonic business models, lawmakers need to tread carefully. Though this has always been true, the platform is introducing new models and structures of exchange at unprecedented rates. Platform companies often have few real assets, and their value is embedded in their technology, user base, and brand. Moreover, platform companies can quickly morph and expand, rendering this definitional-defiant innovation unstoppable. Consider Uber’s ambitions for a moment. Uber recently changed its motto from “[e]veryone’s private driver” to “[w]here lifestyle meets logistics.”<sup>61</sup> The shift from “driving” to “lifestyle” is telling. Uber’s critical mass of users and continuous perfection of its software are both opening opportunities for expansion. Why stop at rides when it can offer delivery services and carpooling? Why stop at cars when the technology it develops is extendable to other forms of transportation, such as boats, planes, and, eventually, driverless cars?

This is not a futuristic dream, but instead an emerging reality. Uber has launched a courier delivery service, UberRUSH, as well as UberBOAT, a service to request a water taxi around harbors, which is currently operating in Boston but soon expanding to Sydney, Australia, and elsewhere (in addition to Uber’s boating services, other actors in the platform economy are offering flights).<sup>62</sup> UberPOOL coordinates individual riders who are traveling to similar locations along a similar route.<sup>63</sup> If there is a match found along the route, the app notifies the rider with their co-rider’s first name.<sup>64</sup> Clearly, Uber aspires to be

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61. Adam Vaccaro, *Uber Isn’t a Car Service. It’s the Future of Logistics*, INC. (Dec. 13, 2013), <http://www.inc.com/adam-vaccaro/uber-isnt-a-car-service.html>.

62. DARCY ALLEN & CHRIS BERG, INST. OF PUB. AFFAIRS, *THE SHARING ECONOMY: HOW OVER-REGULATION COULD DESTROY AN ECONOMIC REVOLUTION* 6 (2014), [https://www.ipa.org.au/portal/uploads/Sharing\\_Economy\\_December\\_2014.pdf](https://www.ipa.org.au/portal/uploads/Sharing_Economy_December_2014.pdf).

63. *Id.*

64. *Id.* The Public Utilities Commission in California decided that Uber’s

the “Everything Platform,” similar to how Amazon morphed from a bookstore to the “Everything Store.” In 2015, Uber announced that it is investing in the research and development of self-driving cars.<sup>65</sup> Uber also recently announced that it would develop its own mapping platform and move away from Google Maps.<sup>66</sup> At the same time, Google is also realizing the potential of what can, in effect, only be described as the “Everything Economy” and has announced its own ambition in getting into the ride-sharing service game with self-driving cars.<sup>67</sup> A new venture in Silicon Valley, appropriately called Magic, promises to push the platform’s vision of totality further. Magic’s business model is its promise to deliver “anything you want (and they do mean anything) as long as it’s legal”—a tiger to your door, sushi on a boat, or your parking ticket handled.<sup>68</sup> The company launched in February 2015 and logged 17,000 requests in its first forty-eight hours of operation.<sup>69</sup> Magic indeed.

As the platform continues to morph and expand, the disruption of conventional business models, definitional boundaries, and doctrinal order will swell.<sup>70</sup> A recent PwC report calls companies to audit all tangible and intangible assets that could potentially be profitably introduced into the platform, including energy, telecoms, and retailing.<sup>71</sup> As it continues to grow, the platform can be best understood as clusters of market developments—driven by network technology—that continuously dis-

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new carpooling service is illegal because two distinct riders pay separate fares to share one car. Mark Rogowsky, *California Threatens To Shut Down Uber’s New Carpooling Service*, FORBES (Sept. 12, 2014), <http://www.forbes.com/sites/markrogowsky/2014/09/12/california-threatens-to-shut-down-ubers-paid-carpools/#76b77d967939>.

65. John Biggs, *Uber Opening Robotics Research Facility in Pittsburgh To Build Self-Driving Cars*, TECHCRUNCH (Feb. 2, 2015), <https://www.techcrunch.com/2015/02/02/uber-opening-robotics-research-facility-in-pittsburgh-to-build-self-driving-cars>.

66. Leslie Hook, *Uber To Pour \$500m into Global Mapping Project*, FIN. TIMES (July 31, 2016), <https://www.ft.com/content/e0dfa45e-5522-11e6-befd-2fc0c26b3c60>.

67. Will Oremus, *Whoa, If True: Is Google Launching an Uber Rival?*, SLATE (Feb. 2, 2015), [http://www.slate.com/blogs/future\\_tense/2015/02/02/google\\_uber\\_rival\\_bloomberg\\_reports\\_google\\_working\\_on\\_ride\\_hailing\\_app.html](http://www.slate.com/blogs/future_tense/2015/02/02/google_uber_rival_bloomberg_reports_google_working_on_ride_hailing_app.html).

68. Sarah Buhr, *Magic Is a Startup that Promises To Bring You Anything—If You’re Willing To Pay for It*, TECHCRUNCH (Feb. 23, 2015), <https://www.techcrunch.com/2015/02/23/magic-is-a-startup-that-promises-to-bring-you-anything-if-youre-willing-to-pay-for-it>.

69. *Id.*

70. *See infra* Figure 2.

71. PRICEWATERHOUSECOOPERS, *supra* note 36, at 14, 28.

rupt previous notions of economies of production, consumption, finance, knowledge, and education. The potential, as well as the peril, of such an amorphous beast is at the core of the regulatory pushbacks it is encountering, and even more fundamentally, the binary accounts of its utopian or dystopian nature.

**Figure 2: Fifty Ways to Look at the Platform**

<b>Traditional Categories</b>	<b>Web 3.0 Categories</b>	<b>Meta</b>
Regulated industry	Community marketplace	Platform
Employer – Employee	Forum	Peer-to-Peer
Seller – Buyer	App	Access economy
Producers – Consumers	Tech software	Pooling systems
Lender – Borrower	Lodging/rental/service intermediary	Mesh economy
Manpower agency	Network of members	Sharing economy
Cable company	User/host	Collaborative economy
Taxi dispatcher		Gig economy
Bank		

### C. THE PLATFORM ECONOMY: ROMANTIC UTOPIA OR NIGHTMARE DYSTOPIA?

The realities of the recent cycles of financial crises and economic restructuring, together with advances in digital technology and shifts in lifestyle, have created the perfect storm for the platform economy. The reasons for the rise of the platform economy are key to analyzing the contemporary challenges presented by existing regulations and the normative questions about law's continued role. Contemporary debates, however, fail to reflect this complexity. One of the striking dimensions of public debates about the platform is the strong, bipolar descriptions of its revolutionary potential. These descriptions are largely raised with broad brushstrokes and absolute terms, either hailing the platform as the anti-corporate utopian answer to twentieth-century discontentment or an accelerated path to further injustice and inequality. While many celebrate the platform's potential to positively transform capitalism into something kinder and fairer, others view that transformation as dangerous to work relations, consumer welfare, distributive justice, and regulatory compliance. Proponents romantically

envision the platform as a return to the days free from corporate dominance, when interactions happened directly and intimately between individuals, when design was bottom-up and relationships were based on community rather than markets.<sup>72</sup> For opponents, it is a dystopian uber-capitalist development in which every interaction becomes the basis of market exchanges, privacy and leisure are lost, and Silicon Valley style-libertarians become richer at the expense of everyone else.<sup>73</sup>

Many commentators decry that “regulatory mechanisms have not kept pace”<sup>74</sup> and consumers are hurt as platform businesses avoid established regulations and “typically operate outside them.”<sup>75</sup> Most of all, some assert that platforms do not simply rise by avoiding regulatory compliance, but that growth is instead directly linked to the desire of businesses to avoid the laws and economic practices designed to enhance employee welfare, such as long-term employment, liability and insurance, and product quality control, all of which create the bedrock of twentieth century business practices. For example, progressive economist Dean Baker views the platform as “largely based on evading regulations and breaking the law,” subjecting consumers to substandard, and often unsafe, products and services.<sup>76</sup> Speaking directly to the utopian/dystopian duality, Anthony Kalamar has coined the term “sharewashing,” in which platform companies, under the guise of the misleading term “sharing economy,” shift liability and risk onto employees and consumers.<sup>77</sup> Others similarly contend, “There is little doubt that

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72. See, e.g., Rosie Neve, *A Sharing Community: It Takes a Village*, INDEPENDENT (Dec. 16, 2013), <http://www.independent.co.uk/life-style/health-and-families/features/a-sharing-community-it-takes-a-village-9008977.html> (discussing examples of communities uniting).

73. See, e.g., Richard Eskow, *Rise of the Techno-Libertarians: The 5 Most Socially Destructive Aspects of Silicon Valley*, SALON (Apr. 12, 2015), [http://www.salon.com/2015/04/12/rise\\_of\\_the techno\\_libertarians\\_the\\_5\\_most\\_socially\\_destructive\\_aspects\\_of\\_silicon\\_valley\\_partner](http://www.salon.com/2015/04/12/rise_of_the techno_libertarians_the_5_most_socially_destructive_aspects_of_silicon_valley_partner).

74. Molly Cohen & Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J., Spring 2014, at 6.

75. Alexandra Chang, *Regulation Won't Kill the Sharing Economy. We Just Need New Rules*, POPULAR SCI. (July 8, 2014), <http://www.popsci.com/article/technology/regulation-wont-kill-sharing-economy-we-just-need-new-rules>.

76. Dean Baker, *Don't Buy the 'Sharing Economy' Hype: Airbnb and Uber Are Facilitating Rip-Offs*, THE GUARDIAN (May 27, 2014), <http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation>.

77. Anthony Kalamar, *Sharewashing Is the New Greenwashing*, OPEDNEWS (May 13, 2013), <http://www.opednews.com/articles/Sharewashing-is-the-New-Gr-by-Anthony-Kalamar-130513-834.html>.

the pro-sharing discourse is blind to the dark side of these innovations.”<sup>78</sup> The contrasting voices, celebrating or denouncing the rise of the platform, are difficult to reconcile. At the same time, a consensus emerges from the heated debate: a paradigmatic shift is underway and its costs, benefits, and legal implications are still unsettled.

## II. PRINCIPLES OF THE PLATFORM

### A. TRANSACTION COSTS REVOLUTION

Can this new set of marketplaces continue to make admirable profits while enabling the casual owner to monetize possessions or skills that were otherwise collecting dust? –Mike Jones, *Forbes*<sup>79</sup>

In 1960, R.H. Coase first wrote about the inherent inefficiencies in the market, sourced in the high transaction costs incurred throughout the stages of a deal: “[O]perations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.”<sup>80</sup> Transaction costs include search and information costs for who and what to deal with; negotiation and decision costs, which include bargaining for the terms of the deal, reaching an agreed upon price, and drafting the contract; and monitoring and compliance costs necessary for successfully carrying out the terms of the deal.<sup>81</sup> In other words, transaction costs can be classified into three categories that correlate with the three stages of pre-deal, deal-making, and post-deal: (1) search costs; (2) bargaining and decision costs; and (3) policing and enforcement costs.<sup>82</sup> Each stage relies on information to reduce costs. The platform, which increases connectivity, access to information, and the application of advanced technology to every aspect of a deal, impacts the relevant transaction costs at all three stages. As

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78. JULIET SCHOR, GREAT TRANSITION INITIATIVE, DEBATING THE SHARING ECONOMY 11 (2014).

79. Mike Jones, *How Capitalism and Regulation Will Reshape the Sharing Economy*, FORBES (Oct. 9, 2013), <http://www.forbes.com/sites/ciocentral/2013/10/09/how-capitalism-and-regulation-will-reshape-the-sharing-economy/#d4c6a19e8a8b>.

80. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–16 (1960).

81. *Id.* at 15; Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 549 (1981).

82. Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979).

the platform grows, efficiencies grow as well. In a systemic way, the market, quite simply, is perfecting.

The platform is driven first and foremost by a combination of technological advancements. In less than a decade, total Internet access has grown by over 500 percent.<sup>83</sup> Most American consumers have at least one mobile device with access to high-speed networks, GPS, and smart apps. Most of the Western world now has Internet access, and the developing world is rapidly gaining access as well. Analysts predict 50 billion mobile wireless devices will connect to the Internet by 2020.<sup>84</sup> With more users, as well as enhanced matching algorithms, pricing software, resource division to tailor each deal, and data mining to monitor the exchange, transaction costs are reduced dramatically.

This Section presents ten fundamental principles of the platform economy. They include the shift from ownership to access (*proprietas* to *usus*), the monetization of excess, the reduction of overhead, and the extension of the life cycle of products. These principles also include the dynamic use of pricing algorithms and rating data. A platform company need not embody all ten principles but as a general matter, these principles represent the revolutionary nature that characterizes the platform. As will be described in Part II.B, beyond the platform's efficiency enhancing principles, the rise of the platform economy is also driven by shifting preferences, including an increased desire for choice and variety, an authentic experience, the reduction of one's carbon footprint, and a general anti-corporate sentiment. Whether the platform actually offers what it sells is, at least in part, separate and distinct from the question of what it is selling: a lifestyle filled with authentic unique experiences, responsible green consumption, social connectivity, and consumer empowerment.

#### 1. Economies of Scale

In the industrial era, corporate structures allowed markets to scale. The scale of informal exchanges was small and left unregulated. As platform companies enter to compete with established industries, they are increasingly taking a lion's share of their *anti-industry*. Perhaps counterintuitively, the rise in

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83. DAVE EVANS, CISCO INTERNET BUS. SOLS. GRP., *THE INTERNET OF THINGS: HOW THE NEXT EVOLUTION OF THE INTERNET IS CHANGING EVERYTHING* 3 (2011).

84. *Id.*

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wireless technology and the expansion of online connectivity has allowed a return, in some ways, to the pre-industrial village—bartering, sharing, and other direct individual-to-individual monetized exchanges. Despite this retro feel, however, the platform village is nothing like the physical village. Rather, platform companies connect strangers on a highly intense global scale. That potential to connect users all around the world digitally is unprecedented.

## 2. No More Waste

A key principle of the platform is putting idle capacity to work. The platform enables a more efficient use of private resources. People shelve most assets for the majority of the time they own that product. Cars are driven less than eight percent of the day.<sup>85</sup> The lawn mower is used once every two weeks. The spare bedroom is occupied only twice a year when the in-laws visit. Still on the supply side, with downturns in the labor market and high unemployment rates, many seek to fill up their free time and leverage their flexibility to earn extra income. In other words, the platform resurrects dormant capital—be it tangible products or human capital.<sup>86</sup> This includes dormant labor capacity both in the form of downtime and as skills people have but could not previously monetize. Many people are good cooks, handymen, home-designers, computer whizzes, artists, or writers but do not use those skills professionally. The platform economy gives people who have developed a skill unrelated to their main source of income the ability to commercialize that skill. In other words, supply is increased by adding underutilized assets into the market and, in turn, costs are reduced.

## 3. Tailoring the Transactional Unit

Platforms are also ushering the end of idle capacity by allowing users to slice up time and space into smaller units. The platform breaks down both supply and demand into tiny modalities: short-term rentals, a few minutes of personal assistance, a couple of hours of furniture installation, or an evening a week enjoying an amateur chef's dinner at her private home. There

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85. See Paul Barter, "Cars Are Parked 95% of the Time." *Let's Check!*, REINVENTING PARKING (Feb. 22, 2013), <http://www.reinventingparking.org/2013/02/cars-are-parked-95-of-time-lets-check.html>.

86. Daniel M. Rothschild, *How Uber and Airbnb Resurrect 'Dead Capital,'* ÜMLAUT (Apr. 9, 2014), <https://www.theumlaut.com/2014/04/09/how-uber-and-airbnb-resurrect-dead-capital>.

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is efficiency in renting a car for an hour rather than for a day; in crashing on someone's couch rather than getting your own hotel room; and in renting a house together with two other families instead of three suites at an established resort. Digital technology facilitates these smaller exchanges, a feature Yochai Benkler has termed "granularity,"<sup>87</sup> which would otherwise be impossible without instantaneous communication among millions of individuals. The platform allows services and products to be rented out by the minute, resulting in an extremely small transactional unit.

#### 4. We Are All Capitalists Now

Sharing is growing exponentially, but it is not free. True, the platform offers bartering (Babysitting Co-ops), gifting (Freecycle and Kashless), and swapping (thredUP and SwapTree) options, but even those exchanges formalize and systemically record previously informal exchanges. The lion's share of exchanges on the platform, however, is based on the price of renting, trading, servicing, and lending. In fact, in many ways, the platform tilts the balance away from altruistic/communal interactions to marketable/commodified exchanges. Imagine the monetization of everything. From a Coasean transaction cost perspective, quite intuitively, uber-capitalization is another way in which supply increases, resulting in reduced costs for consumers. At the same time, there are, of course, costs to monetizing everything: your leisure time, your friendships, and your private home. The platform takes the saying that everything, and *everyone*, has a price quite literally.

#### 5. From Prêt-à-Porter to the People's Haute Couture

In the wake of several economic downturns, consumers are demanding more competitive prices and smaller packaging of their services. They are also demanding more input into the metrics of what they consume. The platform promises to end the conflict between non-tailored supply and specific demands. As offerings become extremely disaggregated, consumers can find exactly what they were looking for: renting a non-smoking, pet-friendly, Kosher, and partly furnished apartment for three nights in a specific neighborhood, with specified features, and

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87. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 100 (2006).

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at a specific cost. In other words, the platform facilitates better customization of the terms and conditions of the transaction to fit individual needs with a new degree of specificity.

#### 6. Access over Ownership

Zero waste and the resurrection of dead capital are achievable because consumption culture has shifted from being dominated by acquisition into a mindset of access. Owning a car is not as important as the ability to use one when needed. Consumers don't feel a need to purchase the lawn mower, and are instead satisfied just knowing that one is there when the grass has grown. In particular, as population density and urbanization continue to rise, congestion and smaller spaces push consumers to place access above ownership. This shift from ownership to access further reduces transaction costs by reducing the stakes of the deal. Purchasing an annual membership in a car sharing platform is not as weighty of a deal as buying a car, and purchasing use of a car for an hour is not as costly as renting it for a day.

#### 7. Less Overhead

The platform has further decentralized transactions by reducing intermediation. No more middleman, besides—of course—the platform. Direct exchanges between private individuals are not new, but they are happening on an unprecedented scale. Technology allows private parties to coordinate directly without the need of anything beyond the software. As described in Part I, while the business models of platform companies vary significantly, many platform companies charge around fifteen percent for each transaction they facilitate. This overhead is far smaller than when off-line companies offer similar services in their respective industries. Online companies have far fewer expenses than their off-line counterparts: they do not own the assets they broker or employ the people who exchange their labor. Nevertheless, as we shall see, the question of cost is inextricably tied to the question of regulation. Costs inevitably increase if, for example, Uber is legally deemed to be an employer of all the drivers it connects to passengers.

#### 8. Reduced Barriers to Entry

The platform economy encourages new entrants into industries long entrenched with incumbents. Due to the reduction in

overhead, start-up costs to compete digitally are low. All you need is a domain name and website. By providing marketplaces of programmers, the platform has also lowered even these minimal setup costs. At the same time, the platform's reliance on scale and trust creates first mover and mass-scale advantages for some, which suggests that we might witness recentralization, even as the platform allows decentralization.<sup>88</sup> Even more importantly, there are virtually zero start-up costs to become a user/provider, essentially a micro-entrepreneur, on one of the existing platforms. Thus, the platform is fundamentally changing the way we exchange and interact as market actors. If you want to test out your abilities as a chef or a bed and breakfast host, you simply list your services on an existing platform and wait for an offer.

### 9. Pricing Precision

When it was first founded, Airbnb realized that choosing a price was the most difficult stage in the listing process for private hosts. Now Airbnb uses a sophisticated series of algorithms to suggest pricing. It developed a model for providing dynamically tailored price recommendations based on location, likeness to other properties, and time of the year.<sup>89</sup> The model takes into account variables like the temperature at any given time as a proxy for seasonality.<sup>90</sup> Similarly, Uber prices rides dynamically, offering discounts when demand is lower while raising prices in peak hours.<sup>91</sup> Uber's "dynamic" or "surge" pricing model adjusts to increase driver efficiency, which gives more incentives for supply when demand is high.<sup>92</sup> These sophisticated pricing algorithms, which continue to evolve through systemic learning, allow for a more accurate valuation of goods and services, and reduce both negotiation and uncertainty costs in striking the deal.

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88. Deven R. Desai, *The New Steam: On Digitization, Decentralization, and Disruption*, 65 HASTINGS L.J. 1469, 1470 (2014). This is partly why Uber, Airbnb, and other major players appear to be pushing for being taxed, as they now become wary of newcomers. *See infra* Part III.

89. ALLEN & BERG, *supra* note 62, at 21.

90. *Id.*

91. Rafi Mohammed, *Regulation Is Hurting Cabs and Helping Uber*, HARV. BUS. REV. (July 9, 2014), <https://www.hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber>.

92. Dan Hill, *OpenAir: Algorithmic Pricing*, AIRBNB (May 7, 2014), <http://nerds.airbnb.com/openair-algorithmic-pricing>. On the controversies surrounding Uber surge pricing, see *infra* Part III.B.3.

## 10. Dynamic Information

Asymmetrical access to information greatly increases transaction costs. Consumers do not know the quality of the experience they are paying for until they consume it; individuals are not familiar with the service they paid for until after they complete the transaction. Platforms combat this by offering dynamic ratings, reviews, and information, which reduce uncertainty and strengthen consumer confidence. It also reduces monitoring costs as the certainty that one will receive a bad review creates *ex ante* incentives to comply with the terms of the deal. As will be discussed at more length in Part IV, the same technological factors that dramatically reduce transaction costs of search and negotiation also enable dynamic quality monitoring, transparency, record-keeping, and data-mining that reduce information asymmetry between providers and consumers, building confidence in the deal. This confidence increases over time as interlocking networks in the platform mature.

### B. MARKET CHALLENGING OR MARKET CREATING?

In large part, the battle over definitions, boundaries, and regulation depends on understanding the economic logic of the platform. Are new platform companies successfully competing within established, regulated industries because they are introducing new business models and creating a substantively different economic transaction, or because they seek regulatory avoidance and generate value from such avoidance? Even if they do not actively avoid regulations, the answer to whether to extend existing regulations to the platform depends on whether these new companies are, at their core, essentially similar to the industries they disrupt. In other words, even when we recognize the economic logic of reducing transaction costs as the core essence of the rise of the platform, we still need to answer whether a platform company is either competing within an existing industry or carving out a new market. To this end, it is important to recognize the difference between market competition and market differentiation. Adding to the complexity of the regulation-innovation nexus at the heart of the platform economy is the fact that the platform is doing both: perfecting and changing existing markets, as well as creating new ones.

In economics, “differentiation,” or “dynamic competition,” refers to ways in which businesses compete, not simply over

pricing, but over the kind of services and products offered.<sup>93</sup> The platform offers new experiences and shapes new preferences. Take, for example, Uber and Lyft. At Uber, drivers add amenities to their cars, such as bottled water, tissues, or hard candy. The transactions are cashless and tip-less,<sup>94</sup> which is not only meant to ensure convenience but also a sense of safety—and perhaps a sense of trust and social connection by partially obscuring the monetary aspect of the exchange. In lifestyle consumption, such small differences matter and can modify the experience. At Lyft, passengers ride shotgun with the drivers, communicating a message of both parity and community inclusion. Ride-hailing platform companies also compete with ride-sharing apps, in which people join drivers on their way to a shared destination, which is even further along on the differentiation spectrum. This latter experience is one more akin to carpooling, even if it is mediated through the platform and carries a price tag. The use of this platform to facilitate transactions is not only about saving money, but also carries the meaning of the environmentally responsible practice of reducing the number of cars on the road.

Lifestyle and social meaning are important to the platform. At the broadest level, the matching system provides a sense of community, which maps onto a contemporary anti-corporatist sentiment. People value the idea of paying the provider directly, even if the platform takes a cut: “[n]o matter how well trained service employees might be, everyone is nicer when they’re dealing with customers directly. Even customers. Nearly everyone who stays at an Airbnb rental, for instance, hangs up their bathroom towels after they use them.”<sup>95</sup>

The distinct experience of exchange through the platform is significant if it changes the nature of the transaction, rather than simply adding a competitor to the existing market. The societal factors for the rise of the platform economy are multiple. Consumers convey a preference for a different kind of mar-

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93. Israel M. Kirzner, *Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach*, 35 J. ECON. LITERATURE 60, 64 (1997).

94. As a result of the class action lawsuits against Uber by drivers who claimed among other things that Uber violated state law by not transferring to them tips which users believed were included in the transportation fare, Uber now allows drivers in Massachusetts and California to post signs saying tips are appreciated. See, e.g., Stephanie Rosenbloom, *To Tip or Not To Tip Your Uber Driver*, N.Y. TIMES (May 18, 2016), [http://www.nytimes.com/2016/05/22/travel/uber-taxi-tipping.html?\\_r=0](http://www.nytimes.com/2016/05/22/travel/uber-taxi-tipping.html?_r=0).

95. Stein, *supra* note 18.

ket exchange. For example, the rise of lodging platforms such as VRBO, Homeaway, and Airbnb can be linked to a sense of adventure in renting a home directly from its owner, rather than staying at a generic hotel chain. Foodies enjoy the idea of eating at the private home of an aspiring chef and being the first to discover the “new, new thing.” The fact that consumers are choosing with their feet and reporting a preference for the choices presented by platform companies is evident by the sheer number of users.<sup>96</sup>

At the same time, the choices and preferences are themselves formed by the embedding of the platform into our everyday life. Consider Airbnb. Studies find that consumers who use Airbnb stay on vacation longer than they would if they stayed at a hotel, and some guests would not have gone on a vacation at all without access to the lodging platform.<sup>97</sup> Airbnb commissioned a study that found that Airbnb rentals are cheaper than hotels, leading people vacationing in California to stay longer and spend on average thirty-one percent more than hotel guests.<sup>98</sup> The study also found that fourteen percent of customers would not have visited San Francisco at all if an Airbnb stay was unavailable.<sup>99</sup> In other words, the platform incited their consumption rather than merely providing an alternative brand within an existing consumer market. Similarly, the platform may go beyond fostering affordability and actually legitimize hiring a personal assistant, dog walker, driver, tutor, or personal chef; purchases that would otherwise seem awkward and unseemly to many people in an offline world. Web 3.0 is transforming the lifestyle of the masses, rather than simply facilitating better matches for a static equilibrium of supply and demand. The platform is generating a different set of preferences and thereby reconfiguring markets.

The behavioral aspects and preference formation in the platform can help explain the variance in the level of pushback

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96. Matthew Mitchell, *An Uber Challenge to Tacky Taxis*, WASH. TIMES (Aug. 28, 2013), <http://www.washingtontimes.com/news/2013/aug/28/an-uber-challenge-to-tacky-taxis>; Jeremiah Owyang, *People Are Sharing in the Collaborative Economy for Convenience and Price*, WEB-STRATEGIST (Mar. 24, 2014), <http://www.web-strategist.com/blog/2014/03/24/people-are-sharing-in-the-collaborative-economy-for-convenience-and-price>.

97. Tomio Geron, *Airbnb Had \$56 Million Impact on San Francisco: Study*, FORBES (Nov. 9, 2012), <http://www.forbes.com/sites/tomiogeron/2012/11/09/study-airbnb-had-56-million-impact-on-san-francisco/#4b1ba7824c2b>.

98. *See id.*

99. *Id.*

from established industries reacting to different platform disruptions. Juxtaposing the taxi industry for ride-sharing, and the hotel industry for home-sharing, the hotel industry has been much less averse to Airbnb compared to the taxi industry's reaction to Uber/Lyft.<sup>100</sup> At least in part, the difference can be explained by the elasticity in each of the markets, and whether the platform presents direct competition. In general, Airbnb competes more directly with bargain and boutique independent hotels, while luxury hotels and bigger hotel chains, which cater to business clients, are less affected. A recent study examining the impact of Airbnb on the hotel industry finds only a small, statistically insignificant negative effect of Airbnb on upscale hotels.<sup>101</sup> The study concludes that “[Airbnb’s] impact is non-uniformly distributed, with lower-priced hotels, and those hotels not catering to business travelers being the most affected” segments and that affected hotels have responded by reducing prices, “an impact that benefits all consumers, not just participants in the sharing economy.”<sup>102</sup>

At the same time, as we saw above, Airbnb is also changing consumption patterns more fundamentally, helping consumers imagine their dream vacations, plan trips that would not otherwise be planned, and stay longer at new cities. Indeed, the paradigmatic shift enabled by the platform, from ownership to access, maps onto contemporary social psychology research showing that expenditures on experiences result in greater happiness than purchases of tangible goods.<sup>103</sup> These changing patterns of experience consumption are endogenous to the rise of the platform economy and can help explain how business models such as Airbnb and Uber disrupt more than one industry. They reconfigure a range of industries by altering basic patterns of supply and demand and shifting incentives previously associated with traditional purchasing decisions. Rather than simply competing with the hotel industry, Airbnb inter-

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100. Joe Kutura, *Why the Hotel Industry Doesn't Really Mind Airbnb*, PULSEPOINT (Feb. 25, 2015), <http://www.create.pulsepoint.com/article/100003570>.

101. Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 22 (B.U. Sch. of Mgmt. Res., Working Paper No. 2013-16, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366898](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898).

102. *Id.* at 1.

103. James Hamblin, *Buy Experiences, Not Things*, THE ATLANTIC (Oct. 7, 2014), <http://www.theatlantic.com/business/archive/2014/10/buy-experiences/381132>.

venes in the hotel and real estate industries, rentals, and titles in ways that shift the balance between these related industries. The same holds true with Uber. It is creating disruption across the taxi, car rental, *and* car seller markets.

Experiences in the platform are tailored and frequently emphasize lifestyle. The platform, especially as it is still forming, often has the appeal of offering exclusive, hip, edgy, exciting, and unusual experiences, while—ironically—also providing a sense of community, openness, and bottom-up expansion.<sup>104</sup> The anti-corporate, anti-ownership streak provides ephemeral value to consumers, further helping explain the rapid rise of the platform. People view platform companies as positively affecting anti-competitive forces: a rejection of corporate concentration, an anti-establishment, underground, or fringe experience. No doubt, as the platform grows, much of it will become mainstream, and concentration will happen in the digital world as well. Moreover, again paradoxically, the anti-corporate streak also has, in some platform exchanges, an elitist undertone. A secret (and pricey) non-restaurant culinary dining event set up through the platform can be characterized as skyboxification—grunge for the rich.<sup>105</sup> Still, platform companies position themselves as experiential, de-centralized, pro-amateur, and crowd-based. There is an overarching ethos of newness, innovation, and empowerment.

This play between exclusive and for-the-masses, amateur and professional, retro and new are all at the core of what the platform is selling. Whether or not any one descriptive feature reflects the realities of platform companies is not insignificant, but it is not the whole inquiry. The consumption experience itself matters. Moreover, the realities of the platform economy will continue to be shaped, in part, by how closely governments regulate them in relation to regulated industry competitors. In other words, the framework itself is unstable and normatively dependent on the answers we provide as legal theorists and policymakers.

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104. See generally RACHEL BOTSCHAN & ROO ROGERS, *WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* (2010) (tracing the development of the sharing economy and the motivations behind it).

105. Michael Sandel, *What Money Can't Buy: The Skyboxification of American Life*, HUFFINGTON POST (Apr. 20, 2012), [http://www.huffingtonpost.com/michael-sandel/what-money-cant-buy\\_b\\_1442128.html](http://www.huffingtonpost.com/michael-sandel/what-money-cant-buy_b_1442128.html) (last updated June 20, 2012).

### III. CONTESTED GROUNDS OF THE PLATFORM: OWN NO EVIL, EMPLOY NO EVIL, DIRECT NO EVIL

#### A. LAW AS ENABLER AND INHIBITOR

Much of [Uber's] spectacular growth has been fueled by outdated regulation. –Rafi Mohammed, *Harvard Business Review*<sup>106</sup>

There were laws created for businesses, and there were laws for people. What the sharing economy did was create a third category: people as businesses. –Brian Chesky, co-founder, Airbnb<sup>107</sup>

Some are sad. And some are glad. And some are very, very bad. –Dr. Seuss<sup>108</sup>

It is an age-old debate. Does law aid or hinder innovation? New technologies present new opportunities and new challenges for regulation. The rise of the platform adds new types of risk, implicating liability laws, consumer protection laws, insurance laws, employment and labor laws, and property and zoning laws. But they also provide new ways to address some of the very same social goals that law has attempted to reach. We are accustomed to thinking in terms of a new industry followed by a new set of regulations, but market innovation also offers an opportunity for more foundational thinking about the role of regulation. New economic models push for new legal processes. The platform economy has introduced innovation in services, entrepreneurship, and the way we work. When manufacturing rose in the industrial era, New Dealers added new regulations, such as safety standards for the auto industry. During the era of the Great Society, trans-industry agencies including OSHA and the EPA were formed, introducing further regulations, often built on and adopted from industry self-standards.<sup>109</sup> In cycles of both financial crisis and technological leaps, markets readjust, new types of transactions are introduced, and in turn new forms of regulation are adopted. Even beyond external economic and social forces, in considering the law as a more closed system, scholars have observed repeated internal cyclical

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106. Mohammed, *supra* note 91.

107. Andy Kessler, *Brian Chesky: The 'Sharing Economy' and Its Enemies*, WALL ST. J. (Jan. 17, 2014), <http://www.wsj.com/articles/SB10001424052702304049704579321001856708992>.

108. DR. SEUSS, ONE FISH, TWO FISH, RED FISH, BLUE FISH 6–7 (1988).

109. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 415 (2004).

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conversions between over- and under-regulation, especially when disruptive business models are introduced.<sup>110</sup>

The goals of regulation are multiple. Regulation can involve correction of market failures and incentivization of competition. Regulation can be designed to address public safety, quality control, privacy, access, equality, fairness, and distributional concerns. All regulations are presumed to enhance the public welfare, but a realistic understanding of regulation in action is that not all regulation is equally situated in this regard. Public choice theory and regulatory capture help explain barriers to entry that do not contribute to overall welfare.<sup>111</sup> Other regulations are simply outdated, and based on incorrect economic and scientific presumptions, or their goals are otherwise achievable through more efficient and accurate means.

The regulatory questions raised by the rapid rise of the platform are expansive. They span the entire map of the legal world, including work, tax, safety and health, quality and consumer protection, intellectual property, zoning, and anti-discrimination. The following Section identifies clusters of regulatory logic. The platform economy pushes us to look at the world of regulation with fresh eyes and to analyze regulatory requirements with these categories in mind. Laws that do not promote welfare but rather protect entrenched interests are easy cases. On this end of the spectrum, the Article identifies many permitting and licensing laws as well as price controls. Tax laws are a similarly easy case because these laws continue along the same logic as in the pre-platform offline market. The hardest cases are regulations that are about fairness, externalities, and normative preferences in a democratic process. These include consumer protection laws, quality and safety controls, zoning laws, employment laws, and intellectual property laws.

## B. EASY CASES: COMPETITION AND BARRIERS TO ENTRY

The traditional way is you can't do it unless you get a license. That made sense up until we had data. Now the starting point is yes.  
—Nick Grossman, Union Square Ventures<sup>112</sup>

### 1. Permitting

There are regulations that enhance public welfare and there are those that enhance the interests of lobbyists, rent-

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110. *See id.* at 367.

111. *See generally id.*

112. Stein, *supra* note 18.

seekers, and entrenched interests.<sup>113</sup> In the transportation market, the taxi industry has claimed that Uber, Lyft, and other transportation platform companies circumvent the regulations and licensing fees with which taxicab companies must contend. In February 2015, the Broward County Commission in Florida voted to regulate ride-sharing services the same way taxis are regulated.<sup>114</sup> As a result, Uber and Lyft will be required to obtain the same certificates as taxis and limousines.<sup>115</sup> In 2014, the Pennsylvania Public Utility Commission held separate hearings for Lyft and Uber to decide whether the companies should be granted permanent licenses to operate statewide.<sup>116</sup> Similar hearings are underway around the country and across the world. In other states, like Texas, Uber and other ride-sharing services have been essentially shut out by rules governing limo services that restrict charging riders based on time elapsed or distance traveled.<sup>117</sup>

At the federal level, Senate Bill 1457 was introduced by Senator Wayne Fontana in 2014 to create a new category of a transportation company, offering legal status for ride-sharing companies.<sup>118</sup> Such an effort rejects the application of the stringent permitting requirements imposed on traditional transportation industries and looks at the platform as a new emerging market. Similarly, in California, the Public Utilities Commission reached an agreement to allow ride-sharing companies to operate while it weighs proposals that would make them full-fledged, legally operating “transportation network compa-

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113. See George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (developing the concept of capture theory); see also Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 103 (1987) (discussing “how politicians reap returns first by threatening and then by forbearing from extracting private rents already in existence”).

114. Celia Ampel, *Broward County Votes To Regulate Uber, Lyft as Taxi Services*, BUS. J. (Feb. 10, 2015), <http://www.bizjournals.com/southflorida/news/2015/02/10/broward-county-votes-to-regulate-uber-lyft-as-taxi.html>.

115. *Id.*

116. *Motor Carriers*, PA. PUB. UTIL. COMM’N, [http://www.puc.state.pa.us/consumer\\_info/transportation/motor\\_carrier/applications.aspx](http://www.puc.state.pa.us/consumer_info/transportation/motor_carrier/applications.aspx) (last visited Oct. 14, 2016).

117. See Aman Batheja, *Austin Council Approves Stricter Rules for Uber, Lyft*, TEX. TRIB. (Dec. 17, 2015), <https://www.texastribune.org/2015/12/17/austin-city-council-approves-new-uber-regs-uber-th>.

118. Kim Lyons, *PUC Chairman, Commissioners Support Fontana Legislation for Lyft, Uber*, PITT. POST-GAZETTE (Sept. 9, 2014), <http://www.post-gazette.com/business/2014/09/09/PUC-chairman-commissioners/stories/201409090082>.

nies.”<sup>119</sup> This new category would not be regulated identically to taxis but rather would likely involve state licensing, required criminal background checks on drivers, and mandatory insurance coverage more stringent than that required of limo companies. In general, Uber is encouraged in some jurisdictions, including California, Oregon, and Washington, but was initially banned in Nevada, Boise, Brussels, and Berlin, followed by a nationwide ban in Germany.<sup>120</sup>

Attempts at extending permit requirements—what industry interests often call “leveling the playing field” between ride-sharing companies and taxi companies, or between other platform companies and the businesses they disrupt—are generally harmful to the evolution of the platform and to competitive markets more broadly. Under capture theory, industry players extract rent from special permitting, licensing, and other regulatory requirements.<sup>121</sup> By designing around these regulatory rents, platform businesses create value for consumers as well as push incumbents to become more efficient and responsive in novel ways. Requiring taxicab medallions is a paradigmatic example of rents. Here is a striking statistic: in the mid-2000s, there were only 12,779 licensed taxicabs in New York City compared with 21,000 in 1931 when the city had a million fewer inhabitants.<sup>122</sup> Limited grants of permits, especially coupled with regulations such as all transportation cars having to be of the same color (yellow cabs), dramatically reduce incentives and access to compete. While consumers largely benefit from

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119. See Tomio Geron, *California Becomes First State To Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES (Sept. 19, 2013), <http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/#20169cff67fe>; Heather Somerville, *California Public Utilities Commission Probes Uber's Car-Leasing Program*, L.A. DAILY NEWS (Aug. 12, 2015), <http://www.dailynews.com/business/20150812/california-public-utilities-commission-probes-ubers-car-leasing-program>.

120. Zach Kyle, *Uber Defies Boise, Starts Charging*, IDAHO STATESMAN (Dec. 31, 2014); see also Tracey Lien, *Uber Gets Big Win in Nevada as Legislature OKs Bill Authorizing Service, UberX*, L.A. TIMES (May 27, 2015), <http://www.latimes.com/business/la-fi-uber-nevada-20150528-story.html>; Kevin Rawlinson, *Uber Service 'Banned' in Germany by Frankfurt Court*, BBC NEWS (Sept. 2, 2014), <http://www.bbc.com/news/technology-29027803>.

121. See Stigler, *supra* note 113, at 5 (outlining capture theory and industry desire to regulate); see also Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213–14 (1976); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 267–68 (1983).

122. SCHALLER CONSULTING, THE NEW YORK CITY TAXICAB FACT BOOK (2006), <http://www.schallerconsult.com/taxi/taxifb.pdf>.

requiring platform transportation companies to have similar safety and insurance standards as taxis, the same is not true about restrictions on prices, routes, and entry.<sup>123</sup> Instead of permitting, regulators should consider direct regulation of the benefits. This is the model that California regulators seem to be following.<sup>124</sup> If risk reduction is the underlying reason for permit requirements, then technology companies could be deemed liable for accidents and therefore required to provide insurance. As we shall see, there are many other paths to directly increase safety without imposing permit requirements.

## 2. Occupational Licensing

A few decades ago, only five percent of jobs required a license.<sup>125</sup> Now nearly one-third of all jobs require some sort of licensing. Some professional services were historically subject to licensing, such as the law bar and medical boards.<sup>126</sup> More recently, occupational licensing has been extended to such low-skill jobs as hairdressers, manicurists, and restaurant workers. As one group of economists have recently stated: “Occupational licensing has been abused by incumbent market participants to exclude rivals, often in unreasonable ways, and to raise prices. This disturbing trend already costs consumers billions of dollars every year and impedes job growth . . . .”<sup>127</sup>

In July 2015, the White House issued a report prepared by the Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor regarding occupational licensing.<sup>128</sup> The report similarly notes that “[m]ore than one-quarter of U.S. workers now require a

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123. *Taxi Competition*, UNIV. OF CHI. BOOTH SCH. OF BUS. (Sept. 29, 2014), [http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV\\_eyDrhnya7vAPrX7](http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_eyDrhnya7vAPrX7); see also Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 232 (2014) (suggesting that the paperwork and permitting that seem appropriate for a large-scale, centralized business focused on taxi services are a mismatch with the compliance capabilities of individual drivers, proposing instead that general permits might be a useful model, lowering compliance costs while minimizing the harm to the public).

124. See *supra* text accompanying notes 119–23.

125. Stein, *supra* note 18.

126. *Id.*

127. Brief of Antitrust Scholars as Amici Curiae in Support of Respondent at 2, *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2014) (No. 13-534).

128. U.S. DEP’T OF THE TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), [https://www.whitehouse.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

license to do their jobs, with most of these workers licensed by the States.”<sup>129</sup> The report warns that while some licensing is designed to provide safety and professionalism,

The current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job. There is evidence that licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across State lines. Too often, policymakers do not carefully weigh these costs and benefits when making decisions about whether or how to regulate a profession through licensing.<sup>130</sup>

The effects of the accelerated rise in occupational licensing to jobs traditionally open to all workers are anti-competitive and regressive, which negatively impact new entry.<sup>131</sup> Permitting and licensing requirements, price controls, and threshold entry standards are all ex-ante barriers.<sup>132</sup> Like with permitting, ex-post regulations that directly address safety and liability are generally preferable and more conducive to new entry. Ex-post regulations include insurance systems and tort and product liability laws.

### 3. Rate Fixing

In February 2015, the City of Orlando passed an ordinance requiring ride-sharing companies to charge the same rate as taxis, \$2.40 a mile.<sup>133</sup> In general, taxicabs are regulated not only through medallion licensing requirements, which are expensive and hard to get, but also by the rates taxis may charge passengers.<sup>134</sup>

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129. *Id.* at 3.

130. *Id.*

131. Veronique de Rugy, *Occupational Licensing: Bad for Competition, Bad for Low-Income Workers*, MERCATUS CTR., GEO. MASON U. (Mar. 25, 2014), <http://www.mercatus.org/publication/occupational-licensing-bad-competition-bad-low-income-workers>.

132. See Arun Sundararajan, *Why the Government Doesn't Need To Regulate the Sharing Economy*, WIRED (Oct. 22, 2012), <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy> (discussing new models of regulation that developed out of the electronic marketplace).

133. Stephen Hudak, *Uber Vows To Pay Drivers' Fines as Orlando Regulations Kick In*, ORLANDO SENTINEL (Feb. 2, 2015), <http://www.orlandosentinel.com/news/breaking-news/os-uber-orlando-fight-20150202-story.html> (noting that Uber has said that it will pay fines of drivers in Orlando).

134. Mohammed, *supra* note 91 (“Local governments need to understand that consumers view ride sharing services like Uber as close substitutes to taxis. Regulators are doing its residents an injustice by regulating taxi prices (consumers would benefit from a taxi vs. Uber price war)—and in the process

A great innovation of the platform, achieved primarily by technological advancement, is accuracy in linking pricing to supply and demand. As a recent article in the *MIT Technology Review* argues, “Dynamic pricing is the future, even if the road to get there will be bumpy.”<sup>135</sup> Uber’s dynamic pricing, though received with hostility by the media, is designed for more than maximizing profits in the face of increased demand, which most companies, for example the airline industry, do in the face of fixed supply.<sup>136</sup> Rather, because of the nature of the platform, Uber’s surge pricing also operates to increase supply: more drivers turn on their Uber app when they see that the rates have increased. Uber reports that supply of drivers increases by seventy to eighty percent when surge pricing is introduced, and more importantly, it eliminates two-thirds of unfulfilled requests, which demonstrates the magic of the platform economy: supply, as well as demand, is highly elastic.<sup>137</sup> This is a fundamentally responsive market-perfecting model:

Dynamic pricing changes are driven algorithmically when wait times are increasing dramatically, and “unfulfilled requests” start to rise. In essence, there are two functions of the increased price model. One is to increase supply. The second function of the price increase is to temporarily intentionally reduce demand. Through these two mechanisms, the company is able to (a) increase supply, (b) assure reliability, a key tenet of the company, and (c) maximize the number of completed rides.<sup>138</sup>

While economically sound, the technological innovation of dynamic pricing is nonetheless largely in tension with regulatory schemes. Many states have anti-gouging laws that prevent sellers of goods or services from raising prices during times of increased demand, such as after a natural disaster. California limits price increases by retailers after an emergency to ten percent. The goal of anti-gouging laws in this case is to create fairness during times of extreme strife. But when the goal is simply to subvert the market effects of short-term volatility in

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unwittingly fueling Uber’s growth and enriching its stockholders.”).

135. James Surowiecki, *In Praise of Efficient Price Gouging*, MIT TECH. REV. (Aug. 19, 2014), <https://www.technologyreview.com/s/529961/in-praise-of-efficient-price-gouging>.

136. *Id.* (explaining that airlines’ fixed supply led them to institute dynamic pricing that encouraged patrons to book early).

137. Bill Gurley, *A Deeper Look at Uber’s Dynamic Pricing Model*, ABOVE THE CROWD (Mar. 11, 2014), <http://www.abovethecrowd.com/2014/03/11/a-deeper-look-at-ubers-dynamic-pricing-model>.

138. *Id.*

supply and demand, anti-gouging laws are distortive and counter-productive.

#### 4. Tax Collection

A primary concern of local regulators involves whether the platform economy should be taxed at the same levels as competing industries. A central issue for Airbnb has been the question of hotel tax. Airbnb recently paid \$25 million in hotel taxes to the city of San Francisco as backpay to account for the past several years.<sup>139</sup> Other cities have started to demand rent-sharing hosts pay taxes.<sup>140</sup> For example, New York and Portland require people who rent their homes to add local hotel taxes to visitors' bills.<sup>141</sup> San Diego requires anyone who owns, operates, or manages rental properties to charge rental unit business taxes. This includes hotels, motels, and any property that is advertised or rented during the calendar year.<sup>142</sup>

Airbnb claims that it benefits cities in multiple ways. First, Airbnb claims it can collect millions in hotel occupancy taxes this year, and the number would continue to increase each year. Moreover, Airbnb claims that the platform generates multiple millions of dollars more in economic activity in cities in which it has listings. When renters stay at an Airbnb location, they are often staying in local neighborhoods, eating at local restaurants, and shopping at local vendors.<sup>143</sup>

Tax law is an easy case because it is designed to collect a percentage of profit from economic activities wherever the transactions were generated. The questions of collection are largely technical and require adaptation to new forms of dealing.<sup>144</sup> For pragmatic purposes, it may make sense to make the

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139. Patrick Hoge, *Airbnb Says It Has Paid Back Taxes to San Francisco*, S.F. BUS. TIMES (Feb. 18, 2015), <http://www.bizjournals.com/sanfrancisco/blog/2015/02/airbnb-paid-back-hotel-taxes-san-francisco.html>.

140. *E.g.*, Amina Elahi, *Airbnb To Begin Collecting Chicago Hotel Tax Feb. 15*, CHI. TRIB. (Jan. 30, 2015), <http://www.chicagotribune.com/bluesky/originals/chi-airbnb-chicago-taxes-bsi-20150130-story.html>.

141. Alan Pentico, *Don't Take a Vacation from Subletting Rules*, SAN DIEGO SOURCE (June 16, 2014), [http://www.sddt.com/Commentary/article.cfm?SourceCode=20140616tza&Commentary\\_ID=272&\\_t=Dont+take+a+vacation+from+subletting+rules%23.VPAfZEvBFuY](http://www.sddt.com/Commentary/article.cfm?SourceCode=20140616tza&Commentary_ID=272&_t=Dont+take+a+vacation+from+subletting+rules%23.VPAfZEvBFuY).

142. *Id.*

143. Tim Logan, *As L.A. Weighs Regulation, Airbnb Touts Its Economic Impact in City*, L.A. TIMES (Dec. 4, 2014), <http://www.latimes.com/business/la-fi-airbnb-touts-its-impact-in-la-20141203-story.html> (reporting Airbnb's estimated total economic impact in L.A. at \$312 million in 2014).

144. *See, e.g.*, Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transpor-*

platform provider, rather than individual user, responsible for tax collection based on convenience and efficiency. Effectively, under current definitions, for the enterprise to avoid falling under the pertinent state regulatory scheme, the provider must be considered a pure broker of information rather than one of goods or services.<sup>145</sup> This avoids defining the enterprise in a manner that makes state regulation applicable (i.e., Airbnb doesn't provide hotel rooms; rather, it provides information to prospective guests and advertisements for hosts). In requiring the provider to collect and pay taxes derived directly from the end consumer, the state could be seen as implying that the platform provider is in fact the service provider, with the agent at the point of sale an employee. However, regardless of potential implications to the harder questions of liability, consumer protection laws, and employment protection laws, tax collection by the platform company may well be the most adequate and practical solution. As such, platform companies can become regulatory facilitators using their technological capacities to collect, as well as provide audited evidence of compliance in the era of decentralized peer-to-peer transactions. Importantly, the question of tax collection should thus be delinked from the definitional questions embedded in other bodies of law discussed below. Indeed, one insight emerging from a fresh look at the innovation-regulation framework mandated by the platform economy is that, rather than lumping all regulatory questions together and attempting to answer them as one, different regulatory bodies should be examined separately and with purpose.<sup>146</sup>

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*tation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 69 (2015); see also Martin Sullivan, *Tax Challenges for the Uber Economy*, FORBES (July 4, 2015), <http://www.forbes.com/sites/taxanalysts/2015/07/14/tax-challenges-for-the-uber-economy>.

145. Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 1032–34 (2016); Mitch Lipka, *How the Sharing Economy Makes Tax Filing Tougher*, TIME (Apr. 15, 2015), <http://www.time.com/3822148/sharing-economy-taxes-uber-lyft>.

146. See generally 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> (describing the benefits of treating short term rental services, such as Airbnb, differently than rideshare services, such as Uber and Lyft).

## C. HARD CASES: PUBLIC WELFARE IN THE PLATFORM

## 1. The Experience Economy: Does Airbnb Violate Zoning Laws?

City officials fear lodging platform companies like Airbnb will negatively affect residential life.<sup>147</sup> While some cities are attempting to limit the lodging platform, others cities are changing their zoning laws to increase certainty and enable the rise of new lodge-sharing models.<sup>148</sup> Zoning laws have multiple purposes. They attempt to keep residential areas quiet, clean, and safe, all of which can be at risk when increasing the number of transient users in these areas.<sup>149</sup> They also may be designed to increase a sense of neighborhood community and local familiarity.<sup>150</sup> Zoning laws can also have population planning goals such as rent stabilization and an increase in the availability of affordable housing for students.<sup>151</sup>

On February 1, 2015, a new city ordinance took effect in San Francisco that regulates vacation rentals in private homes.<sup>152</sup> The law legalizes vacation rentals in private homes and restricts them to permanent residents who must register in person with the city's planning department.<sup>153</sup> Additionally, vacation rentals are limited to ninety days a year for entire-home rentals.<sup>154</sup> Previously, residential rentals of less than thirty days were illegal, though the rule was only loosely enforced.<sup>155</sup>

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147. See generally Julie Bort, *San Francisco Makes Airbnb Legal at Last*, BUS. INSIDER (Oct. 10, 2014), <http://www.businessinsider.com/san-francisco-makes-airbnb-legal-at-last-2014-10> (discussing how local legislatures are responding to the growing popularity of services such as Airbnb).

148. Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 931–34 (2015) (describing the range of local legislative responses to lodging platform companies).

149. Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. REG. 91, 115–17 (2011) (detailing the progression of how zoning laws have been addressed, interpreted, and justified by various federal courts).

150. *Id.*

151. For examples of how zoning laws achieve these ends, see Rolf Pendall, *From Hurdles to Bridges: Local Land-Use Regulations and the Pursuit of Affordable Rental Housing*, JOINT CTR. HOUSING STUD. HARV. U., 4–5 (2007).

152. *Office of Short-Term Rental Registry & FAQs*, CITY & COUNTY OF S.F. PLAN. DEP'T, <http://www.sf-planning.org/office-short-term-rental-registry-faqs> (last visited Oct. 14, 2016).

153. *Id.*

154. *Id.* This 90-day limit only applies when the owner of the home is not present during the time that the guests are renting the property.

155. Bort, *supra* note 147.

The law is not only designed to allow short-term private rentals but also to dissuade non-locals from buying San Francisco properties strictly for the business of short-term rentals.<sup>156</sup> A housing shortage in San Francisco influenced the latter restriction, such that the law will keep San Francisco homes available for permanent residents.<sup>157</sup> Although the law has barely taken effect, many are already seeking tighter regulation of the lodging platform, such as an amendment that would allow affordable housing nonprofits to directly sue private hosts who break the law.<sup>158</sup>

Others are advocating new legislation that “would create new insurance requirements for tenants who proceed with converting their residence into a vacation rental.”<sup>159</sup> The insurance would be “similar to what is offered to lodging and bed and breakfast companies, removing a landlord’s liability for personal injury and property damage done by a subletter.”<sup>160</sup> Other local lawmakers, in cities such as San Diego, are pushing for legislation that would maintain zoning laws and the pre-platform “stable and familiar feel of many residential neighborhoods.”<sup>161</sup> Airbnb has been deemed in some legal disputes around the country to violate local hospitality regulations, condominium board rules, and other limitations on short-term housing usage.<sup>162</sup> Criticism of Airbnb comes from many directions: angry hosts who found themselves the subjects of fines

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156. See generally Mayor Lee Announces New “One-Stop Shop” Office of Short-Term Rental Administration & Enforcement, CITY & COUNTY OF S.F. PLAN. DEPT (July 2, 2015), <http://www.sfmayor.org/article/mayor-lee-announces-new-“one-stop-shop”-office-short-term-rental-administration-enforcement>.

157. See generally Kopytoff, *supra* note 146 (stating that Airbnb’s “rentals also take affordable housing off the market”).

158. Allen Young, *State Legislation Could Hit Airbnb, Other Rental Sharing Services with New Rules*, SACRAMENTO BUS. J. (Feb. 24, 2015), <http://www.bizjournals.com/sacramento/news/2015/02/24/state-legislation-could-hit-airbnb-other-rental.html>.

159. *Id.*; see also Emily Pedersen, *City Rent Board To Investigate Legality, Effects of Airbnb on City Housing*, DAILY CALIFORNIAN (Feb. 23, 2015), <http://www.dailycal.org/2015/02/23/city-rent-board-investigate-legality-effects-airbnb-city-housing>.

160. Young, *supra* note 158.

161. Hugo Martin, *L.A. To Consider Regulating Airbnb and Other Short-Term Home Rentals*, L.A. TIMES (Dec. 2, 2014), <http://www.latimes.com/business/la-fi-regulating-short-term-home-rentals-20141202-story.html>.

162. Ron Klain, *Airbnb’s Biggest Disruption: America’s Laws*, FORTUNE (Sept. 10, 2014), <http://www.fortune.com/2014/09/10/airbnbs-biggest-disruption-americas-laws> (discussing various legal responses to emerging technologies).

and eviction notices as well as city officials who have received complaints from neighborhoods where disrespectful renters wreaked havoc.<sup>163</sup> The safety, property value, and quality of life sentiments reverberate across local debates.

Compared to San Francisco, New York has been more resistant to the expansion of the lodging platform.<sup>164</sup> New York law prohibits private owners from renting out their apartments for short periods unless they are living in the property.<sup>165</sup> In fact, New York City residential zoning and rent control laws render nearly half of Airbnb rentals unlawful.<sup>166</sup> In 2015, a New York judge upheld a landlord's decision to evict a tenant who was caught leasing out his apartment for more than twice what he was paying his landlord.<sup>167</sup> In particular, New York officials have been searching for illegal hotels in people who rent multiple units on the Airbnb site. New York Attorney General Eric Schneiderman has subpoenaed Airbnb for information regarding 225,000 landlords, alleging that "as many as 75 percent of rentals on Airbnb are illegal under current [New York] law . . . ."<sup>168</sup> Schneiderman has also attempted to get the company to shut down illegal hotels that have been developed by hosts.<sup>169</sup> In an attempt to cooperate with officials to identify hosts who operate de facto hotels rather than temporarily renting out their homes, Airbnb reported 124 hosts to the state attorney's office that Airbnb found to have multiple listings on the site.<sup>170</sup> David Hantman, the Global Head of Public Policy for Airbnb, provided New York with suggested regulations that would stop these de facto illegal commercial hotels.<sup>171</sup> Hantman suggests that first, the city should create tougher penalties for unlicensed hotel operators and amendments that protect regular

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163. Pentico, *supra* note 141.

164. Kopytoff, *supra* note 146.

165. Cf. Ryan Lawler, *As It Seeks New Regulations in NY, Airbnb Estimates It Would Collect \$65 Million in Taxes There*, TECHCRUNCH (Jan. 16, 2015), <https://www.techcrunch.com/2015/01/16/airbnb-65-million-in-ny> (explaining current legal restrictions and advocating a new, broader approach).

166. Jason Clampet, *Airbnb's Growing Pains Mirrored in New York City, Where Half Its Listings Are Illegal Rentals*, SKIFT (Jan. 7, 2013), <http://www.skift.com/2013/01/07/airbnbs-growing-pains-mirrored-in-new-york-city-where-half-its-listings-are-illegal-rentals>.

167. Julia Marsh, *Rent-Stabilized Tenant Evicted After Cashing in on Airbnb*, N.Y. POST (Feb. 20, 2015), <http://www.nypost.com/2015/02/20/rent-stabilized-tenants-who-peddle-their-pads-may-be-evicted>.

168. Lawler, *supra* note 165.

169. *Id.*

170. *Id.*

171. *Id.*

New Yorkers who want to share their homes.<sup>172</sup> Second, the law should be amended to allow owners to share space only in the home in which they live.<sup>173</sup> Third, Airbnb has offered to pay for hosts' hotel and tourist taxes, providing New York with \$65 million that can be used to fund public services in the city, including increasing enforcement activity against illegal hotels.<sup>174</sup> A final suggestion has been that regulations should prohibit residents from making more money through home sharing than they pay in rent each month.<sup>175</sup>

Rejecting the New York approach and embracing similar reforms as in California, the United Kingdom "announced plans to remove laws controlling short-term rentals . . . ."<sup>176</sup> France too has legalized short-term rentals of primary residences.<sup>177</sup> Other international cities are accepting Airbnb but imposing various regulatory controls, such as Amsterdam and Berlin. Amsterdam allows residents to rent out their homes for up to two months of the year to up to four people at a time.<sup>178</sup> Other global cities are reacting similarly to New York, such as Berlin and Barcelona, which have imposed increased restrictions on the operation of Airbnb.<sup>179</sup>

The wisdom emerging from these recent developments and heated debates about the legality of the vast lodging platform is that regulatory controls are often a matter of legitimate social trade-offs and emphasize certain values. The residential nature of a city, the spread of affordable housing, the perceived and actual safety inherent in transient lodging are all questions that must be answered through the democratic process. These are hard questions because there is no one right answer. Most of the time, each choice involves preferring one social value over another. At the same time, the debates need to be based on facts rather than perceptions. Are jurisdictions that support the spread of the lodging platform more prone to safety issues? If so, can insurance, rather than zoning controls, address these

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. Gill Carson, *Five Key Sharing Economy Sectors Could Generate £9 Billion of UK Revenues by 2025*, PRICEWATERHOUSECOOPERS (Aug. 15, 2014), [http://www.pwc.blogs.com/press\\_room/2014/08/five-key-sharing-economy-sectors-could-generate-9-billion-of-uk-revenues-by-2025.html](http://www.pwc.blogs.com/press_room/2014/08/five-key-sharing-economy-sectors-could-generate-9-billion-of-uk-revenues-by-2025.html).

177. Johanna Interian, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. L. REV. 129, 144 (2016).

178. *Id.* at 145.

179. *Id.* at 145–46.

concerns? Using classic economics terminology, does Airbnb create more negative than positive externalities? Does the potential noise of temporary lodgers endured by resident neighbors outweigh the benefits of increased commercial activity in the neighborhood and affordable tourism overall? From an equity perspective, are jurisdictions that allow short-term rentals pricing the poor out of their neighborhoods? If so, can direct affordable housing solutions such as tax subsidies or new development projects better address these concerns?

These are questions that can only be answered over time, with data and analysis, and the balance will likely be struck differently in different communities.<sup>180</sup> As the platform economy rapidly grows, many companies are running up against regulatory hurdles. As thousands of companies have transformed many aspects of our lives as consumers, workers, and citizens, the lines we drew through regulation are now being redrawn. The fluidity between home/hotel, ownership/loan, work/gig, and individual/business presents a challenge to policy makers. The hard questions that have always been at the core of regulation continue over to new business models. The problem is that many of the values we desire to promote as lawmakers—freedom, equality, choice, fairness, and welfare—are not only in tension but also incommensurable.<sup>181</sup> However, ideally, lawmakers should attempt to resolve these competing values with more fine-tuned solutions, such as targeted risk regulation, rather than direct blanket prohibitions.

## 2. The Gig Economy: Does Uber Violate Employment Laws?

Can you imagine if this turns into a Mechanical Turk economy, where everyone is doing piecework at all odd hours, and no one knows when the next job will come, and how much it will pay? What kind of private lives can we possibly have, what kind of relationships, what kind of families? –Robert Reich<sup>182</sup>

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180. In a related area, some localities have updated their city ordinances to allow temporary dining. Others already have different types of permits that allow non-restaurant commercial dining, such as catering licenses. Schindler, *supra* note 53; Memorandum from Rajiv Bhatia, Dir. Env'tl. Health, S.F. Dep't Pub. Health to the Food Safety Program Staff (Nov. 18, 2011), <https://www.sfdph.org/dph/files/EHSdocs/ehsFood/PopUpGuidelines.pdf>.

181. See generally Bruce Chapman, *Law, Incommensurability, and Conceptually Sequenced Argument*, 146 U. PA. L. REV. 1487 (1998) (discussing the problem of incommensurability and analyzing solutions).

182. Farhad Manjoo, *Uber's Business Model Could Change Your Work*, N.Y. TIMES (Jan. 28, 2015), <http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html>.

From the perspective of labor market shifts, commentators worry that absent regulatory controls, the platform will lead work to be so app-driven that the internal logic of full-time employment, job security, and worker rights will collapse.<sup>183</sup> The more labor there is in supply, the cheaper the pay, or put differently, “the more humans are fungible; that is one human can replace another and do whatever that person is doing, the less they have value.”<sup>184</sup> A leading critic of what is termed “the gig economy,” economist Robert Reich argues that the rise of platform companies is making work life unpredictable, insecure, and, ironically, not even profitable.<sup>185</sup> Based on interviews of platform workers, Reich “has concluded that ‘most would much rather have good, well-paying, regular jobs.’”<sup>186</sup>

The concerns about the nature of employment in the twenty-first century, while valid and significant, are largely misdirected. The rise of the contingent workforce precedes the rise of the platform. The contingent workforce now constitutes more than one-third of all employees with predictions that it will rise to nearly half of the workforce by 2020.<sup>187</sup> Given these realities, the question of whether one would rather have a high-paying stable job offline or a part-time job is misleading. The contrast should be to other available work options, whether enabled by the platform or not. With that comparison in mind, a new study by Princeton economist Alan B. Krueger mines through Uber data in order to analyze the work-life realities of Uber drivers.<sup>188</sup> The Krueger report finds that on average, Uber drivers work fewer hours and earn more per hour than traditional taxi drivers, even after accounting for their expenses.<sup>189</sup> Moreover, most Uber drivers are employed full- or part-time elsewhere and work for Uber for additional income.<sup>190</sup>

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183. See generally Freeman, *supra* note 12.

184. Ian Welsh, *Why the Sharing Economy Is Destroying Prosperity*, IAN WELSH (Nov. 13, 2014), <http://www.ianwelsh.net/why-the-sharing-economy-is-destroying-prosperity>.

185. Manjoo, *supra* note 182.

186. *Id.*

187. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Princeton Univ. Indust. Relations Section, Working Paper No. 587, 2015).

188. *Id.*

189. *Id.* at 19, 23. For a critique of this study's methodology due to its failure to fully consider the costs associated with using one's own car as an Uber driver, see *Ubernomics*, CTR. FOR ECON. & PUB. POL'Y (Jan. 23, 2015), <http://www.cepr.net/index.php/blogs/beat-the-press/ubernomics>.

190. Hall & Krueger, *supra* note 187, at 10.

At the same time, similar to many jobs, platform work raises questions about the nature of the relationship between the providers—drivers, cleaners, hosts, chefs, dog walkers, personal assistants—and the platform company. With definitional determinations comes legal responsibility. Many platform companies—from the grocery delivery service Instacart to the courier service Postmates—involve people working in time frames and ways that posit a challenge to traditional modes of employment. The employment status of the providers on these companies remains uncertain. For example, Handy is a cleaning service, but unlike local cleaning franchises before it, it digitally and directly connects customer with a cleaner and takes a fifteen percent commission of every hour worked.<sup>191</sup> Handy classifies its cleaners as independent contractors.<sup>192</sup> Handy cleaners recently brought a class action lawsuit alleging that Handy misclassifies them.<sup>193</sup> The cleaners seek recognition of their status as employees and, consequently, compensation for missed lunch breaks, minimum wage compensation, reimbursement for business expenses, and overtime.<sup>194</sup> Handy has argued that its users “choose the Handy platform because it provides much needed flexibility by allowing them to book whatever jobs best suit them.”<sup>195</sup> In the company’s terms of service, when referring to its cleaners, it includes at least five repetitions of an agreement that they are independent contractors rather than employees, perhaps hoping repetition can replace solid legal argument.<sup>196</sup>

The highest profile battles involve platform drivers. As we have seen, Uber asserts that it is only a software technology company, which provides a smart phone application that matches ride-seekers with drivers.<sup>197</sup> Uber subsequently maintains that it

does not employ drivers, own vehicles or otherwise control the means and methods by which a driver chooses to connect with riders . . . it merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other people looking to pay for those skills and assets.<sup>198</sup>

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191. Kessler, *supra* note 17.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Salovitz v. Uber Techs., Inc., No. A-14-CV-823-LY, 2014 WL 5318031, at \*1 (W.D. Tex. Oct. 16, 2014).

198. *Id.*

While both Uber and Lyft have been firm in classifying their drivers as independent contractors, others have viewed the arrangement differently. Recent class action suits brought against both companies by drivers claiming misclassification stress the degree of control and direction the companies exercise. In the Uber lawsuits, plaintiffs claim that, while drivers decide when to turn on the app to get notifications about ride requests, drivers “must respond to assignments generated by the Uber computer system ‘within seconds’ or they will lose the job.”<sup>199</sup> Further, Uber sets the pickup time, the passenger pay rate, the method of pay, and which passengers the drivers must pick up.<sup>200</sup> The payment goes to a centralized account set up by Uber.<sup>201</sup> Uber has responded with other factors that support an independent contractor relationship: its drivers supply the instrumentalities of their work (the cars), are paid by the job, and control their work hours, their geographic area for pickups, and whether to accept a passenger’s request for a ride.<sup>202</sup> While Uber drivers own the vehicle and smartphones with the required GPS, in some instances Uber provides these phones and assists drivers in securing leases for vehicles. In preliminary hearings in one such lawsuit, Judge Edward Chen stated, “The idea that Uber is simply a software platform, I don’t find that a very persuasive argument.”<sup>203</sup> Chen found that the fact that “Uber sets the rates by which drivers are paid, screens them . . . and can terminate them” weighs in favor of finding them to be employees.<sup>204</sup> In a parallel case against Lyft, the court stated, “[P]eople who do the kinds of things that Lyft drivers do here are employees.”<sup>205</sup> In June 2015, the California Labor Commissioner, citing the high degree of control Uber exercises over its drivers, ruled in an individual hearing that at least one driver of Uber was an employee.<sup>206</sup> In December 2015, a Cali-

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199. *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148, at \*2 (D. Mass. Mar. 27, 2014).

200. *Id.*

201. *See id.* For an example of how courts have approached the question of how overlapping taxi service contracts impact the restrictive financial obligations of their parent companies, see generally *Ali v. U.S.A. Cab Ltd.*, 98 Cal. Rptr. 3d 568 (2009).

202. *See* Karen Gullo, *Uber and Lyft Drivers May Have Employee Status, Judge Says*, BLOOMBERG (Jan. 30, 2015), <http://www.bloomberg.com/news/articles/2015-01-30/uber-drivers-may-have-employee-status-judge-says>.

203. *Id.*

204. *Id.*

205. Pringle, *supra* note 17.

206. Lauren Weber & Douglas MacMillan, *Uber Driver Was Employee, Not*

California court issued a final order certifying the Uber drivers case as a class action with trial set for June 2016.<sup>207</sup> However, that trial now may not go forth. In April 2016, the plaintiffs filed a motion for preliminary approval of a settlement with Uber,<sup>208</sup> which was denied.<sup>209</sup> The proposed settlement had two primary components: a \$100 million payment, and promises to address the most problematic areas of Uber's business practices.<sup>210</sup> Among those changes were the following: a clarified process for deactivating drivers, as well as a way for drivers to appeal their deactivation; a "Driver Association" comprised of elected drivers that Uber agrees to meet with quarterly; and a promise to make good-faith efforts to inform riders that tips, though not required or expected, are not included in the fare.<sup>211</sup> The settlement would not have required Uber to reclassify drivers as employees so it leaves the question unsettled and could allow for new litigation of more groups of drivers in the future.<sup>212</sup>

Lyft, like Uber, moved to settle its own class action in April, offering a \$12.25 million settlement and agreeing to remove its at-will termination provision; instead, Lyft will only terminate drivers for specific, listed reasons and offer them a grace period to fix the problem.<sup>213</sup> However, the judge denied that motion on the grounds the settlement amount was unreasonably low, giving Lyft and the plaintiffs until May to negotiate a new settlement consistent with his findings.<sup>214</sup> In June

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*Contractor, California Commission Says*, WALL ST. J. (last updated June 17, 2015), <http://www.wsj.com/articles/uber-driver-was-employee-not-contractor-california-commission-says-1434557958>.

207. UBER DRIVERS, <http://www.uberlawsuit.com> (last visited Oct. 14, 2016).

208. Notice of Motion and Motion for Preliminary Approval and Memorandum of Points and Authorities in Support Thereof at 1, *O'Connor v. Uber Techs., Inc.*, No. 3:13-CV-03826 (N.D. Cal. Apr. 21 2016), ECF No. 516-3 [hereinafter *Motion, O'Connor*].

209. *O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2016 WL 4398271, at \*4-6 (N.D. Cal. Aug. 18, 2016) (denying motion for preliminary approval); UBER, *supra* note 207.

210. *O'Connor*, 2016 WL 4398271, at \*4-6.

211. *Id.*

212. *See id.*

213. *See* Notice of Motion and Motion and Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement at 1, *Cotter v. Lyft, Inc.*, No. 3:13-cv-04065-VC (N.D. Cal. Jan. 26, 2016), ECF No. 169 (noting a settlement agreement with Lyft as Exhibit 1 of the document).

214. Order Denying Motion for Preliminary Approval of Class Action Settlement at 20-21, *Cotter v. Lyft, Inc.*, No. 3:13-cv-04065-VC (N.D. Cal. Apr. 7, 2016), ECF No. 200.

2016, the judge granted preliminary approval to a \$27-million settlement.<sup>215</sup>

While these mushrooming lawsuits are important, the employment law issues are hardly unique to the platform. Nearly a century after the passage of the Fair Labor Standards Act, uncertainty about the boundaries between covered employees and independent contractors is as high as ever. Indeed, the question of employee classification has been recognized as one of the most difficult and blurry judicial line-drawing techniques in the world of law.<sup>216</sup> Recently, FedEx lost several class action suits that alleged misclassification of its drivers as independent contractors. In *Alexander v. FedEx Ground Package Systems Inc.*, the Ninth Circuit found that FedEx held “all necessary control” over its drivers.<sup>217</sup> Taxi drivers themselves, operating under the conventional pre-platform model, have similarly fought over their employment status. In *Ali v. U.S.A. Cab Ltd.*, the plaintiffs sought class certification of one hundred taxi drivers arguing companies misclassified them as independent contractors with respect to wage and hour law provisions of the California Labor Code and that, in turn, they were eligible for workers’ compensation insurance.<sup>218</sup> The court denied certification, holding that there was not enough commonality and raised questions about whether drivers fit under the common law test of an employee.<sup>219</sup> The court pointed to the fact that taxi drivers had provided equipment, including cell phones, GPS, and credit card machines, and that some of the taxi drivers advertised their services via the Internet, telephone yellow pages, and business cards.<sup>220</sup> These are very similar context-specific factors considered by the Uber class action court.<sup>221</sup> In effect, these battles over employment status online and offline are virtually identical. They have to do with the challenge of line-drawing using multi-factor, common law tests that are of-

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215. Tracey Lien, *Judge Approves Lyft’s \$27-Million Class-Action Settlement with Drivers*, L.A. TIMES (June 23, 2016), <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-approval-20160623-snap-story.html>.

216. Cf. Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539 (2006) (arguing that work law has many substantive and historical layers making categorization difficult).

217. *Alexander v. FedEx Ground Package Sys. Inc.*, 765 F.3d 981, 991, 997 (9th Cir. 2014).

218. *Ali v. U.S.A. Cab Ltd.*, 98 Cal. Rptr. 3d 568, 572 (2009).

219. *Id.* at 579–84.

220. *Id.* at 581.

221. See Motion, *O’Connor*, *supra* note 208.

ten outdated due to new patterns of work and production. Put differently, the problem is not work via the platform, but rather the legal definition itself, which is inherently complex.

Contemporary realities may necessitate extending protections we find valuable as a society—dignity and anti-discrimination principles, whistleblowing protections, insurance and portable benefits, and occupational health and safety—to all laborers regardless of their employment status. Rather than insisting on archaic binary definitions of employee versus independent contractor, creative proposals consider a third category of “dependent contractor.”<sup>222</sup> Former Chairwoman of the National Labor Relations Board, Wilma Liebman, has suggested such a category in a dissenting opinion of the NLRB, noting that “Canada and Germany have statutes protecting such workers.”<sup>223</sup> Liebman stated, “Some people are clearly independent contractors and some are clearly employees, but a third category becomes necessary when you have people who are borderline,” while being economically dependent on one employer.<sup>224</sup> Again, these questions are challenging but not unique to the platform. As part of the democratic process, each society strikes a balance between freedom of contract and employment protections, fairness, and welfare. The normative values embedded in these choices and their economic consequences present difficult challenges. They are at the heart of all contemporary debates about law and economics at large.<sup>225</sup> The platform provides new opportunities to continue these debates, but it does not transform or transcend these hard choices in any meaningful way.

In 2014, the National Economic Council invited economists studying the platform, as well as key business and union leaders, to the White House. The agenda was set to think about the shifts from traditional employment safety nets and new forms of work in the digital world. These shifting patterns are widespread and not unique to the platform economy. As with the

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222. Harry Campbell, *Could Dependent Contractors Be the Answer for Uber?*, FORBES (June 19, 2015), <http://www.forbes.com/sites/harrycampbell/2015/06/19/could-dependent-contractors-be-the-answer-for-uber/#7c9f7dff72d5>.

223. Lauren Weber, *What If There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>.

224. *Id.*

225. Peter Ferrara, *Fallacies of Economic Inequality that Promote Poverty*, FORBES (July 7, 2011), <http://www.forbes.com/sites/peterferrara/2011/07/07/fallacies-of-economic-equality-that-promote-poverty/#2978d69c5ce2>.

case of lodging platforms, regulators should prefer solutions that directly address any negative consequences that people or society may experience from the rise of the platform, rather than blanket prohibitive solutions that stymie its development.<sup>226</sup> There are important legislative proposals designed to increase security in ways other than job stability. As venture capitalist Marc Andreessen explains, “Perhaps the single biggest key enabler for the sharing/gig/1099 economy in the US: Affordable Care Act of 2010, aka Obamacare.”<sup>227</sup> Indeed, in some ways, HealthCare.gov has become a human-resources site for the platform economy.<sup>228</sup>

The deeper questions about the desirability of commodifying every aspect and minute of one’s life, labor, skill and energy are more unique to the platform, but are likely unsuitable for legal regulation. Is the platform further destabilizing job security and long-term employment? Is it a cause or a symptom of the shifting patterns of the labor market? The answer is both. The rise of the platform is partly due to the decline of full-time, long-term jobs and cycles of high rates in unemployment. It also represents a shift in preference, as many people entering the labor market today prefer flexibility and control over their work-time. The platform also offers opportunities to profit more directly from one’s labor. Compared to workers employed through manpower agencies, platform companies allow for a greater share of the pay to go to the worker.

To close with an optimistic perspective, the platform may also be an opportunity to connect workers to each other and organize in ways that were not previously available. Amazon’s Mechanical Turk is an online platform that pays independent contractors cents per task. Millions of individual providers can speak directly to each other, compared with before when factory workers had to physically meet at odd hours and picket in front of their manufacturing plant. Using their online connectivity, its workers have organized a letter-writing campaign to Amazon’s CEO Jeff Bezos asking him to “see that Turkers are not only actual human beings, but people who deserve respect, fair treatment, and open communication.”<sup>229</sup> With the technolo-

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226. CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 47–49 (2008).

227. Marc Andreessen (@pmarca), TWITTER (Oct. 14, 2014, 2:37 AM), <https://www.twitter.com/pmarca/status/521957932720615424>.

228. See HEALTHCARE, <https://www.healthcare.gov> (last visited Oct. 14, 2016).

229. Sarah Kessler, *What Does a Union Look Like in the Gig Economy?*,

gy of the platform lowering barriers of entry, it is not impossible to imagine that a critical mass of discontent among providers could lead workers to create co-op versions of companies like Uber and Mechanical Turk.<sup>230</sup> With the energy of creative cause lawyers, it is possible to envision a transportation platform cooperative which adopts Uber-like technology and is essentially driver-owned.<sup>231</sup> The platform enables “ridiculously easy group-forming,” which “matters because the desire to be part of a group that shares, cooperates, or acts in concert is a basic human instinct that has always been constrained by transaction costs.”<sup>232</sup> Online communities have been able to organize and affect policy in other realms, such as organizing against SOPA/PIPA. Why not form online communities of platform laborers? One such first initiative is Peers, an organization for platform economy workers and an advocacy group for the platform economy that provides services to its members, such as personal-liability protection for homes and replacement cars for drivers.<sup>233</sup> Peers describes itself as a “grassroots organization” with the goal to “mainstream, protect, and grow the sharing economy,” and it already has over 11,000 members and dozens of corporate partnerships.<sup>234</sup> Other local groups of users are forming to share advice, think about policy, push risk and responsibilities back from the individual provider to the platform company, and standardize pricing.<sup>235</sup>

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FAST COMPANY (Feb. 19, 2015), <http://www.fastcompany.com/3042081/what-does-a-union-look-like-in-the-gig-economy>. A Mechanical Turk worker working for Crowdfunder launched a class-action lawsuit in 2012, alleging misclassification of employees as independent contractors. First Amended Complaint FLSA Collective Action and State Law Class Action, *Otey v. Crowdfunder, Inc.*, No. C 12-5524 CRB, 2012 WL 6913384 (N.D. Cal. Dec. 20, 2012).

230. Cf. Kessler, *supra* note 229.

231. See generally JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMICS (2012) (writing about many aspects of legal work in the sharing economy).

232. SHIRKY, *supra* note 226, at 54.

233. Shelby Clark, *Our First “Homegrown” Products, by Popular Request: Homesharing Liability Insurance and Keep Driving*, PEERS (Dec. 4, 2014), <http://www.peers.org/our-first-homegrown-products-by-popular>.

234. Tarun Wadhwa, *The Sharing Economy Fights Back Against Regulators*, FORBES (Sept. 16, 2013), <http://www.forbes.com/sites/tarunwadhwa/2013/09/16/the-sharing-economy-fights-back-against-regulators-with-an-advocacy-group/#6f66db0e3dc4>.

235. See, e.g., Juliet Schor, *Risks and Rewards of Cultivating a Sharing Economy*, BRINK (Dec. 23, 2014), <http://www.brinknews.com/risks-and-rewards-of-cultivating-a-sharing-economy> (mentioning Airbnb as having created a platform for users to set price floors and share advice).

### 3. The Cloud Economy: Does Aereo Infringe Copyright Law?

In a different field of consumption, media content, the Supreme Court ruled in 2014 that Aereo, a provider of online streaming technology, was an illegal service operating in violation of copyright law.<sup>236</sup> While commentators do not regularly describe the fight for over-the-air content access as part of the “sharing economy” defined by lodging and transportation apps, Aereo fits well within the rise of the platform. The new business model in significant part turned on technological innovation to better leverage the longstanding mandate for free local broadcasting. The technological innovation was a dynamic sharing of antennas, avoiding the cost of duplicating hardware from house to house. Aereo provided users access to hardware to capture broadcast and record content for time-shifting purposes.<sup>237</sup> Over-the-air content is free for individual interception. If you buy rabbit ear antennas and place them on your rooftop, you are free to watch any programming broadcast over the air without cost. Aereo sought to allow individuals to shift from ownership to access. It developed a bank of tiny antennas in each city in which it operated, which received local TV broadcast signals, much like old rabbit ears. Every time a subscriber wanted to watch or record a show, Aereo assigned an individual antenna to the subscriber. Aereo, viewed through the lens of the platform, was basically a cloud-based intermediary, enabling people to intercept what they were free to consume directly. The challenge was that, in reality, users who subscribed to Aereo could intercept the local television package of any city in which Aereo operated, regardless of the user’s location. This meant that someone in California could purchase the local TV package for New York City, no longer intercepting in the same way that a local clunky rabbit ear would enable without the intermediary. Aereo’s controls on who could watch a certain television package were very loose; it required users to check a box stating, “I live in the designated area,” an affirmation similar to Airbnb’s warning of hosts to respect local zoning laws.<sup>238</sup>

236. *Am. Broad. Co., Inc. v. Aereo, Inc.*, 134 S. Ct. 2516 (2014).

237. See Jacob Kastrenakes, *Aereo Loses to Broadcasters in Supreme Court Fight for Its Life*, THE VERGE (June 25, 2014), <http://www.theverge.com/2014/6/25/5801052/aereo-supreme-court-ruling> (obtaining legal copies of shows shifts the time individuals would otherwise have to spend getting those legal copies onto services like Aereo).

238. See Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html>.

Unsurprisingly then, much like other incumbents challenged by the platform, the broadcasting networks opposed this new business model and claimed that it violated their rights to receive transmission fees under the Copyright Act. In 2014, the Supreme Court ruled against Aereo, finding that Aereo had violated copyrights held by the networks.<sup>239</sup> The point of contention was whether Aereo's business model constituted a "public performance" rather than merely enabling individual viewing,<sup>240</sup> and if so, Aereo would be legally required to obtain permission from the copyright owners of any programs it transmits.<sup>241</sup> The court ruled in a six to three decision that Aereo's business model was essentially like that of a cable television provider, publicly performing content, despite the great differences in technology.<sup>242</sup> Following the decision, the company announced it would immediately suspend its services.<sup>243</sup> In November 2014, Aereo filed for Chapter 11 bankruptcy.<sup>244</sup> Another company based on similar technology, FilmOn.com, has faced the same fate.<sup>245</sup>

Aereo was put in a no-win situation.<sup>246</sup> The Supreme Court told Aereo it needed a license as a cable provider in order to help transmit content to end users,<sup>247</sup> yet Aereo was unable to obtain a compulsory license because it was an Internet provider not regulated by the FCC.<sup>248</sup> Thus, Aereo is a striking example of a disruptive platform business facing protective regulations, outdated legal definitions, and strong industry foes. In 2015, the FCC released a new proposed rule for public comment on

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239. *Aereo*, 134 S. Ct. at 2511.

240. *Id.* at 2499.

241. *Id.* at 2500.

242. *Id.* at 2502–03.

243. Steel, *supra* note 59.

244. *Id.*

245. See *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10 Civ. 7532(NRB), 2014 WL 3702568 (S.D.N.Y. July 24, 2014).

246. At the bankruptcy sale, TiVo bought Aereo's customer lists and trademarks, and are planning on starting a similar service, if the FCC's new rule passes. Bill Rosenblatt, *TiVo Moves Towards Legal Aereo Offering*, FORBES (May 20, 2015), <http://www.forbes.com/sites/billrosenblatt/2015/05/20/tivo-inches-towards-legal-aereo/#c65fa3952d12>. See FCC's regulation cited *infra* note 249.

247. *Fox Broad. Co. v. Dish Network LLC*, No. CV 12-4529 DMG (SHx), 2015 WL 1137593 (C.D. Cal. Jan. 12, 2015).

248. Todd Shields & Alex Barinka, *Aereo Sees Path Forward in FCC Online Video Proposal*, BLOOMBERG (Oct. 29, 2014), <http://www.bloomberg.com/news/articles/2014-10-28/help-for-online-video-competition-to-be-considered-at-fcc>.

permitting providers like Aereo.<sup>249</sup> It might be too late for Aereo,<sup>250</sup> but the rule will be impactful as online video services become more popular.

If an Aereo copycat were to emerge under the new FCC rules, with a compulsory license, the new company might no longer need the geographic restrictions. Many viewers who have moved around enjoy watching the local television programming from their hometown, especially in the areas that Aereo thrived in, such as live sporting events and live news. Similar to the way other platform companies customize consumption for active users, Aereo provided these options, changing the nature and the range of options available in the area of television. Instead of consumers purchasing an enormous cable package and not watching seventy percent of the channels, and some of the preferred content is unavailable in their cable zone, Aereo provided a cheaper and more fine-tuned option. Moreover, Aereo helped to reduce the barriers to entry for small, independent broadcasters, who aired niche television content that broadcasters and cable companies ignored. These small broadcasters lacked the infrastructure and equipment to broadcast their channels beyond their locality.

Along with the proposed FCC reforms, post-Aereo, there seem to be positive developments towards enabling innovation in this area without the threat of regulatory liability. In 2015, a California court refused to apply the *Aereo* decision to Dish Networks' "DISH Anywhere" service, which allows users to watch live television on their smartphones or tablets.<sup>251</sup> The court said that DISH Anywhere is different from Aereo because Dish has a license to transmit the programming while Aereo did not<sup>252</sup>:

The ultimate function of DISH Anywhere is to transmit programming that is already legitimately on a user's in-home hardware to a user's Internet-connected mobile device. Relying on external servers and equipment to ensure that content travels between those devices

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249. See Promoting Innovation and Competition in the Provision of Multi-channel Video Programming Distribution Services, 80 Fed. Reg. 2078 (proposed Jan. 15, 2015) (to be codified at 47 C.F.R. pt. 76).

250. Aereo is now suing the Broadcast companies under antitrust law for causing Aereo to earn less than they should have at their bankruptcy sale by saying that Aereo's technology is only appropriate for violating the law. Hiawatha Bray, *Aereo Hits Back at TV Networks in Lawsuit*, BOS. GLOBE (Mar. 11, 2015), <https://www.bostonglobe.com/business/2015/03/10/bankrupt-aereo-attacks-nets-again/vzXYiKCiCeP39VcMd10WHP/story.html>.

251. *Fox Broad. Co.*, 2015 WL 1137593.

252. *Id.* at \*11.

properly does not transform that service into a traditional cable company.<sup>253</sup>

Aereo's plight illuminates the risk for new platform businesses operating in the shadow of the law. Regulatory politics often decides the winners and losers in society; in this case, the founders of Aereo took an entrepreneurial risk and lost, in the face of massive established industry players resistant to disruption and protected by intellectual property law. Line-drawing in intellectual property law is notoriously hard. Looking ahead, the restrictions placed on platform companies should be ones that raise consumer welfare, rather than protect incumbent giants. It is pertinent to note a consensus in the regulatory literature about the importance of lobbying for determining outcomes, as ambiguity in regulatory language is often resolved through political influence. Comparing the magnitude of the TV networks, as a Goliath that Aereo could not overcome, Uber may be viewed as a digital unicorn in its lobbying efforts against the taxi industry,<sup>254</sup> which helps to explain the differences in outcomes of these regulatory battles.

#### IV. FROM CODE AS LAW TO PLATFORM AS REGULATION

The key to this shift was the discovery that while we totally distrust strangers, we totally trust people—significantly more than we trust corporations or governments. —Joel Stein, *Time Magazine*<sup>255</sup>

Modern digital communications allow sharing to happen across a global village of consumers and providers, with trust established through electronic peer reviews. —John Hawksworth, Chief Economist at PwC<sup>256</sup>

##### A. LAW OF THE HORSE AND LAW OF THE PLATFORM

In a short essay written for a symposium about the law of cyberspace, Judge Easterbrook began with the statement:

[T]he University of Chicago did not offer a course in “The Law of the Horse.” [The Dean] did not mean by this that Illinois specializes in grain rather than livestock. His point, rather, was that “Law and . . .”

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253. *Id.* at \*12.

254. *Compare Uber Technologies*, OPEN SECRETS, <https://www.opensecrets.org/lobby/clientsum.php?id=D000067336&year=2015> (last visited Oct. 14, 2016) (revealing that Uber Technologies spent \$470,000 in 2015 on lobbying), *with Taxicab, Limousine & Paratransit Assn.*, OPEN SECRETS, <https://www.opensecrets.org/lobby/clientsum.php?id=D000029343&year=2015> (last visited Oct. 14, 2016) (revealing that the taxi industry spent \$150,000 in 2015 on lobbying).

255. Stein, *supra* note 18.

256. Carson, *supra* note 176.

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courses should be limited to subjects that could illuminate the entire law. Instead of offering courses suited to dilettantes, the University of Chicago offered courses in Law and Economics, and Law and Literature, taught by people who could be appointed to the world's top economics and literature departments—even win the Nobel Prize in economics, as Ronald Coase has done.<sup>257</sup>

For Easterbrook, there was nothing new about regulating the rising World Wide Web. The same principles that lawmakers have always applied to earlier innovations in industry, technology, and business throughout history would be applied to this new space. At the same time, Easterbrook warned that regulatory errors are a great risk, especially in the face of technology that is not fully understood and still in formation.<sup>258</sup> Therefore, he urged policymakers to “not struggle to match an imperfect legal system to an evolving world that we understand poorly.”<sup>259</sup>

Regulatory regimes should be understood as interrelated sets of rules based on the structure of industries, norms, and social goals. From a “law of the horse” perspective, every new business transaction is analyzable using standard microeconomics transaction costs principles. For example, Easterbrook may view taxi medallion regulations as a simple case of guild protectionism, while viewing zoning regulations as plausible responses to externalities.<sup>260</sup> As demonstrated earlier, regulators could view the new puzzles of the platform through the traditional framework of transaction costs analysis, yet a purely “law of the horse” lens would be incomplete. That is, the developments of the platform cannot be fully captured by analyzing the terms of each deal digitally struck on a platform company, and the subsequent efficiencies created. The platform is also transforming the meaning of markets and actors in nuanced ways. Moreover, as will be discussed next, the platform lends itself to unique thinking about the right mix of private and public regulation.

The distinctiveness of the regulatory questions presented by the rise of the platform lies in the potential these innovations have for disrupting previously accepted legal categories and regulatory goals. The interplay of interrelated new models,

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257. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207.

258. *See id.* at 211.

259. *Id.* at 215.

260. *Cf. id.* at 208 (arguing for developing sound legal principles first, then applying those principles to new technology).

practices, and technology introduced by the platform requires us to revisit settled legal categories, as well as traditional regulatory solutions, and to create predictable and determined regulations for new environments. In this sense, it is both true that the platform should be understood in light of basic legal principles that existed before its rise *and* that, unlike in the case of horses, there is something new and unique about the law of the platform. In particular, we have seen that platform business models have created new hybrids, which regulators must contemplate. Off-on categories such as consumer-business; employee-freelancer; residential-commercial are, in some instances, no longer viable as organizing frameworks. Unique fusions emerge as technology companies centralize some important aspects of the market transaction like, for example, the methods of payment, search and review, and information and trust. Simultaneously, these companies are decentralizing other fundamental aspects of the exchange controlled by users, such as pricing in the lodging apps and work hours in the transportation and cleaning service apps, aspects which once determined the supply infrastructure of a business. What this means for regulators is that, rather than a unified single entity, which has traditionally been the object of regulation, transactions are now shaped by multiple actors, with varying capacities, interests, and needs. The easy cases are where old categories and concepts, such as tax collection, are still applicable to new business models. The hard cases are those which require policymakers to revisit longstanding legal distinctions and fundamental regulatory goals. The platform economy is therefore a perfect setting to innovate, not only markets, but also the legal process.

#### B. JUST AN APP? PLATFORM IMMUNITY AND THE COMMUNICATIONS DECENCY ACT

In 1996, in the early days of the Internet, the Communications Decency Act (CDA) was enacted to protect providers of an interactive computer service from civil liability for another's actions. The Act holds that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>261</sup> An overarching practical question in light of the shift to Web 3.0 is whether the CDA protects platform

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261. Communications Decency Act, 47 U.S.C. § 230(c)(1) (1998).

business models. The Act provides a legal background against which Internet platforms like Airbnb can operate with some degree of legal certainty as to their liability for their users' actions. Companies like Uber, Lyft, and Airbnb, based on their self-definition as purely online tech sites, are arguing that they fall under the definition of the Act, which thereby protects them from civil liability.<sup>262</sup> At the same time, the protection under CDA is limited. Section 230 grants broad immunity to websites with user-generated content, but it does not apply to Internet sites that "materially contribute" in branding or shaping the transaction.<sup>263</sup> Additionally, §230 does not apply to websites that materially contribute to unlawful content.<sup>264</sup> Lastly, §230 protects websites from neither federal criminal violations nor state law violations.<sup>265</sup>

In 1995, a year before Congress passed the CDA, San Francisco-based programmer Craig Newmark created Craigslist.org, a website that enables users to post classified ads and interact in forums.<sup>266</sup> Craigslist's simple design, modest beginnings, and firm reluctance to selling advertisement space contributed significantly to its success in more than 450 cities worldwide.<sup>267</sup> To date, Craigslist has avoided every civil charge raised against it under §230 and recently implemented changes to its website to avoid future liability.<sup>268</sup> However, a recent case demonstrates the limits of §230 immunity.<sup>269</sup> In a lawsuit action against Roommates.com, a matching site that allows people to find roommates, the court determined that immunity did not apply, because Roommates.com acted as an information *content provider* when it required website users to complete question-

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262. Cf. *Zeran v. American Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) ("Section 230, however, plainly immunizes computer service providers like AOL from liability.").

263. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014) (holding Dirty World not liable because it did not materially contribute to the tortious content at issue).

264. See 47 U.S.C. § 230(e)(1) (2012) (mentioning the sexual exploitation of children and obscenity as unlawful content).

265. 47 U.S.C. § 230(e)(1)–(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.").

266. Shahrzad T. Radbod, *Craigslist—A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. 597, 597 (2010).

267. *Id.*

268. *Id.* at 615.

269. See *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008).

naires it had created.<sup>270</sup> That is, Roommates.com contributed to the content users placed on its website. The court elaborated that §230 did not shield online service providers from civil claims when they materially contribute to the unlawfulness of the content.<sup>271</sup> The court reasoned that “[t]he Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”<sup>272</sup>

Under this newer analysis, an interactive platform company may not be as fortunate as Craigslist, but rather is more closely characterized to Roommates.com, and certainly may be liable for any illegal behavior if prosecutors bring criminal charges. There are fine lines separating conduct that would fall within the exceptions. If the service provider puts branding on elicited content; supplies the user with tools of the trade, such as GPS devices or equipment to process transactions; or sets the pricing and the transactional conditions, then it is unclear if the service provider is still a pure publisher. Still, the CDA has largely acted as a liability shield from civil litigation, and it is likely that, for the most part, platform companies will continue to enjoy at least partial immunity under the Act. As a consequence of this immunity, local and state agencies may focus some of their regulatory and enforcement powers on the users of platform services, instead of focusing on the actual companies.<sup>273</sup> This result is problematic and recalls the prosecution of end-users who download music or infringe upon patents.<sup>274</sup> At the same time, as we shall see in the next Section, platform companies have taken an active role in creating an infrastructure that provides grievance mechanisms, insurance coverage, and compliance controls, which together may operate as alternatives to traditional law and regulation.

### C. SYSTEMS OF STRANGER TRUST

In olden times, villagers built trust through repeated interactions with neighbors. Familiarity, proximity, reciprocity, continuity, repeat interactions, and immediate accountability in the small community enhanced compliance.<sup>275</sup> Over time, as

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270. *Id.* at 1166.

271. *Id.* at 1169.

272. *Id.* at 1164.

273. Brittany McNamara, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 160–61 (2015).

274. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

275. *See generally* ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVO-*

exchanges grew in scale and pace, and as the corporate form took over, this trust was broken, and regulators stepped in. The platform is anything but a return to the small-scale community. The platform is characterized by its vast ever-expanding scale, generated by access and connectivity between strangers. At the same time, access, scale, repeat interactions, and technological identification combine to create a new system of stranger-oriented trust. The platform is introducing new forms of private regulation: reviews, ratings, and social network recommendations. These features can combine to provide alternatives to traditional regulation. Strikingly, the same technological advancements that enable the rise of new business models also enable forms of dynamic mass monitoring and transparency. The confidence generated by state permitting, occupational licensing, and other regulatory requirements is substitutable with crowd confidence.

Web 2.0 marketplace pioneer, eBay, was a leader in creating a “trust and safety” division and, not coincidentally, former eBay insiders led many next generation start-ups.<sup>276</sup> The most successful new platform companies now offer similar services to increase user protection and confidence. Airbnb, for example, recently stepped up its own “trust and safety” unit when it created an around-the-clock hotline.<sup>277</sup> Airbnb also advises its hosts on best practices, recently holding its first ever convention with over 1500 of its most productive providers.<sup>278</sup> The company has taken the lead in proactively engaging in knowledge sharing, building best practices, disseminating information about hospitality standards and guidelines, and supporting meet-ups for hosts.<sup>279</sup> From a regulatory compliance standpoint, Airbnb notifies its users about their obligation to

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LUTION FOR INSTITUTIONS OF COLLECTIVE ACTION (1990) (describing conditions for commons).

276. Stein, *supra* note 18.

277. Claire Cain Miller, *When Uber and Airbnb Meet the Real World*, N.Y. TIMES (Oct. 17, 2014), [http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html?\\_r=0](http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html?_r=0).

278. Arun Sundararajan, *What Airbnb Gets About Culture that Uber Doesn't*, HARV. BUS. REV. (Nov. 27, 2014), <https://www.hbr.org/2014/11/what-airbnb-gets-about-culture-that-uber-doesnt>.

279. *Id.*; cf. Kara Swisher, *Yahoo Loses Government Relations Head to Airbnb*, ALLTHINGS (Oct. 15, 2012), <http://www.allthingsd.com/20121015/yahoo-loses-government-relations-head-to-airbnb-internal-memo-time> (discussing Airbnb's hiring of David Hantman to “help them convince governments that allowing people to rent out their own homes or apartments . . . is great for the economy”).

abide by their zoning restrictions, local government laws, and tax regulations.<sup>280</sup> These notifications also come with a caveat: Airbnb users are warned in the terms and conditions on Airbnb's website not to break any laws, but also are required to release the company from any responsibility for hosts' compliance with those laws.<sup>281</sup> From a liability standpoint, as will be discussed in the following Subsection, Airbnb has gradually upgraded its standard insurance policy, which now covers \$1,000,000 for loss or damages.<sup>282</sup>

In a 2015 PwC survey, the majority of respondents reported that they will not fully trust platform businesses until the questions of their regulation are settled: "[w]hen regulation is solidified, these business models will be fully legitimized—not just by law, but also in the minds and hearts of consumers."<sup>283</sup> The following Sections examine the developments in self-regulation of platform companies, which are often triggered by local and federal regulations. The Subsections proceed from the more traditional responses of insurance and background checks to the newer dynamic feedback systems of ratings and reviews.

## 1. Insurance

Insurance is the traditional response to regulating risk. After Gawker published a story about a San Francisco woman whose house was vandalized by Airbnb renters in 2011, Airbnb added a \$50,000 host guarantee against vandalism.<sup>284</sup> Airbnb has since instituted its Host Protection Insurance program, covering up to \$1 million primary liability for third party bodily injury or property damage.<sup>285</sup> Most recently, in October 2015, the plan expanded to cover claims against landlords and homeowners associations from guests who suffer injury during a stay, and claims against hosts filed by landlords for damages caused by guests to a building's property.<sup>286</sup> Airbnb also offers

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280. *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> (last visited Oct. 14, 2016).

281. *Id.*; Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html>.

282. *Host Protection Insurance*, AIRBNB, <https://www.airbnb.com/host-protection-insurance> (last visited Oct. 14, 2016).

283. PRICEWATERHOUSECOOPER, *supra* note 36, at 29.

284. Ryan Tate, *Sleazy Airbnb Is 'Very Sorry' for Wrecking Your Apartment*, GAWKER (Aug. 2, 2011), <http://www.gawker.com/5827043/sleazy-airbnb-is-very-sorry-for-wrecking-your-apartment>.

285. *Host Protection Insurance*, *supra* note 282.

286. *Id.*

an online Host Protection Resolution Center, a sophisticated and efficient internal dispute resolution system, which strives to resolve disputes within one week, far quicker than most public and private grievance processes.<sup>287</sup> When a dispute arises between guests and renters, parties are referred to the Resolution Center where the parties communicate directly.<sup>288</sup> If the parties fail to reach an agreement, Airbnb can step in to arbitrate the dispute.<sup>289</sup> In addition, a number of Airbnb policies serve to prevent disputes before they occur by allowing refunds within twenty-four hours in the event the rented accommodation is unacceptable.<sup>290</sup>

Uber has similarly instituted a liability policy of \$1 million in coverage for each trip.<sup>291</sup> Other platforms similarly offer insurance for their users. For example, Feastly, a culinary platform company, offers insurance when booking a culinary pop-up event through its app.<sup>292</sup> While leading platform companies initiated some of these developments, regulators play a role in directing a platform's insurance policies. In Colorado, ride-sharing companies must offer up to \$1 million in liability insurance from the time a driver accepts a request to the moment when the rider leaves the car.<sup>293</sup> California's law is even more stringent than that, as starting July 2016, the law will require ride-sharing companies to provide insurance from the moment a driver turns on the app.<sup>294</sup> Proposed legislation in the state of Washington, similar to California's law, would require insurance to be valid as soon as the driver logs into the app.<sup>295</sup> In Washington D.C., the law requires ride-sharing services to pro-

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287. See *What Is the Resolution Center?*, AIRBNB, <https://www.airbnb.com/help/article/767/what-is-the-resolution-center> (last visited Oct. 14, 2016).

288. Ethan Katsch & Orna Rabinovich-Einy, *Technology and Dispute Systems Design: Lessons from the "Sharing Economy,"* 21 DISP. RESOL. MAG., Winter 2015, at 8, 11.

289. *Id.*

290. *Id.* at 12.

291. Nairi, *Insurance for Ridesharing with Uber*, UBER, <https://newsroom.uber.com/insurance-for-uberx-with-ridesharing> (last updated July 8, 2016).

292. Anthony Ha, *Feastly, A Marketplace for Dining Experiences, Raises \$1.25M*, TECHCRUNCH (Nov. 25, 2014), <https://www.techcrunch.com/2014/11/25/feastly-seed-funding-westly-group>.

293. Douglas MacMillan, *Uber Laws: A Primer on Ridesharing Regulations*, WALL ST. J. (Jan. 29, 2015), <http://blogs.wsj.com/digits/2015/01/29/uber-laws-a-primer-on-ridesharing-regulations>.

294. *Id.*

295. Victoria Cavaliere, *Washington State Lawmakers Consider Statewide Ridesharing Rules*, REUTERS (Feb. 2, 2015), <http://www.reuters.com/article/us-usa-washington-ridesharing-idUSKBN0L625420150203>.

vide primary insurance coverage “of at least \$1 million per occurrence for accidents” from the time a driver accepts a call until the passenger exits the car.<sup>296</sup> The U.K. government recently brought insurance leaders together to design good policies for platform business models.<sup>297</sup>

In some cases, regulators have brought action against platform companies that have failed to comply with insurance requirements. RelayRides, a peer-to-peer car rental company, recently received a cease-and-desist letter from New York State’s Department of Financial Services (DFS), which charged RelayRides with “false advertising and violations of insurance law.”<sup>298</sup> DFS also issued a “scam alert” because New York insurance law could leave car-sharing users unprotected in the event of an accident.<sup>299</sup> DFS further stated that car-sharing programs may be in violation of existing insurance policies, which in turn may lead to users losing their coverage.<sup>300</sup> Despite its continued ban from New York, RelayRides recently rebranded itself under the name “Turo” and has raised funding in excess of \$100 million.<sup>301</sup> Turo updated its insurance policy to ensure it covers all of its travelers with at least the minimum coverage required by the state in which its users are located.<sup>302</sup> In addition, like Uber drivers, Turo car owners are provided with \$1 million of insurance.<sup>303</sup> Turo now operates in over 2500

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296. Lori Aratani, *D.C. Council Okays Bill To Legalize Lyft, Sidecar, UberX-Type Services in the District*, WASH. POST (Oct. 28, 2014), <https://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/10/28/d-c-council-okays-bill-to-legalize-lyft-sidecar-uberx-type-services-in-the-district>.

297. Carson, *supra* note 176.

298. Chantal Fleischfresser, *Car-Sharing Service RelayRides Halts Service After Cease-and-Desist Letter*, ZD NET (May 17, 2013), <http://www.zdnet.com/article/car-sharing-service-relayrides-halts-service-after-cess-and-desist-letter>.

299. *Id.*

300. *Id.*

301. Sean O’Neill, *RelayRides Rebrands as Turo, Lands \$47M Series C*, TNOOZ (Nov. 3, 2015), <https://www.tnooz.com/article/relayrides-rebrands-as-turo-lands-47m-series-c>; *see also* Alex Konrad, *With \$47 Million and a New Name, Car-Sharing Startup RelayRides Seeks Rebirth*, FORBES (Nov. 4, 2015), <http://www.forbes.com/sites/alexkonrad/2015/11/04/with-47-million-and-a-new-name-car-sharing-startup-relayrides-seeks-rebirth/#4622dd6b7c7c>. Along with the name change, Turo shifted gears into a new market that facilitates peer-to-peer car rentals, which allows users to rent a car that fits their needs for longer periods of time.

302. *Detailed Explanation of Insurance and Protection Provisions*, TURO, <https://support.turo.com/hc/en-us/articles/203990610-Detailed-explanation-of-insurance-and-protection-provisions-renters> (last visited Oct. 14, 2016).

303. *See id.*

cities and in every state except New York, and has recently expanded into Canada.<sup>304</sup>

## 2. Background Checks

Background checks of providers are another traditional response to risk. All ride-sharing legislation imposes safety regulations that include driver background checks and car inspections. The area of disagreement is how stringent the tests should be. Colorado, for example, imposes background checks on Uber drivers that are less stringent than those required of taxi drivers. In Colorado, taxi drivers are subject to fingerprint background checks performed by the federal and Colorado bureaus of investigation, while ride-sharing drivers remain vetted by private companies that use publicly available data.<sup>305</sup> In 2014, Illinois legislators passed two bills, supported by the taxi industry, that require state-conducted background checks for platform drivers.<sup>306</sup> The governor vetoed these bills, and instead signed a less-stringent background check bill in 2015.<sup>307</sup> New laws regulating ride-sharing in Virginia<sup>308</sup> and Washington D.C.<sup>309</sup> similarly require less-stringent background check requirements. The D.C. law also requires transportation platform companies to suspend drivers when a customer complains of drug or alcohol use, or that the driver refused service on the basis of discrimination.<sup>310</sup>

Regardless of state regulation, Uber itself, following media criticisms about the safety of its service, pre-screens its drivers in all localities using four separate checks: driving history; criminal background checks, including checks against the National Sex Offender Registry; vehicle inspections; and medical

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304. *Why Turo?*, TURO, <https://www.turo.com/all-cities> (last visited Oct. 14, 2016).

305. Andy Vuong, *Colorado First To Authorize Lyft and Uber's Ridesharing Services*, DENVER POST (June 5, 2014), <http://www.denverpost.com/2014/06/05/colorado-first-to-authorize-lyft-and-ubers-ridesharing-services>.

306. See Ray Long, *Quinn Lays Political Traps for Rauner on Way out the Door*, CHI. TRIB. (Jan. 13, 2015), <http://www.chicagotribune.com/news/local/politics/chi-quinn-leaves-political-traps-for-rauner-on-way-out-door-20150112-story.html>.

307. *Id.*

308. Luz Lazo, *Uber and Lyft Are Now Legal in Virginia*, WASH. POST (Feb. 18, 2015), <https://www.washingtonpost.com/news/dr-gridlock/wp/2015/02/18/uber-and-lyft-are-now-legal-in-virginia>.

309. Aratani, *supra* note 296.

310. MacMillan, *supra* note 293.

screening.<sup>311</sup> The Uber driver's car also undergoes testing and Uber sets requirements for auto quality.<sup>312</sup> No Uber vehicle is allowed to be older than a 2004 model. In the area of home services, TaskRabbit, matching over 30,000 "taskers," pre-screens and provides background checks for each of its taskers.<sup>313</sup> In lodging, Airbnb provides digital verification of government IDs of its users.<sup>314</sup>

### 3. Ratings and Reviews

More revolutionary than either insurance or background checks is the dynamic rating and recording of each transaction on the platform. At Uber, a bilateral record of every transaction is kept: riders rate drivers who rate riders. Safety is inherent in the design. Companies store each customer's credit card and other identifying information in their system. The transactions are cashless and tip-less to disincentivize theft. The rating system is not only provided to the riders and drivers, but is also operationalized. Riders or drivers that fall beneath a certain rating are suspended. Before suspending, Uber also has a consultation process for drops in ratings and, while drivers have criticized the process for a lack of transparency, Uber promised to clarify its termination and consultation policies as part of the proposed settlement in *O'Connor*.<sup>315</sup> All of these combine to incentivize consistently good service and behavior:

[D]rivers have an incentive to provide great service because at the end of each trip, passengers rate them on a scale of 1–5 (with 5 being the best). Uber drops drivers with low scores—market incentives tend to yield better service than the “who else are you going to use” attitude often associated with regulated monopolies such as taxis.<sup>316</sup>

311. See *Details on Safety at Uber*, UBER (July 15, 2015), <https://newsroom.uber.com/details-on-safety> (explaining four separate background checks required in California).

312. *Uber Car Requirements*, IDWU (Mar. 21, 2016), <http://www.idrivewithuber.com/uber-car-requirements>.

313. *Are Your Taskers Screened and Background Checked?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411630-Are-your-Taskers-screened-and-background-checked> (last visited Oct. 14, 2016).

314. *What Is Verified ID?*, AIRBNB, <https://www.airbnb.com/help/article/450/what-is-verified-id> (last visited Oct. 14, 2016).

315. *O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2016 WL 4398271, at \*5 (N.D. Cal. Aug. 18, 2016).

316. Rafi Mohammed, *Uber's "Price Gouging" Is the Future of Business*, HARV. BUS. REV. (Dec. 16, 2013), [https://www.hbr.org/2013/12/ubers-price-gouging-is-the-future-of-business?utm\\_source=feedburner](https://www.hbr.org/2013/12/ubers-price-gouging-is-the-future-of-business?utm_source=feedburner). Notably, while reviews are significant for identification of quality service on the platform, it is also a platform feature that could potentially determine the fate of the entire industry on the employment law front. The Uber/Lyft lawsuits emphasize the

At least from initial studies, it appears that these technological safety-by-design systems implemented by platform companies are effective. For example, a recent study conducted by Zendrive, a company that looks at driving habits using smart technology, shows that taxi drivers were forty-six percent more likely to speed than a platform driver, including Uber, Lyft, and Sidecar, and eight percent more likely than a “nonprofessional” private driver.<sup>317</sup> Taxi drivers were also twenty-six percent more likely than platform drivers to engage in other unsafe practices such as cellphone use or hard-braking.<sup>318</sup>

Technology allows for a variety of real-time monitoring. Uber and Lyft allow users to see the GPS path and monitor the driver-chosen route. These types of systemic controls align incentives on both ends of the deal. All users of the platform, whether buyers or sellers, host or guest, driver or rider, errand runner or errand giver, are interested in a successful transaction to maintain high ratings. The identification, review, and ratings systems in turn create reciprocal trust that is multi-layered: trust in participants; in value exchanged; in platform/network. Pre-platform, consumer groups were the watchdog intermediaries of the market, but now watchdogging is crowdsourced.

In many ways, these new forms of regulation are superior to traditional ones. Technology creates a record of each transaction, and digital rating systems functionally substitute personal trust and regulated standards.<sup>319</sup> Insurance focuses on liability when things go wrong. Background checks are backward looking. But ratings systems are real-time and dynamic. They are relevant, updated, broad, and deep. Every service, product, and provider is tracked and reviewed for customer satisfaction. Every customer is also identified, rated, and reviewed. This creates a true Foucauldian panopticon, or what Eric Goldman has referred to as the “secondary invisible hand”:

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use of ratings to suspend drivers as one of the key indications that drivers are employees rather than independent contractors. *See also* Kessler, *supra* note 17.

317. Ann-Marie Alcantara, *Study Finds Taxi Drivers Are the Worst Drivers*, BOLD ITALIC (Dec. 11, 2014), <https://thebolditalic.com/study-finds-taxi-drivers-are-the-worst-drivers-the-bold-italic-san-francisco-fde1c187c055#.6mfg>.

318. *Id.*

319. *See* Lior Strahlevitz, ‘How’s My Driving?’ for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1759–65 (2006) (explaining how technology can expand citizen policing to even loose-knit environments).

When information . . . is costly, reputational information can improve the operation of the invisible hand by helping consumers make better decisions [about vendors]. In this case, reputational information acts like an invisible hand of the invisible hand . . . because reputational information can guide consumers to make marketplace choices that in aggregate enable the invisible hand.<sup>320</sup>

Above the layer of the reviews of each individual company, specialized consumer review sites aggregate information and compare reviews across companies, making such sites more important than advertising.<sup>321</sup> Aggregators include sites like AlltheRoom, which looks at the various competing lodging platforms and presents information about all availabilities. Such aggregators ensure competitive price and quality. The most interesting aggregators highlight individual providers who are active across various platforms. Increasingly, the platform offers layers of reputational certification. AirtaskerPRO, for example, offers background checks and even in-person interviews for anyone providing platform services. Another example, Klout, offers a reputational capital tool which aggregates general online influence, e.g., measuring the number of times one's Facebook posts are viewed.<sup>322</sup> Many of these start-ups seek to expand the reputational information of their brands to reach potential new consumers through the use of an application program interface (API).<sup>323</sup> APIs allow third-party developers to integrate the services of another company directly into its application. To illustrate, Uber expanded its API to include eleven new partners ranging from TripAdvisor and OpenTable to Starbucks and Hyatt Hotels.<sup>324</sup> Now, a user who makes a reser-

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320. Eric Goldman, *Regulating Reputation*, in THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD 51, 53 (Hassan Masum & Mark Tovey eds., 2011); see also Chrysanthos Dellarocas, *Designing Reputation Systems for the Social Web*, in THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD 3, 7 (Hassan Masum & Mark Tovey eds., 2011) (listing ways to aggregate and display reputation information); Liangjun You & Riyaz Sikora, *Performance of Online Reputation Mechanisms Under the Influence of Different Types of Biases*, 12 INFO. SYS. & E-BUSINESS MGMT. 417, 418 (2014).

321. See Paul Resnick et al., *Reputation Systems*, 43 COMM. ACM 45, 46 (2000) (noting that registered retailers who have profiles in websites such as bizrate.com foster trust among consumers).

322. Alyson Shontell, *How a Guy Who Had His Jaw Wired Shut for 3 Months Used the Experience To Build a \$200 Million Startup*, BUS. INSIDER (Mar. 27, 2014), <http://www.businessinsider.com/how-klout-sold-for-200-million-2014-3> (explaining the rise of Klout and its founder, Joe Fernandez).

323. *Id.*

324. Ryan Lawler, *Uber Opens Its API with 11 Launch Partners, Including OpenTable, TripAdvisor, and United Airlines*, TECHCRUNCH (Aug. 20, 2014),

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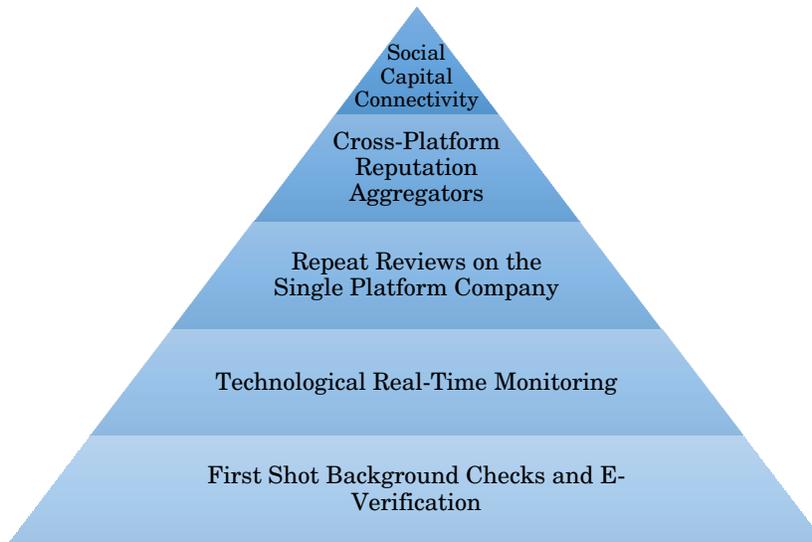
vation at a restaurant through the OpenTable app or books a room through TripAdvisor can request an Uber driver directly from those third-party apps. Success in the platform economy often comes down to reaching and retaining more users, and API utilization exposes potential users to new platforms through the apps they already use.

Beyond cross-reputational aggregators, platform companies increasingly rely on the overall social capital that each participant develops online. For example, Airbnb asks users to provide links to their social media profiles, including Facebook, Google+, Twitter, and LinkedIn. In essence, ratings are getting another step up—delinked from one digital service or company, and creating a multi-layered trust pyramid that becomes richer and thicker over time.<sup>325</sup> Licensing rose as the consumer protection default for quality control. But once the technology is in place and a critical mass of participants and points of data is reached, systems of online trust may be more effective than traditional one-shot regulation.

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<https://www.techcrunch.com/2014/08/20/uber-api-part-deux>.

325. See *infra* Figure 3.

**Figure 3: The Trust Pyramid**

#### D. DESIGN AROUND REGULATION: ARBITRAGE, CIRCUMVENTION, LOOPHOLES AND NEGATIVE SPACES

We have seen that definitional defiance is central to the business model of the platform. At the same time, law is all about definitions. A fundamental challenge for regulators is what we might call the notorious GRC, the Goldilocks Regulatory Challenge: getting law just-right with neither definitional over-inclusiveness nor under-inclusiveness. Inevitably, there are always loopholes around definitions meant to apply to new circumstances, resulting in under-inclusive coverage. At the same time, because of the limits of imagination and the inevitable lag of law behind life, we can expect regulation through false analogies and the insertion of new circumstances into existing boxes that no longer fit the goals envisioned by their designers, inevitably resulting in over-inclusive coverage.

Different bodies of law have dealt with the Goldilocks Regulatory Challenge in varying ways. First, it is useful to consider the concept of regulatory arbitrage,<sup>326</sup> developed primarily with-

<sup>326</sup> See Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997) (explaining the origins and concept of regulatory arbitrage).

in scholarship in the context of tax and financial planning. Regulatory arbitrage is

a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs. Regulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision.<sup>327</sup>

Regulation imposes costs and if that cost can be reduced, both sides of the transaction, the buyer and seller or user and provider, can split the savings. The challenge of sorting out regulatory avoidance from innovation is at the core of debates about the regulation of new business models:

When new forms are chosen because they reduce transaction costs, legal innovation presumptively increases efficiency. But when new forms are chosen because they reduce regulatory costs and increase transaction costs compared to the old structure, we lose twice: efficiency is reduced by the increase in transaction costs, and the regulatory burden is shifted onto those who cannot engage in arbitrage.<sup>328</sup>

Under regulatory arbitrage, a key to differentiating regulatory avoidance and legitimating innovation is to track "the economic substance of deals in accordance with the policy goals of that regime" as closely as possible.<sup>329</sup> Focusing on the substance of the deal, we have seen that technology and economic efficiencies have driven the rise of the platform economy. If a platform company is avoiding costs that are part of the policy goals of a legal regime, then regulators can step in to extend requirements to the new business model. Still, the economic and social logic of the platform, pushing down transaction costs in all stages of the deal, as well as creating new markets that map onto new preferences and lifestyles, is the primary *raison d'être* of the rise of the platform. Therefore, it is largely the case that the substance of the deal is to create efficiency *not* directly linked to regulatory avoidance.

Another field of law that can offer insight into the definitional defiance dilemma is copyright law. This area of law grapples directly with technological progress and new economic models. The "anti-circumvention" provisions of the Digital Millennium Copyright Act codified in §1201 of the Copyright Act, were enacted to stop copyright infringement by preventing

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327. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010).

328. *Id.* at 275.

329. *Id.*

technological advances from defeating anti-piracy protections built into copyrighted works.<sup>330</sup> Proponents of anti-circumvention laws have argued that it was necessary to extend existing protections into new forms of consumption and digitization. Conversely, similar to more recent debates about regulating the platform, critics of these policy expansions have argued that the push comes from entrenched business interests.<sup>331</sup> A central insight from anti-circumvention critics is that the law overreaches. Regulation through anti-circumvention prevents not only infringement but also fair use.<sup>332</sup> In *Aereo*, the architecture of the system was viewed by the dissent in the Second Circuit Court as “over-engineered” and a “Rube Goldberg” model.<sup>333</sup> The Supreme Court later agreed and viewed the technological innovation as designed with the sole purpose of avoiding the black-letter copyright law, or in other words, it equated definitional defiance with regulatory avoidance.<sup>334</sup> The Court dismissed the argument that the technological differences made *Aereo* legal, revealing an anti-circumvention lens under which the default response for technological change is expansion of the regulatory coverage.<sup>335</sup> A different concept within intellectual property may better serve policymakers as they continue to strive for smart regulatory measures, while encouraging innovation and progress. In patent law, unlike the schema of circumvention, which pervades copyright law, the concept of “design around” offers a default approach that views definitional defiance as positive. Indeed, patent law “has long recognized the policy justification of inventing around which is

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330. 44 Cong. Rec. H7093, H7094-5 (Aug. 4, 1998); Senate Judiciary Comm., S. Rep. 105-190 (1998) at 29; Judiciary Comm., H. Rep. 105-551 Pt 1 (1998) at 18; House Commerce Comm., H. Rep. 105-551 Pt 2 (1998) at 38.

331. *E.g.*, *Unintended Consequences: 15 Years Under the DMCA*, ELEC. FRONTIER FOUND. (Mar. 2013), <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca> (giving examples of how DMCA has enabled businesses and the government to censor and chill research and expression).

332. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 BERKELEY TECH. L.J. 519, 537–57 (1999) (claiming the non-infringing uses of the copyright bill are too narrowly tailored).

333. Adam Liptak, *Justices Skeptical of Aereo’s Business*, N.Y. TIMES (Apr. 22, 2014), <http://www.nytimes.com/2014/04/23/business/media/supreme-court-hears-arguments-in-aereo-case.html>.

334. *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014).

335. *Id.* at 2508–09.

sometimes touted as one of the benefits of the patent system.”<sup>336</sup> Competitors to the patent holder are encouraged to invest their creativity and resources to finding substitutes to the patented technology. The concept of design around thus offers a productive lens from which to view innovation: seeking alternative models to dominant competitors should be assumed to be permissible. Indeed, this shift in the default assumptions of business innovation fits well with a broader shift in contemporary regulatory theory.

In recent decades, regulation has shifted away from command-and-control to more participatory modes of rule-making, compliance, and enforcement. If law was once conceptualized as national, top-down, and sanctioned under the New Deal regulatory model, the beginning of the twenty-first century has marked a new regulatory paradigm: that of governance. Against the backdrop of global competition, changing patterns of production, and a declining commitment to direct legal intervention, policymakers have been experimenting with more participatory and collaborative models of regulation, in which government, industry, and society share responsibility for achieving policy goals. Under this model, platform companies can be viewed as partners, rather than adversaries, of the legal process. The governance paradigm encourages multiple stakeholders to share traditional roles of governance. Highlighting the increasing significance of norm-generating nongovernmental actors, the model promotes a movement downward and outward, transferring responsibilities to states, localities, and the private sector—including private businesses and nonprofit organizations. Lawmaking shifts to a reflexive approach, which is process-oriented and tailored to local circumstances. At the same time, by linking together geographically and materially dispersed law reform efforts, the model provides innovative ways to coordinate local efforts and to prevent the isolation of problems:

Scaling up, facilitating innovation, standardizing good practices, and encouraging the replication of success stories from local or private levels become central goals of government. Legal orchestration is achieved through interpenetration of policy boundaries, new public/private partnerships, and next-generation policy strategies such as negotiated rulemaking, audited self-regulation, performance-based

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336. Dan L. Burk, *Inventing Around Copyright*, 109 NW. U. L. REV. ONLINE 64, 67 (2014).

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rules, decentralized and dynamic problem solving, disclosure regimes, and coordinated information collection.<sup>337</sup>

One of the key principles under the new model of regulation is the principle of permanent learning. Max Weber warned that

those who continuously participate in the market intercourse with their own economic interests have a far greater rational knowledge of the market and interest [in the] situation than the legislators and enforcement officers whose interest is only ideal . . . . It is those private interested parties who are in a position to distort the intended meaning of a legal norm to the point of turning it into its very opposite.<sup>338</sup>

While Weber emphasizes learning capacities of regulated industry, under a new governance framework, smart regulation aids positive evolution of policy and prevents ossification.<sup>339</sup> The advanced technological capabilities of the platform economy can be revolutionary in aiding this practice by allowing better data collection and analysis. The business of regulatory agencies becomes more about regulatory research and development than rule-making and enforcement.<sup>340</sup> With data and research, we can continue to address the key questions for the law of the platform: Are new business models presenting an opportunity of systematic reduction in transaction costs rather than simply a shift in rents from incumbents to new firms? Are there new kinds of inequities and systematic market failures in the rise of the platform? Can some of these failures, such as asymmetric information, be rectified by the very technology that helps the transactions? Are there other types of failures, for example externalities of third-party safety or the rise of quasi-monopolies, that require public regulation? The message of new governance is to continue engaging these challenges with a data-driven, multi-stake collaborative framework, experimenting with different solutions to encourage innovation. In other words, we want to keep the platform weird, diverse, and fair.

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337. Lobel, *supra* note 109, at 345.

338. Max Weber, ON LAW IN ECONOMY AND SOCIETY 38 (Max Rheinstein ed., Edward Shils trans., 1954).

339. *E.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22 (1997) (listing framework of how to implement smart regulation).

340. *Id.* at 31 (“In the collaborative model, the state is in the business of regulatory research and development.”).

### E. KEEP THE PLATFORM WEIRD BUT EQUITABLE: A DIGITAL NEW DEAL

Why has the Internet proved to be such a powerful engine for creativity, innovation, and economic growth? . . . A big part of the answer traces back to one key decision by the Internet's original architects: to make the Internet an open system. —FCC Chairman Julius Genachowski<sup>341</sup>

A promising aspect of the contemporary law of the platform is that many of the regulatory questions of Web 3.0, including zoning, consumer protection, residential and transportation safety, worker rights, and occupational licensing, are traditionally resolved at the state and local levels. This decentralization lends to a productive natural experiment. Local governments can see the benefits of collaborating and participating in the platform economy and try different paths toward the policy goals with which they are charged. The Brandeis dream of laboratories of experimentation, with its contemporary iteration in new governance theory calling for democratic experimentalism, can be realized at this moment of immense simultaneous innovation across so many industries in so many localities.<sup>342</sup> For example, cities, as well as private homeowner's associations, can position themselves on any point of the spectrum ranging from platform-friendly to platform-free.<sup>343</sup>

Notably, first-mover platform companies appear to want some light regulation as they attempt to shape the regulatory field. Indeed, the most successful unicorn start-ups quickly become incumbents, and one way to prevent competition is to accept certain regulatory requirements that will prove more burdensome to newcomers. Put differently, similar dynamics of resistance through the insistence of regulatory barriers of entry, which existed when platform companies first challenged their offline competitors, are likely to occur in the competition among platform companies. It is possible that Web 3.0 platform

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341. Michael Moyer, *Better Broadband: New Regulatory Rules Could Change the Way Americans Get Online*, SCI. AM. (Feb. 1, 2010), <http://www.scientificamerican.com/article/bigger-better-broadband> (quoting FCC Chairman Julius Genachowski).

342. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Charles Sabel & Michael Dorf, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314–16 (1998) (arguing that differing local government policies allow local governments to learn from each other).

343. See, e.g., Rauch & Schleicher, *supra* note 3, at 931–32 (showing examples of both cities and homeowner associations that have differing Airbnb policies).

companies will be able to sustain more competition by robust differentiation of services, as opposed to previous generations of search (Google), social media (Facebook), and retail (Amazon), which have emerged as quasi-monopolies.

Still, first-mover advantage is key, especially with a business model that relies on scale of user network for effective supply and demand. As the nature of platform companies continues to evolve, it is likely that, as some of these dominant first-mover companies transition from upstarts to the “establishment,” new opportunities for disruption will emerge. This has been the trajectory of many Web 2.0 companies, such as eBay and Amazon, which started as a collection of individual sellers and small sellers and quickly shifted to include mainstream retail operations. The platform is similarly transforming in some parts. At Airbnb, many homes are now listed by professional property managers, which lead private users to voice concerns that raising the standards and requirements from hosts will deter casual hosts from this leading platform company.<sup>344</sup> Similarly, Uber drivers are now frequently not simply private individual users, but rather drivers hired by small businesses operating small fleets of cars.<sup>345</sup> There are recent indications that precisely because of reliance of scale efficiencies, the transportation platform operates under “winner takes all” conditions, where only a few survive and the rest fall out of the race.<sup>346</sup>

Thus, the platform economy offers us the important insight that business models continuously change. Business identity shifts from upstart to establishment and with it the interests of stakeholders, with regard to regulatory requirements, shift as well. Moreover, traditional offline competitors are likely to look increasingly like new platform companies as a result of fruitful disruption of their established long-standing practices. As one

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344. Drew Fitzgerald, *Airbnb Moves into Professional Vacation Rentals*, WALL ST. J. (May 19, 2015), <http://www.wsj.com/articles/airbnb-signals-expansion-into-professional-vacation-rentals-1432051843> (stating that professional vacation home owners may now use Airbnb with ease).

345. Lucy Battersby, *Uber Attracts More Carless Drivers as Entrepreneurs Buy up Ride-Share Fleets*, SYDNEY MORNING HERALD (Apr. 23, 2016), <http://www.smh.com.au/business/innovation/uber-cars-used-all-day-and-night-as-drivers-take-turns-using-cars-20160419-goaoip.html>.

346. *E.g.*, Allen Griswold, *Uber Competitor Sidecar Is Shutting Down*, QUARTZ (Dec. 29, 2015), <http://www.qz.com/583498/uber-competitor-sidecar-is-shutting-down> (stating that Sidecar, the third largest company in the transportation platform after Uber and Lyft, announced in early 2016 that it will cease operations due to “significant capital disadvantage”).

analyst commented with Internet startups and established businesses, “the worlds are actually converging in both directions.”<sup>347</sup> The platform will gradually seek new avenues to commercialize offline and established pre-platform industries will inevitably venture to electronic services.

Most importantly, to understand the continuous evolution of the platform, analysts require data and sustained research. With their technological sophistication and foresight, platform companies have taken a leading role in presenting information about their own social and economic effects. They have introduced studies that suggest positive effects of the platform on emissions, tourism, and the labor market.<sup>348</sup> These studies are useful, but not without the danger that they are directed, or at least funded, by the interested parties themselves, in large part as a way to convince legislatures and regulators, alongside the public, to support their growth. Under new governance theory, as new business models are introduced, regulatory agencies should view themselves not merely as reactive enforcers, but also as active researchers of these changes.<sup>349</sup>

Equity issues should continue to be examined with the expansion of the platform. As we have seen, the platform, through its access and decentralization of supply, can have a tremendous positive impact for individuals who wish to capitalize on their previously un-monetized talents and abilities. A key question for policy will continue to be whether platform companies are serving the poor and underserved. Some evidence of disparities and inequality is beginning to emerge with regard to certain services. Both Uber and Lyft are currently facing litigation in multiple states under the Americans with Disabilities Act (ADA).<sup>350</sup> In one case, an Uber driver allegedly placed a disabled passenger’s service dog in the trunk, while other drivers are alleged to have sped past riders waiting in wheelchairs.<sup>351</sup> As

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347. Emily Steel, *Netflix, Amazon and Hulu No Longer Find Themselves Upstarts in Online Streaming*, N.Y. TIMES (Mar. 24, 2015), [http://www.nytimes.com/2015/03/25/business/media/netflix-amazon-and-hulu-no-longer-find-themselves-tvs-upstarts.html?\\_r=0](http://www.nytimes.com/2015/03/25/business/media/netflix-amazon-and-hulu-no-longer-find-themselves-tvs-upstarts.html?_r=0).

348. Cannon & Summers, *supra* note 21 (suggesting sharing economies should be proactive with regulators and demonstrate their positive effects).

349. Lobel, *supra* note 109, at 395–96; *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 558 (2000).

350. Nina Stochlic, *Uber: Disabilities Laws Don’t Apply to Us*, DAILY BEAST (May 21, 2015), <http://www.thedailybeast.com/articles/2015/05/21/uber-disability-laws-don-t-apply-to-us.html> (stating Uber has had disability related law suits in three states).

351. Jen Wieczner, *Why the Disabled Are Suing Uber and Lyft*, TIME (May

with its employment disputes, in these cases Uber argues that, because it is a technology company and not a transportation company, it does not fall under the purview of the ADA.<sup>352</sup> Uber claims it cannot control the actions of its drivers who refuse to accept passengers with disabilities because the drivers are independent contractors, and thus, Uber has no legal obligation to ensure they comply with the ADA. However, in April the judge denied Uber's motion to dismiss, finding that more factual development was needed before the court could rule on Uber's qualifications as a "specified public transportation service," and whether it would, as a result, be liable under the ADA.<sup>353</sup> Uber, possibly in response to pending litigation, recently launched its UberASSIST service to provide senior citizens and people with disabilities with specially trained drivers.<sup>354</sup>

Discrimination may also pervade renting of homes through Airbnb, but the company has been making a visible effort to send a clear message of zero tolerance.<sup>355</sup> A new study conducted by researchers at Harvard Business School found that requests from guests with distinctively African American names are sixteen percent less likely to be accepted than identical guests with distinctively white names.<sup>356</sup> These differences persisted whether the host was male or female, African American or white. To reduce discrimination, the authors of the study suggest that Airbnb, like traditional hotel chains, should require hosts to accept guests without revealing the guest's name first.<sup>357</sup> However, when Airbnb CEO Brian Chesky announced Airbnb's Verified Identification program in 2013, he stated that "[a]ccess is built on trust, and trust is built on transparency. When you remove anonymity, it brings out the best in people

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22, 2015), <http://www.time.com/3895021/why-the-disabled-are-suing-uber-and-lyft>.

352. *Id.*

353. Order Denying Motion to Dismiss at 12, Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc., No. 3:14-cv-04086-NC (N.D. Cal. Sept 09, 2014), ECF No. 37.

354. See Strochilic, *supra* note 350.

355. Mike McPhate, *Discrimination by Airbnb Hosts Is Widespread, Report Says*, N.Y. TIMES (Dec. 11, 2015), <http://www.nytimes.com/2015/12/12/business/discrimination-by-airbnb-hosts-is-widespread-report-says.html> (quoting Airbnb's statement that says they are open to new ideas to combat host discrimination).

356. Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment 1* (Harv. Bus. Sch., Working Paper No. 16-069, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2701902](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701902).

357. *Id.* at 19.

. . . . We believe anonymity has no place in the future of Airbnb or the sharing economy.”<sup>358</sup>

These emerging challenges of equity and identity on the platform reveal the inevitable points of tension that policymakers have always faced. Balancing equality and anonymity, inclusion and credibility, and safety and privacy is not a new legal challenge. At the same time, the platform presents new opportunities for monitoring and compliance in order to reach a desirable delicate balance. Technology-based monitoring can detect misbehavior in more accurate and fine-tuned ways than broad-brush rules that risk stifling experimentation and growth. As private entities, platform companies can respond swiftly and strongly to incidences of discrimination. Airbnb’s anti-discrimination policy informs hosts about compliance with federal and local laws, such as the Fair Housing Act and the ADA.<sup>359</sup> Airbnb asserts that it “respond[s] quickly to any concerns raised by hosts or guests, and [has] a zero-tolerance policy for discrimination on [its] platform.”<sup>360</sup> In April 2015, Airbnb removed a Texas bed and breakfast from its listings after its host reportedly discriminated against a gay couple.<sup>361</sup> Airbnb refunded the money paid for the booking and paid for a night at the hotel that the couple ultimately stayed in.<sup>362</sup> The company also issued a statement condemning the incident: “AirBNB has clear guidelines that a host or a guest may not promote hate or bigotry.”<sup>363</sup> Following this model, transportation platform companies could also do more with regard to anti-discrimination detection and enforcement. One of the great advantages of platform companies’ self-regulation of such issues is the very low costs involved in looking at the data digitally presented and reacting forcefully against misconduct by disconnecting a driver from the app.

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358. McPhate, *supra* note 355.

359. See *Airbnb’s Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect?topic=533> (last visited Oct. 14, 2016).

360. Rebecca Greenfield, *Study Finds Racial Discrimination by Airbnb Hosts*, BLOOMBERG (Dec. 10, 2015), <http://www.bloomberg.com/news/articles/2015-12-10/study-finds-racial-discrimination-by-airbnb-hosts>.

361. Curtis M. Wong, *Airbnb Removes Texas Property Listing After Owner Reportedly Rejects Gay Couple*, HUFFINGTON POST (May 1, 2015), [http://www.huffingtonpost.com/2015/04/30/airbnb-gay-couple-discrimination-\\_n\\_7183806.html](http://www.huffingtonpost.com/2015/04/30/airbnb-gay-couple-discrimination-_n_7183806.html).

362. *Id.*

363. *Id.*

At the same time, there are types of equity issues that may be harder to deal with. While the mutual rating and review systems widely adopted on the platform have positive implications for trust and credibility, rating systems may also be affected by biases informed by attitudes on race, sexual orientation, or disability.<sup>364</sup> Because services like Uber generally contain a photo of the rider, drivers can easily dismiss passengers of color or those requesting service to a poorer neighborhood for non-minority passengers seeking a more upscale destination. Here again, large-scale systematic data analysis, drawing on the growing technological sophistication of the platform, is key. Large-scale data can help inform policymakers about patterns of discrimination better than the inevitable arbitrariness inherent in case-by-case discrimination litigation.<sup>365</sup> As with the other regulatory questions analyzed above, regulators could potentially require platform providers to disclose such data and assist with its analysis.

#### CONCLUSION

The platform economy has incredible potential upsides, but its rise will continue to leave a wake of disruptive effects that are not unambiguously positive. When we fundamentally alter the way that we interact with others, we create new possibilities for efficiency and for achieving social goals. At the same time, we face the possibility that market innovation undermines existing policy choices as well as introduces new avenues for abuse. A deep understanding of the dynamics of the platform economy, its logic, and the efficiencies it creates, can better guide policymakers through the vast range of legal fields and legal categories currently unsettled. An ongoing study of the nature and effects of the rise of the platform will better inform the law in the continuous search for the optimal balance between innovation and regulation.

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364. Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 95 (2015) (explaining how implicit and explicit biases affect user ratings).

365. See Lobel, *supra* note 109; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–64 (2001) (arguing that a new framework is needed to combat implicit biases and lays out new framework).