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Regulating Employment Relationships in the Sharing Economy

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REGULATING EMPLOYMENT RELATIONSHIPS IN THE SHARING ECONOMY

BY
DEEPA DAS ACEVEDO*

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I. INTRODUCTION

What does it mean to be an employee in the sharing economy?¹

* A.B., Princeton University (2006); Ph.D., University of Chicago (2013); J.D., University of Chicago (expected June 2016). My thanks to Daniel Abebe, Anup Malani, and Jonathan Masur for their comments on earlier drafts of this article, to Laura Weinrib for her careful and generous reading and, as always, to John F. Acevedo. All errors remain mine alone.

1. The “sharing economy” isn’t the only term used to describe these companies and their business models. Maybe the most well-known alternative is “collaborative consumption.” RACHEL BOTSMAN & ROO ROGERS, WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE

For a steadily growing percentage of the U.S. labor force it might mean avoiding temporary joblessness, retaining a home, or acquiring discretionary income. It might also mean working multiple unrelated jobs for fluctuating wages and no benefits while subject to the invisible oversight of a smartphone algorithm. But in fact, this is a trick question because (outside California²) there *are* no employees in the sharing economy.³ Uber drivers, Airbnb hosts, and TaskRabbit Taskers have no contractual relationship with their companies beyond a simple user agreement, and that agreement generally describes them as independent contractors who work for the *consumer*.⁴ This miscategorization fails to meaningfully reflect what employment means for a growing number of Americans.

The sharing economy links individual workers (“suppliers”) and companies in an “employment” relationship – where the word “employment” references the lay notion of compensated labor rather than a specific legal classification with attendant rights and responsibilities. (For clarity’s sake, I’ll indicate the legal category with capitalization: *Employee*.) Because current law recognizes no Employment relationship between suppliers and their companies, those companies are free to impose increasingly substantial requirements on suppliers and to market these requirements as part of their brands while leaving suppliers to internalize the risks

CONSUMPTION (2010); *see also The Power of Connection: Peer-to-Peer Business: Hearing Before the H. Comm. on Small Business*, 113th Cong. (2014) [hereinafter *Peer-to-Peer Business Hearing*] (written testimony of Philip Auerswald, Assoc. Prof. of Pub. Pol’y, George Mason Univ.) (on file with author) (using “sharing economy” and “peer-to-peer economy”); LISA GANSKY, *THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING* (2010) (using “the mesh”); Arun Sundararajan, *From Zipcar to the Sharing Economy*, HARV. BUS. REV., Jan. 3, 2013, <<https://hbr.org/2013/01/from-zipcar-to-the-sharing-eco/>> (using “sharing economy,” “peer economy,” and “collaborative consumption”). The “sharing economy” has come under increasing fire, both for its ostensible inaccuracy (it’s really not about *sharing*) and for its unhelpfulness (if it’s not about sharing, then what *is* it about?). Compare Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413 (2015) with Emily Badger, *Why We Can’t Figure Out How to Regulate Airbnb*, WASH., POST, Apr. 23, 2014, <<http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/23/why-we-cant-figure-out-how-to-regulate-airbnb/>> (arguing that “‘sharing’ is an ill-fitting word for what most Airbnb hosts or Sidecar drivers are doing” because their services are not free).

2. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765 (Cal. Lab. Comm’r, June 3, 2015), *appeal docketed*, No. CGC-15-546378 (Cal. Super. Ct. June 16, 2015).

3. This excludes the comparatively small number of “staff” positions at sharing economy companies.

4. Uber maintains that, insofar as drivers have a contractual relationship with Uber itself, that relationship derives from the fact that drivers are *consumers* of Uber’s app (“Uber provides drivers with a service and not the reverse.”). Reply of Defendant Uber Techs., Inc. in Support of Its Motion for Summary Judgment at 2, *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133 (N. D. Cal. 2015) (No. C-13-3826 EMC).

associated with transactions. What we need is a new way to think about the individual businessperson in the sharing economy that adequately captures the conditions under which she works but avoids stifling this new economy's resource-maximizing potential. These objectives are best satisfied by recognizing that the interaction between companies and suppliers is a kind of employment and by applying certain minimum requirements to that interaction.

This article makes three contributions to scholarship on the sharing economy. Part II establishes a coherent and intuitive taxonomy of the sharing economy that demonstrates the existence of an "employment" relationship. Part III argues that this employment relationship demands some regulatory response and critiques suggestions that regulation is either temporarily or categorically undesirable. Part IV articulates specific concerns that are triggered by sharing economy employment and contends that some – but not all – of these must be addressed by any regulatory response we choose to adopt.

II. A TAXONOMY OF THE SHARING ECONOMY

*A. Renters, Swappers, and Platforms*⁵

Conversations about the sharing economy are still young enough for the terminology to warrant independent analysis as well as the occasional graphic illustration.⁶ Imagine a circle that encompasses the entire range of companies usually associated with the sharing economy: Airbnb, Uber, Feastly,⁷ TaskRabbit,⁸ ZipCar, Rent the

5. For similar terminology, see Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption* J. ASS'N INFO. SCI. & TECH. 2 (early online view 2015) (on file with author) (using "renting, swapping, or trading"). However, Hamari et al. do not develop the distinctions because their focus is on individuals' motivations for participating in the sharing economy.

6. See Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 150-84 (2016) (proposing ten "first principles" that "define the ways that the sharing economy is transforming commerce" and "on which any future regulation must rest").

7. Feastly connects would-be diners looking for an in-home eating experience with amateur and semi-professional chefs who prepare and serve meals in their own homes. Chefs post meal descriptions, seating capacities, costs, and available dates that diners can browse. *Food with a Story*, FEASTLY, <<https://eatfeastly.com>> (last visited Mar. 20, 2016).

8. TaskRabbit allows individuals to hire others to perform discrete tasks (e.g., grocery-shopping, gift-wrapping, event planning) at pre-arranged rates. *We Do Chores. You Live Life*, TASKRABBIT, <<https://www.taskrabbit.com>> (last visited Mar. 20, 2016).

Runway,⁹ Couchsurfer,¹⁰ eBay, Bitcoin, LiquidSpace,¹¹ Kickstarter, Etsy, Blue Apron¹² – the list is huge and internally diverse.¹³ There is good reason to describe all of these businesses as part of something new, the sharing economy, because they use technology to facilitate the use or exchange of assets by otherwise unconnected individuals. In a sense, they're the Marshall Fields or the Selfridges of the twenty-first century because – like those earliest department stores¹⁴ – companies within this smaller circle are changing the time, place, manner, and purpose of consumption.¹⁵

9. Rent the Runway allows users to rent haute couture that they can't afford to buy. Customers rent outfits for designated dates, keep the outfit for either four or eight days, receive a backup size of the same outfit, and get free return shipping. *Change your Closet Forever*, RENT THE RUNWAY, <<https://www.renttherunway.com>> (last visited Mar. 20, 2016).

10. Couchsurfer connects travelers with individuals who are willing to host visitors in their homes for free. Hosting usually involves more than simply providing a place to stay. *Stay with Locals for Free*, COUCHSURFING, <<https://www.couchsurfing.com>> (last visited Mar. 20, 2016).

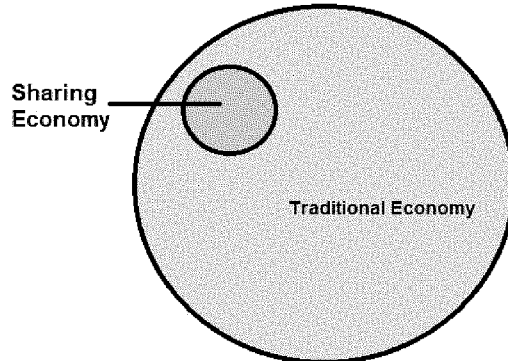
11. LiquidSpace allows property owners to rent office spaces by the hour. *Office Space that Works the Way You Do*, LIQUIDSPACE, <<https://liquidspace.com>> (last visited Mar. 20, 2016).

12. Blue Apron delivers menus and pre-measured ingredients to users' homes so that they can prepare meals from scratch without having to plan or go grocery shopping. *Discover a Better Way to Cook*, BLUE APRON, <<https://www.blueapron.com>> (last visited Mar. 20, 2016).

13. For different visualizations of sharing economy companies categorized by industry and provider-type see JEREMIAH OWYANG, COLLABORATIVE ECONOMY HONEYCOMB: VERSION 2.0 (2014), *available at* <https://www.flickr.com/photos/jeremiah_owyang/15928658251/sizes/k/> (last visited Mar. 20, 2016); JEREMIAH OWYANG, COLLABORATIVE ECONOMY HONEYCOMB: VERSION 1.0 (May, 2014), <<http://www.web-strategist.com/blog/wp-content/uploads/2014/05/Honeycomb.jpg>> (last visited Mar. 20, 2016).

14. For general histories of the department store *see, e.g.*, MICHAEL MOSS & ALISON TURTON, A LEGEND OF RETAILING: THE HOUSE OF FRASER (1989); JAN WHITAKER, WORLD OF DEPARTMENT STORES (2011).

15. *See* GANSKY, note 1 (describing “the negative consequences of modern consumerism” that the sharing economy addresses, including environmental destruction, self-definition via consumption patterns, and a valuation of independence over cooperation); Russell Belk, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, 67 J. BUS. RES. 1595, 1595 (2014) (concluding that the “old wisdom that we are what we own, may need modifying to consider forms of possession and uses that do not involve ownership”).

Figure 1: Sharing Economy

Outside the circle are (figuratively) brick-and-mortar companies. They may also adapt technology to their needs (e.g., using iPhone squares to run credit cards). But what keeps these companies outside the circle of the sharing economy is their use of a traditional model in which one retailer offers relatively standardized products at standardized rates to customers who transact with it directly, usually in-person or via a website.

Within the sharing economy, many companies alter either the *means* of transacting business (as with Zipcar¹⁶) or the *goal* of the transaction (as with Rent the Runway¹⁷). At the very least, these companies are changing what we consume – an extra vacation instead of expensive car insurance, haute couture rather than off-the-rack clothing. They’re also changing how we think of consumption, in terms of it being based on access versus ownership.¹⁸ These differences are fascinating from a social science perspective. Nevertheless, “renters” simply replicate traditional commercial structures in which one entity directly rents (or sells) products and services it owns to clients – in other words they are “gussied-up rental

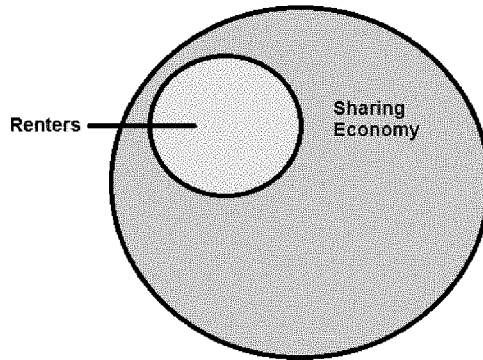
16. *Winter Meet Wanderlust*, ZIPCAR, <http://www.zipcar.com/?redirect_p=0> (scroll down to “how it works”) (last visited Mar. 20, 2016) (“[b]ook a Zipcar for a couple hours or the whole day. Do it online or on your phone via our mobile app . . . [w]alk to the car and hold your Zipcard to the windshield. Ta da.”).

17. *The World Saw a Dress. We Saw an Opportunity*, RENT THE RUNWAY, <<https://www.renttherunway.com/pages/about>> (last visited Mar. 20, 2016) (stating that “[b]y giving people access to remarkable luxury experiences, we’re changing the meaning of ownership” and “[w]e exist because we believe a beautiful product shouldn’t only be experienced by owning it”).

18. See generally GANSKY, *supra* note 1; Belk, *supra*, note 15.

operations.”¹⁹ More significantly, renters operate within existing regulatory schemes: ZipCar drivers are subject to license checks largely like those undergone by drivers who rent from ZipCar’s parent company, Avis.²⁰ As a result, renters pose negligible legal challenges.

Figure 2: Renters



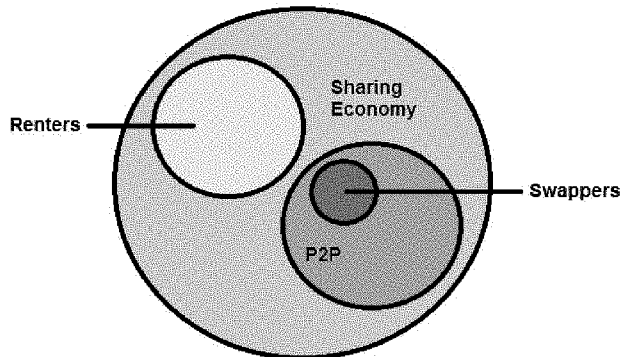
A different cluster of sharing economy companies is in the business of facilitating sales, rentals, or exchanges between third parties. Let’s call this the “peer-to-peer” economy. Peer-to-peer companies can be further broken down into “swappers” or “platforms” on the basis of what they do (and what they *don’t* do) in order to facilitate those third party transactions. Swappers like Couchsurfer, Craigslist, and LeftoverSwap facilitate transactions but do not resolve information asymmetries between the parties or vouch for the quality of what’s bought, rented, or exchanged. The third party transactors they connect may organically develop customs that

19. Doug Henwood, *What the “Sharing Economy” Takes*, THE NATION, Feb. 16, 2015, at 13.

20. Actually, Zipcar drivers face some greater restrictions. *Compare Frequently Asked Questions*, ZIPCAR, <<http://www.zipcar.com/how#faqs-category-joining>> (click on “What are the eligibility requirements to join Zipcar?”) (last visited Mar. 20, 2016) (stating that applicants with non-US or Ontario licenses “are required to complete and submit a ‘declarations form’ attesting to the validity of their driving history and license status” and that Michigan drivers under the age of twenty-one must have no major violations, “incidents,” or alcohol or drug related violations) *with Avis Car Rental FAQs*, AVIS, <<http://www.avis.com/car-rental/content/render-faq.ac#>> (under “Country,” select “USA,” under “Find a Topic,” select “Requirements for Renting,” and under “Requirements for Renting, FAQs,” select “Avis accepted Forms of Identification”) (last visited Mar. 20, 2016) (accepting any license issued by “any U.S. state, territory or possession . . . Canadian province . . . a country that participated in the 1949 Geneva convention on Road Traffic or the 1943 Convention on the Regulation of Inter-American Automobile Traffic . . . a country that has a reciprocal agreement with the U.S.”).

resolve some of these issues – think of the bulletin board practice of including small, tearable strips of paper with a seller’s contact info – but these aren’t really part of what the company itself does. In keeping with their function as glorified bulletin boards, swappers earn minimal to no money from the transactions they facilitate.²¹ Consequently, they’re also mostly interesting from a social science rather than a legal perspective.

Figure 3: P2P and Swappers



Like swappers, platforms facilitate third party transactions by using technology to connect disparate individuals with complementary needs.²² However, *unlike* swappers, platforms insert themselves into the transaction in two ways: by resolving information asymmetries between the third parties and by providing a minimal but independent source of quality control. (This, of course, is a far from neutral assertion: the license agreements and operating models of all platforms are based on the idea that the platform is *not* a party

21. Couchsurfer and LeftoverSwap currently do not earn revenue from the services they provide. Devan Rosen et al., *CouchSurfing: Belonging and Trust in a Globally Cooperative Online Social Network*, 13 *NEW MEDIA & SOC'Y* 981, 982 (2011); Elise Hu, *A New App Will Let You Share Your Leftovers with Strangers*, NPR (July 29, 2013), <<http://www.npr.org/blogs/alltechconsidered/2013/07/29/206493794/a-new-app-will-let-you-share-your-leftovers-with-strangers>>. Craigslist’s revenue streams are extremely limited (fees for job listings in seven major U.S. areas, and a \$ 10 fee for apartment rentals in New York). Keith Patrick, *How Craigslist Makes Money*, *CHRON.COM*, <<http://smallbusiness.chron.com/craigslist-money-27287.html>> (last visited Mar. 20, 2016).

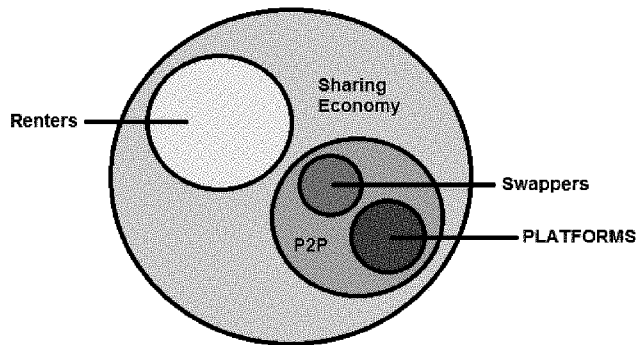
22. The term “platforms” is derived from the companies’ own view of their role as a zone or stage on which two third parties can connect with one another. See, e.g., *The TaskRabbit Platform*, TASKRABBIT <<https://www.taskrabbit.com/platform>> (last visited Mar. 20, 2016). Despite the incongruence in using a term while rejecting the view it signifies, “platform” has two advantages that make it worth sticking with for now: first, it’s already associated with these particular companies, and second, it evokes the relationship between the company and suppliers/consumers.

to any of the transactions it enables.)²³

Platforms often promote information exchange by establishing a system of reputational feedback, as when Airbnb and Feastly users rate each other and those ratings are made visible to other users. Additionally, most platforms provide an independent source of information to users, as when Uber and TaskRabbit perform security checks on drivers and Taskers.

Virtually all platforms do both: Airbnb verifies all users' personal identities and Feastly vets its cooks, while Uber and TaskRabbit also allow users to publicly rate their experiences.²⁴ Finally, and also unlike swappers, platforms add an additional level of security by processing monetary exchanges themselves. For all of this added value, platforms charge suppliers and consumers a percentage of each transaction.

Figure 4: Platforms



A quick word is in order about how suppliers match up against

23. See, e.g., *Terms and Conditions*, FEASTLY (last updated Oct. 23, 2014), <https://eatfeastly.com/t_and_c/> (stating, among other things, that “YOU UNDERSTAND AND AGREE THAT FEASTLY IS NOT A PARTY TO ANY AGREEMENTS ENTERED INTO BETWEEN COOKS AND FEASTERS IN ANY CIRCUMSTANCE”); *Terms and Conditions of Use*, LIQUIDSPACE (last revised Feb. 17, 2016), <<https://liquidspace.com/Home/Terms-Of-Use>> (stating, among other things, that “[y]our transactions, communications and interactions with any other Users, including transactions, communications and interactions initiated through the Service, are solely between you and such Users”).

24. Not *all* platforms offer independent quality control of the product or service being offered – and given the coordination costs involved, space rental services (Airbnb, HomeAway, LiquidSpace) are perhaps least likely to exercise independent quality control. What nonetheless distinguishes these platforms from swappers is their provision of other services. For example, the office space rental service LiquidSpace doesn’t independently evaluate the venues posted by owners, but it *does* offer secure and automatic payment, as well as automatic linking to the calendaring services used by many businesses. *Terms and Conditions of Use*, LIQUIDSPACE (last revised Feb. 17, 2016), <<https://liquidspace.com/Home/Terms-Of-Use>>.

existing regulatory categories like franchisees and temporary workers hired via matchmaking agencies. Platforms *have* been described as “almost like a digital franchise,” because suppliers seem like micro-entrepreneurs and platforms create brand recognition via supplier controls.²⁵ But commentators have already noted that franchising isn’t a good analogy because platform employment involves a “far greater delegation of ownership and control to [platforms].”²⁶

The “temporary worker” analogy is more complicated. Platforms – perhaps TaskRabbit more than others – *do* seem somewhat like Employment agencies. But suppliers are unlikely to qualify as “temporary Employees” even under the Fair Labor Standards Act’s²⁷ broad “economic realities” test, let alone the several other relevant acts (like the Employee Retirement Income Security Act²⁸ and Occupational Safety and Health Act²⁹) that use a *narrower* common law agency test.³⁰ Suppliers also share similarities to “on-call workers,” but again the match is far from perfect because suppliers are not a reserve pool that platforms rely on when their regular Employees are unavailable.³¹ Above all, if we want to respect the new controls and freedoms inherent in platform employment – and if we don’t want to regulate sharing economy companies out of existence – then it doesn’t make sense to squeeze suppliers into marginally relevant legal categories that trigger a whole host of undesirable responsibilities.³²

B. Platforms and Regulatory Concerns: “Participation” and “Substitution”

When we focus on what different sharing economy companies

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

26. *Id.*

27. Fair Labor Standards Act of 1938, 75 Pub. Law No. 718, 52 Stat. 1060.

28. Employee Retirement Income Security Act of 1974, 93 Pub. Law No. 406, 88 Stat. 829.

29. Occupational Safety and Health Act of 1970, 91 Pub. Law No. 596, 84 Stat. 1590.

30. See Katherine V. W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 269 (2006).

31. *Id.* at 256.

32. Consequently, it’s tempting but dangerous to think that the sharing economy’s classification issues can be resolved by simply buckling down even more on existing principles. But see Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U. C. DAVIS L. REV. 1511, 1538 (2016) (arguing that in sharing economy classification cases, courts should focus their inquiry on “flexibility” because “to the extent control is the measure of independence, flexibility is often the best evidence of control”).

actually *do* it's easy to see why platforms cause more regulatory concern than renters or swappers. First, platforms don't simply scale up or tweak existing practices while remaining conventional retailers or "matchmakers" for third parties.³³ They participate in the transactions they facilitate. The logic in hiring someone to mow your lawn via TaskRabbit rather than using Craigslist's "Odd Jobs" section is that the Tasker has been vetted by a third party and comes with easily available performance evaluations.³⁴ Put differently, platforms meaningfully change the terms on which individuals transact by adding information and security to the process of two strangers conducting business sight unseen.³⁵

Second, platforms often substitute themselves for government safeguards meant to protect public goods like safety, non-discrimination, and fair labor practices. Uber, for instance, vets aspiring drivers – actually, Uber has suggested that it does a *better* job of fulfilling this public safety function than taxi licensing boards.³⁶

33. See, e.g., *Lyft Terms of Service*, LYFT (Feb. 8, 2016), <<https://www.lyft.com/terms>> (stating, among other things, that "The Lyft Platform provides a marketplace where persons who seek transportation to certain destinations ('Riders') can be *matched* with persons driving to or through those destinations ('Drivers')" (emphasis added)).

34. Tom Slee, *Some Obvious Things About Internet Reputation Systems*, WHIMSLEY (Sept. 29, 2013, 22:40 PM), <<http://tomslee.net>> ("Classified ads, whether local newspapers or sites like Craigslist and Kijiji, solve coordination problems but do not even try to solve problems of trust beyond the most basic verification.").

35. Again, this is a hotly contested area: Uber, Airbnb, Craigslist and eBay all invoke the Communications Decency Act, 47 U.S.C. § 230 (2012), to argue that they are mere marketplaces and not providers. Ellen Huet, *Uber Rider Might Lose an Eye from Driver's Hammer Attack. Could Uber Be Held Liable?*, FORBES (Sept. 30, 2014, 9:37 PM), <<http://www.forbes.com/sites/ellenhuet/2014/09/30/uber-driver-hammer-attack-liability/>>; see also Alatraqchi v. Uber Techs., Inc., No. C-13-3156-JSC, 2013 U.S. Dist. LEXIS 119642, at *15-17 (N.D. Cal. Aug. 22, 2013) (dismissing a former Uber driver's complaint because, among other reasons, he had inconsistently described his relationship with Uber as being that of an employee and of an independent contractor).

36. Uber's website used to state that "within each city we operate, *we aim to go above and beyond local requirements* to ensure your comfort and security." Complaint at 5-6, California v. Uber Techs., Inc., No. CGC-14-543120 (San Francisco Cty. Super. Ct. filed Dec. 9, 2014) (emphasis added). See Joe, *Details on Safety*, UBER NEWSROOM (July 15, 2015), <https://newsroom.uber.com/details-on-safety/?_ga=1.95799516.1304615373.1457295665> contrasting Uber's screening process with that undergone by California taxi drivers); Chris Taylor, General Manager, Uber Chicago, Lunch Talk at the University of Chicago Law School: Uber and Innovating in a Regulatory Regime (Dec. 1, 2014) (stating that the City of Chicago only requires that aspiring taxi drivers pass criminal background checks within Illinois, but Uber Chicago checks criminal backgrounds across all states).

True, Uber's claim is unusually ambitious (as demonstrated by the California lawsuits explicitly challenging its consumer non-discrimination policies³⁷ and its background checks³⁸). But the underlying idea that platforms can combine some form of internal oversight with reputational feedback mechanisms to meet or exceed the goals of the regulations they sidestep is hardly unique to Uber.

At first glance, it may seem that "substitution" mostly affects consumers while "participation" mostly affects suppliers, so that it makes sense to discuss each group's concerns separately. Nascent critiques of substitution generally *do* focus on whether reputational feedback and internal oversight adequately protect consumers (for example, does Uber adequately screen out aspiring drivers who are sexual predators?).³⁹ But the adequacy of platform-driven substitution is an issue for suppliers too – for instance, does Airbnb encourage racial biases that, were it regulated on par with the hotel industry, might subject it to anti-discrimination penalties?⁴⁰

Likewise, platforms' refusal to acknowledge participation in the

37. Complaint at 1, Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc., 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (3:14-cv-04086-NC) (arguing that Uber violated the Americans with Disabilities Act, 42 U.S.C. §§ 12181-189 (2012), by denying "blind individuals with service animals full and equal access to Defendants' UberX transportation service").

38. Complaint at 5-11, California v. Uber Techs., Inc., No. CGC-14-543120 (San Francisco Cty. Super. Ct. filed Dec. 9, 2014) (arguing that Uber's failure to use fingerprint analysis as well as its reliance on self-reported information devalues the vetting process and give consumers a false sense of security); Karen Gullo, *Uber Sued by San Francisco, Los Angeles Prosecutors*, BLOOMBERG (Dec. 9, 2014, 4:33 PM), <<http://www.bloomberg.com/news/articles/2014-12-09/uber-sued-by-california-prosecutors-in-consumer-protection-case>>; see also Gillette v. Uber Techs., Inc., No. 3:14-cv-05241-LB (N.D. Cal. filed Dec. 15, 2014) (arguing, among other things, that Uber's improper use of an ex-driver's consumer background report violated the Fair Credit Reporting Act); Ravi Mahesh, Note, *From Jimney Buses to App-Based Ridesharing: Understanding California's "Third Way" Approach to Ride-for-Hire Regulation*, 88 S. CAL. L. REV. 965, 993-99, 1013-14 (2015) (arguing against anti-competitive regulations for the ride-sharing industry but supporting regulations that fulfill the basic tenets of health and safety regulation).

39. See, e.g., Olivia Nuzzi, *Uber's Biggest Problem Isn't Surge Pricing. What If It's Sexual Harassment By Drivers?*, THE DAILY BEAST (Mar. 28, 2014), <<http://www.thedailybeast.com/articles/2014/03/28/uber-s-biggest-problem-isn-t-surge-pricing-what-if-it-s-sexual-harassment-by-drivers.html>>.

40. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harvard Bus. School, Working Paper No. 14-054, 2014) (finding that black Airbnb hosts are on average only able to charge 12 percent less than non-black hosts and pay a larger price penalty for having a poor location); Curtis M. Wong, *Airbnb Removes Texas Property Listing After Owner Reportedly Rejects Gay Couple*, HUFFINGTON POST, Apr. 30, 2015, <http://www.huffingtonpost.com/2015/04/30/airbnb-gay-couple-discrimination-_n_7183806.html>. Note that platforms don't encourage discrimination the way, say, a hotel does when it complies with a guest's request to not have a black maid clean her room. But query whether discrimination occurs at the point of suppliers' entry and exit from the platform.

transactions they facilitate seemingly affects suppliers more than consumers, since suppliers can be held to demanding standards (the ubiquitous five star Uber rating⁴¹) yet kicked off the platform without notice or appeal because they are not even classified as Independent Contractors vis-à-vis the platform.⁴² But “participation denial” also affects consumers, who come under considerable pressure to retract negative ratings from suppliers desperate to avoid termination. When consumers succumb to such pressure and give undeservedly high ratings, they damage the reliability of reputational feedback mechanisms – which, in turn, produces a “substitution” problem.⁴³ In other words, there are no purely “consumer” or “supplier” problems.

Nevertheless, there are good reasons to momentarily narrow our focus to the issues facing platform suppliers. First, supplier issues are already important to a large and growing population that is uniquely vulnerable.⁴⁴ Suppliers are at a disadvantage relative to their platform “employers” because platforms have the resources to effect the same kind of regulatory capture associated with industry incumbents while suppliers lack union-derived bargaining power.⁴⁵ Nascent supplier associations don’t solve this problem because, as non-Employees,

41. Slee, *supra* note 34, at 6 (analyzing reputational feedback systems and noting, with respect to Blablacar, that with “over 98% of ratings being five stars, the reputation system does not meaningfully discriminate among drivers or riders . . . [and] fails to solve the problem of trust”).

42. Mimzy, Uber Driver (San Diego), Comment to *Uber Pay Cuts & Unfair Ratings System – Wash Rinse Repeat*, UberPeople (Sept. 14, 2014), <<http://uberpeople.net/threads/uber-driver-pay-cuts-unfair-ratings-system-wash-rinse-repeat.3543/>> (on file with author) (noting that drivers “are tied to a system of the customer *has the last and final say* – no matter how unruly, rude, intoxicated, or just plain uninformed the passenger may be – with the best intentions *thinking 4 is ‘very good’* . . . with Uber. 4.5 is grounds for **IMMEDIATE SUSPENSION OR TERMINATION** from the system”). Note that Uber’s settlements of misclassification claims in California and Massachusetts provide that drivers in those states will no longer be subject to immediate and un-appealable deactivation. *O’Connor v. Uber Technologies, Inc.*, Case No. 3:13-cv-03826-EMC (Apr. 21, 2016), Class Action Settlement and Release 135(a) at 36.

43. See Nuzzi, *supra* note 39 (describing how an ex-Uber driver upset by the author’s low rating and his subsequent termination wrote to the author at her work email address as well as to her employer, and provided the author’s name and photo to a third party as part of a request for help appealing the termination).

44. See, e.g., Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015) (observing that Uber “enables discrimination by drivers and passengers” and that it is “undermining working standards for taxi drivers and compensating its own drivers poorly” but that the company’s “ultimate effect on labor standards is . . . unclear”).

45. Perry Stein, *Uber’s Next Fight with the D.C. Council? A Wheelchair-Accessibility Bill*, WASH. CITY PAPER (Nov. 20 2014, 4:46 PM), <<http://www.washingtoncitypaper.com/blogs/citydesk/2014/11/20/ubers-next-fight-with-the-d-c-council-a-wheelchair-accessibility-bill/>> (noting that in D.C., Uber is lobbying against a proposed vehicle accessibility bill that would not place any demands on Uber itself but would require it to report requests for wheelchair-accessible vehicles to help the city keep track of demand).

suppliers can be punished for their efforts at collective organization.⁴⁶ And unlike their counterparts in many incumbent industries (who also can't officially unionize) suppliers are subject to stringent performance controls and don't enjoy fixed profit margins.⁴⁷ Given their collective action problems and the phenomenon of control without protection, suppliers are unsurprisingly resorting to class action lawsuits as a way of resolving issues with their platforms.⁴⁸

Second, it is worth focusing on suppliers because supplier issues are gaining traction in regulatory circles and will continue to do so as more regions enact legislation targeting platforms.⁴⁹ Right now many of these laws are industry-specific rules that highlight the close and largely unexamined relationship between platforms and suppliers – think of San Francisco's requirement that Airbnb hosts pay hotel taxes,⁵⁰ or Boston's demand that Uber extend the scope of driver

46. The California App-Based Drivers' Association (CADA) is one such "non-union association" catering to platform suppliers. The O'Connor settlement allows Uber drivers to participate in a drivers' association without fear of retaliation and provides for quarterly meetings between Uber and the leaders of the association, as well as some funding for the association. At the same time, it also expressly notes that the association "is not a union" and "will not have the right or capacity to bargain collectively with Uber." Michael Skapinker, *Unions Suffer for Lack of a Killer App*, FIN. TIMES, Jan. 27, 2005, at 10; see also O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (denying summary judgment based on genuine issue of material fact regarding employment status of Uber drivers for purposes of California Labor Code); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143, 152-53 (2005) (observing that NLRA protections don't extend to independent contractors).

47. Non-union associations do sometimes exist among independent contractors – for example, the National Taxi Workers' Alliance founded in New York City by Bhairavi Desai. The NTWA has managed to build a strong association (roughly 18,000 of New York's estimated 50,000 yellow cab drivers). See *Mission & History*, NYTWA, <<http://www.nytw.org/mission-and-history/>> (last visited Mar. 21, 2016). Similarly, over 1000 Uber drivers in New York recently signed cards with a non-union association, the Amalgamated Local of Livery Employees in Solidarity (ALLES). *Uber Drivers in New York Form Labor Association*, THE HUFFINGTON POST (May 1, 2016), <http://www.huffingtonpost.com/entry/uber-new-york-labor-association_us_5726852fe4b0f309baf132d7>.

48. See O'Connor, 82 F. Supp. 3d at 1133 (Uber drivers litigating tip laws); Gillette v. Uber Techs., Inc., No. 3:14-cv-05241-LB (N.D. Cal. filed Dec. 15, 2014) (Uber drivers litigating alleged violations under the Fair Credit Reporting Act, 1970, Pub. Law No. 91-508, 84 Stat. 1114).

49. See, e.g., David Harris, *Massachusetts Set to Ok Regulations on Uber, Lyft*, BIZJOURNALS (Jan. 2, 2015), <<http://www.bizjournals.com/boston/blog/startups/2015/01/massachusetts-gives-ok-uber-other-ride-sharing.html?page=all>> (describing proposed legislation that calls for "ride-sharing companies to be regulated by the Department of Public Utilities" and requiring "ride-sharing drivers to undergo a background check . . . be 21 or older [and not] . . . have more than three traffic violations or one 'major traffic violation over a three-year period'").

50. Tax on Transient Occupancy of Hotel Rooms, San. Francisco Bus. & Tax. Regulations Code, art. 7, No. 1.504-1.

background checks.⁵¹ As more industries are “disrupted” by platform technology, regulators will need to separate problems that are common to all platforms from those that are particular to the industry in which a platform operates. This article argues, in part, that platform suppliers face certain common challenges across industries that can and should be regulated without damaging the platform business model.

Finally, we should not be discouraged that the conversation initially overlooked suppliers. That conversation has overwhelmingly been driven by media commentary that initially focused on conspicuous issues like consumer service (which platforms like to emphasize) and unfair competition (which incumbents like to emphasize). There have also been a few forays into third-party effects, like the way Airbnb impacts housing availability.⁵² But as I’ve already suggested, the platform business model affects suppliers in ways that demand serious analysis. Indeed, media commentary is already shifting towards the regulatory challenges posed by the sharing economy.⁵³ As more people move away from the conventional workforce into part- or full-time work as platform suppliers, we need to make “supplier issues” more than an afterthought. We can begin by actively reconsidering Employment concepts that fail to reflect what it means to participate in the sharing economy.

III. REGULATORY CONCERNS AND EXISTING APPROACHES TO SHARING ECONOMY EMPLOYMENT

Labor and Employment regulation is meant to protect values or public goods that the market can’t always protect by itself. For instance, we may want to prevent discrimination on the basis of religion because we think it’s wrong *and even when* prohibiting such discrimination overrides rational entrepreneurial judgments to

51. Bob Salsberg, *Bill Calls for Uber Background Checks, No Fingerprinting*, BOSTON.COM (Mar. 4, 2016, 2:12 PM), <<http://archive.boston.com/news/local/massachusetts/2016/03/04/uber-bill-calls-for-background-checks-fingerprinting/p8ghJRFkE7sloU0FwZFYQI/story.html>>.

52. Henwood, *supra* note 19; Miller, *supra* note 6; John J. Horton, *The Tragedy of Your Upstairs Neighbors: Is the Airbnb Negative Externality Internalized?* (May 28, 2014) (unpublished manuscript) (on file with author).

53. See Emily Badger, *The Rise of Invisible Work*, CITYLAB (Oct. 31, 2013), <<http://www.citylab.com/work/2013/10/rise-invisible-work/7412/>> (quoting Sundararajan’s statement that “eBay’s impact hasn’t been on the thousands of tech jobs it created for eBay . . . but on the hundreds of thousands of sellers it created” for the proposition that “the real economic impact” of the sharing economy lies in the employment-related challenges it creates).

maximize profits by appealing to customer prejudices.⁵⁴ Just as well, we may think legal intervention is necessary to manage the tradeoff between having certain jobs and suffering the negative health and societal effects attached to those jobs as Employers would like to structure them.⁵⁵

The sharing economy evokes three kinds of responses: regulate it out of existence,⁵⁶ don't regulate it at all,⁵⁷ and a variety of Goldilocks approaches that I collectively call "wait-and-see."⁵⁸ Unsurprisingly,

54. See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 153 (1997) ("Suppose, for example, that purchasers or fellow employees refuse to buy from or work for a company that does not discriminate [I]t is the failure to discriminate that operates as a tax on the employer's business, rather than vice versa. The phenomenon is hardly unusual [M]arket pressures create rather than prevent discrimination."). Federal courts have come out differently on the issue of whether customer preference is a Bona Fide Occupational Qualification (BFOQ) exempt under Title VII. Compare, e.g., *Diaz v. Pan Am Airways*, 442 F.2d 385 (5th Cir. 1971) (finding that a preference for female flight attendants on the part of co-workers, airline employers, and customers did not justify sex discrimination in hiring flight attendants), and *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (finding that customer preference for promoting men to executive positions did not constitute a BFOQ but upholding the lower court's finding against the employee because she was unqualified for the promotion), and *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 533 (5th Cir. 1986) (observing that the defendant could have argued that religious affiliation was a BFOQ but that even had it done so such discrimination "would normally be prohibited from discrimination under Title VII"), with *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) (finding that an employer demonstrated that adherence to Islam was a BFOQ for being a pilot in Saudi Arabia because non-Muslims caught flying above Mecca are beheaded).

55. Compare, e.g., Richard A. Epstein, *Contractual Solutions for Employment Law Problems*, 38 HARV. J. L. & PUB. POL'Y 789, 790 (2014) (arguing, both generally as well as in the specific context of youth unemployment and the minimum wage, that "one thing that is sure today is that there are many forms of labor restrictions today not in place in the 1950s that help account for increased unemployment rates"), with Robert C. Bird & Niki Mirtorabi, *Shiftwork and the Law*, 27 BERKELEY J. EMP. & LAB. L. 383, 429 (2006) (discussing the severe health effects of "shiftwork" and arguing that "until law and policy towards shiftwork changes, millions of Americans will remain unnecessarily exposed to an increased risk of a wide variety of health and safety problems"), and Marion Crain, *Work, Free Will and Law*, 24 EMP. RESPONSIBILITIES & RTS. J. 279, 280 (2012) (arguing that the at-will doctrine "leaves the public to pick up the costs of supporting workers who are 'free' to agree to work at jobs regardless of how dangerous, low-paying or onerous the working conditions may be").

56. See 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>>; Tom Slee, *Why Canada Should De-Activate Uber*, WHIMSLEY (Nov. 22, 2014) <<http://tomslee.net/2014/11/why-canada-should-de-activate-uber.html>>.

57. Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529 (2015); Horton, *supra* note 52; John J. Horton, *Does Airbnb Hosting Beggar Your Neighbor?*, JOHN J. HORTON (May 29, 2014), <<http://john-joseph-horton.com/does-airbnb-hosting-beggar-your-neighbor/>>.

58. *Peer-to-Peer Business Hearing*, *supra* note 1 (testimony of Arun Sundararajan, Professor of Info., Operations & Mgmt. Sci., N.Y.U. Stern Sch. of Bus.) (stating that "[s]ome level of government oversight seems necessary, certainly until there is enough data about the extent to which the platforms can prevent market failure by themselves, and enough data about any new safety or liability issues"); see also Boyd Cohen & Jan Kietzmann, *Ride On! Mobility*

the first response has gained little traction in the United States – one of its most vocal representatives has been the *Canadian* technology and economics writer, Tom Slee – because, as the online journal *Knowledge@Wharton* recently put it, even “as regulators continue to crack the whip, there is little sign they will be able to stem the tide of popularity for these services.”⁵⁹ Add to this the fact that platforms operate with remarkable complaisance in legal gray (or red) zones, and it becomes clear that option one is more suited for the dining table rather than the classroom or city hall.

Option two – don’t regulate *at all* – has some similar feasibility problems, but they are less drastic. More importantly, option two is likely to make intuitive sense to many Americans and their political representatives.⁶⁰ As a result it’s worth taking a look at the nuts and bolts of the “no regulation” response to the sharing economy. Readers should note that the arguments below as well as throughout the rest of this article are skewed to consider suppliers alone, and that there are consumer and third party concerns that deserve dedicated analysis as well.

A. *No Regulation at All*

1. Aligned Interests

In a short blog post, the labor scholar John J. Horton suggests that since “[m]ost of these platforms make [sic] money by taking some percentage of each labor transaction, they have an incentive to tilt the platform . . . in favor of the worker.”⁶¹ This kind of “aligned

Business Models for the Sharing Economy, 27 *ORG. & ENV’T* 279 (2014) (observing that “a move toward merit-based business models may offer a more optimal alignment between service provider and local government objectives” but not offering explicit regulatory proposals); Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 81 *U. CHI. L. REV. DIALOGUE* 69 (2015) (arguing that “existing regulatory structures often discourage such innovations, reducing their popularity and slowing their development” but acknowledging that “identifying these problems is easier than solving them” and concluding that there are commonly “two diametrically opposite” and “imperfect” strategies that will continue to “interact cyclically” until “someone comes up with a better innovation”); Badger, *supra* note 53; Miller, *supra* note 6.

59. *Sharing Economy 2.0: Can Innovation and Regulation Work Together?*, KNOWLEDGE@WHARTON (Nov. 5, 2014), <<http://knowledge.wharton.upenn.edu/article/the-next-hase-for-the-sharing-economy/>>.

60. On when regulation is appropriate *see generally* Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J ECON. & MGMT. SCI.* 335, 335 (1974). On regulation in the sharing economy, *see* Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 *U. CHI. L. REV. DIALOGUE* 116, 120 (2015).

61. John J. Horton, *Labor in the Sharing Economy*, JOHN J. HORTON (Aug. 18, 2014), <<http://john-joseph-horton.com/labor-in-the-sharing-economy/>>.

interests” argument is often made with respect to *consumers* – for example Koopman et al. state that “reputational incentives at work require firms to constantly seek ways to satisfy rapidly evolving consumer demands and to gain (and keep) consumers’ trust”⁶² – but it’s not immediately evident that it does or should apply to suppliers. The best case that it does goes something like this: platforms want to maximize transactions, this depends in part on attracting suppliers from a limited labor pool, so platforms are already motivated to offer attractive terms.

There are several reasons why the pool of potential suppliers for any given platform is unlikely to be limited enough to generate competition. To begin with (and to borrow some public choice terminology) suppliers are essentially a “non-rivalrous” good.⁶³ An Uber driver can simultaneously be a Lyft driver, a Tasker, and part-time sales associate at her local department store.⁶⁴ While there are accounts of platforms competing with one another for suppliers – witness Uber’s “undercover operation” to recruit Lyft drivers⁶⁵ – the truth is probably less entertaining. Suppliers often simultaneously work on competitor platforms, as with Uber and Lyft. Or, as with Airbnb and Homeaway, platforms that *seemingly* compete in the same supplier pool actually do not because consumer preferences lead them to target distinct suppliers.⁶⁶ Either way, platforms do not self-evidently have cause to lure suppliers away from their platform competitors, or even from non-platforms. Finally, although many platforms impose certain requirements on suppliers, that screening process seems unlikely to narrow the pool enough to force platforms to compete for suppliers.⁶⁷

62. Koopman et al., *supra* note 57, at 542.

63. Non-rivalrous goods are those that can be used by A without becoming unavailable to B. See, e.g., John F. Duffy, *The Marginal Cost Controversy in Intellectual Property*, 71 U. CHI. L. REV. 37, 40 (2004).

64. See Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES, Aug. 16, 2014, http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0 (describing Jennifer, who cobbles together an income from work acquired on four platforms and a swapper, Craigslist).

65. Neil Irwin, *Uber’s Secret Agents: When Poaching Becomes Unethical*, N.Y. TIMES, Aug. 27, 2014, <http://www.nytimes.com/2014/08/28/upshot/ubers-secret-agents-was-poaching-from-lyft-unethical.html?_r=0&abt=0002&abg=0>.

66. Miguel Helft, *Growing Quietly in Airbnb’s Shadow*, FORTUNE, Mar. 12, 2014, <<http://fortune.com/2014/03/12/growing-quietly-in-airbnbs-shadow/>> (noting that Airbnb started out renting rooms, not entire units, and focuses on major metropolitan areas, whereas HomeAway rents entire units and is clustered in vacation spots).

67. As things stand, there’s no information regarding either “admissions rates” or “yield rates.”

This last point is worth underscoring. One of the prime enticements held out by platforms is the idea that pretty much anyone with a car, spare room, or knack for pastry-making can sign on as a supplier. Consider the following:

Got a Car? Turn it into a money machine. The city is buzzing and Uber makes it easy for you to cash in on the action. Plus, you've already got everything you need to get started.⁶⁸

Whether you're offering a seaside villa or an air mattress in the corner of your living room, it's free to list your space.⁶⁹

If you've got a vehicle, a smart phone, and a friendly, professional work ethic – we've got an opportunity for you.⁷⁰

Even discounting for marketing hyperbole – after all, not *anyone* with *any* car can be an Uber driver – there is real merit to the claim that platforms reduce barriers to entry to previously unimaginable levels.⁷¹ True, being a platform supplier sometimes requires a basic criminal background check (also faced by many minimum wage earners outside the sharing economy) and sometimes requires an existing asset like a car (also a frequent, if implicit, requirement for many minimum wage earners). But for the most part, suppliers face no educational or specialized certification requirements, zero to low capital expenditure, no incorporation paperwork, no set working hours, and no designated place of employment. The ease with which numerous people can participate in the sharing economy is one of its great advantages. But it is also why “no regulation” advocates are wrong to suggest that competition will drive platforms to offer attractive terms to their suppliers.

Part of the problem is that platforms are eager to attract both suppliers and consumers, but their strategies for appealing to one

68. *Uber Needs Partners Like You*, UBER, <<https://get.uber.com/drive/>> (last visited Mar. 22, 2016) (scroll down to “Make Good Money”).

69. *How to Host*, AIRBNB, <<https://www.airbnb.com/help/getting-started/how-to-host/>> (last visited Mar. 22, 2016) (scroll down to “List your Space”).

70. *Deliv. In Your Community*, DELIV, <<http://www.deliv.co/drivers/>> (last visited Mar. 22, 2016).

71. David Fagin, *Life as an Uber Driver: It's Just Not Fare*, HUFFINGTON POST (updated Apr. 5, 2014), <http://www.huffingtonpost.com/david-fagin/life-as-an-uber-driver_b_4698299.html> (“Becoming an Uber driver is actually a piece of cake. They'll pretty much take anyone . . . as far as I can tell there's no license check; you simply get your vehicle's paperwork and head to a nearby Holiday Inn . . . the cute 12-year-old girl running the show gives you your *Uber'd-out* iPhone 5 . . . and then says, ‘Next?!’ That's pretty much it. You're good to go.”).

often have complicated effects on their attractiveness to the other. Take the surge pricing models used by Uber and Lyft: platforms argue that raising prices (and driver profits) during high demand periods ensures that the highest value users are able to get rides. But surge pricing has an interesting side effect on drivers – as one Uber driver rather bluntly put it, “Uber Passengers get a bill 2x-4x what they *approved when drunk* the next morning, and rate the driver in disgust with UBER, not the driver – even though they had an amazing ride the night before and it goes on the Drivers [sic] permanent record.”⁷²

Theoretically, this shouldn’t happen since passengers are made aware of the higher fares before they accept a ride – and, for sure, not all surge period passengers are drunk. Just as certainly, though, it will continue to happen. But most importantly, this decidedly unfair outcome for suppliers is also a flaw in the model, which depends on the assumption that feedback mechanisms generate information that’s useful for both consumers and platforms. When a passenger “spite grades” a driver, that rating skews the system.

Finally, let’s consider one more reason why platforms might have interests that at least minimally align with their suppliers: the public relations costs of appearing predatory. Note that this is about attracting or retaining *consumers* on the basis of *supplier treatment*. And indeed, several prominent non-platform companies have increased wages to varying degrees in the past eighteen months, at least partially because they want to appear like good corporate citizens.⁷³ There’s no data on whether or not platform consumers care enough to contribute to similar wage hikes – perhaps they do, but just as plausibly, perhaps they’ll be attracted to cheap, quick service regardless of the conditions in which service providers work.⁷⁴

2. “Self-Regulation is the Best Regulation”

“No regulation” advocates also argue that platforms are better positioned to protect the non-economic goods driving regulation

72. Mimzy, *supra* note 42.

73. Jenny Che, *13 Companies That Aren’t Waiting for Congress to Raise the Minimum Wage*, HUFFINGTON POST (Apr. 2, 2015, 9:46 AM ET), <http://www.huffingtonpost.com/2015/04/02/companies-minimum-wage_n_6991672.html> (naming, among others, McDonald’s, Walmart, Aetna, Target, Starbucks, and Ikea).

74. See Hamari et al., *supra*, note 5, at 19-21 (concluding that attitudes toward the sharing economy are positively affected by a belief that it promotes environmentally responsible consumerism, but that “economic benefits (saving money and time)” have a more significant effect on the likelihood of *actual participation* in the sharing economy).

because they have expertise and methodological flexibility. In other words, Feastly knows best what problems are likely to confront its cooks and diners, and Feastly can find innovative ways of resolving those problems. For the most part, these innovative methods consist of two things: reputational feedback mechanisms and internal vetting systems free of the red tape bogging down, say, health inspection agencies.

Let's suppose that it really is in Feastly's interest to resolve *all* the same problems that we have assigned to regulatory oversight, which is no small assumption in itself. The question then becomes, are Feastly's methods of self-regulation equal or superior to the regulatory system it seeks to avoid? Put differently is it really true that "bad actors get weeded out" *as or more quickly* "through better information, reputational incentives, and aggressive community self-policing?"⁷⁵ There are strong (non-Feastly-specific) reasons to doubt that this is the case.

Much of the punch for this argument comes from platforms' use of reputational feedback mechanisms that let users rate each other and make those scores public so that future users can use them in their own decision-making. Reputational feedback is undoubtedly a powerful and rapidly expanding tool, and is the focus of a growing body of literature exploring how online communities foster "cooperation and altruism in the face of anonymity."⁷⁶ Nonetheless, these feedback mechanisms have weaknesses that affect the accuracy of the information available to platform users in non-negligible ways. Moreover, there's no one-size-fits-all solution because the problems vary from platform to platform depending on the mechanics of the feedback system and on the way users interact with the platform.

For example, *spite grading* – mentioned earlier regarding Uber and Lyft – is unlikely to be as problematic for Airbnb, Feastly, or TaskRabbit, where the consumer's choice is made after some research and probably without the constraints of an urgent meeting, playoff game, or a night spent bar-hopping. Conversely, *grade*

75. Koopman et al., *supra* note 57, at 543.

76. Compare Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 508 (2003) (explaining that cooperation in anonymous communities is facilitated by a "charismatic code," according to which cooperative behavior is magnified and uncooperative behavior is masked), with Heng Li Yang & Cheng Yu Lai, *Motivations of Wikipedia Content Contributors*, 26 COMPUTERS IN HUM. BEHAV. 1377, 1382 (2010) (finding that knowledge-sharing behavior is primarily motivated by its ability to reinforce conceptions of self that emphasize high achievement and knowledge, rather than being motivated by a pleasure in helping others).

inflation by both consumers and suppliers is probably less tied to the circumstances of the transaction than on some combination of dependence (on the platform) and emotional investment (in the transaction) – which is an off-the-cuff hypothesis as to why transportation and retail platforms like Uber, Ebay, and Amazon are notorious for uselessly high ratings.⁷⁷

Most rating systems are also subject to *packaging effects*, where the platform’s use of algorithms, score averaging, and filters shapes user choice. Virtually no platform simply provides information to users and then steps back while they make decisions, although talk of “resolving informational asymmetries” suggests that platforms do just this. For example, most platforms where users read reviews before making a choice “average and rank”: they average out all reviews and then rank according to average score. “Average and rank” helps sort the huge quantities of information platforms control, but its consequences for suppliers are *powerful*. Two restaurants on Yelp with similar average scores (for example, 3.24 and 3.26 out of 5) will be rounded to the nearest half point (3.0 and 3.5) for the purposes of ranking. That half-point change has been “associated with being 21 percentage points more likely to have sold out all 7:00 PM tables and moving from 3.5 to 4 stars makes restaurants an additional 19 percentage points more likely to have sold out all tables.”⁷⁸ Or, as Slee puts it, “Yelp’s own choices about how to present ratings, independent of business ‘quality’ . . . [have] a significant effect on some businesses.”⁷⁹

These accuracy problems are by no means unique to platforms: reputational rankings occur in all kinds of consumer contexts, and, right now, there’s no reason to think that platforms are somehow especially vulnerable to feedback failure.⁸⁰ But “no regulation”

77. Gary Bolton et al., *Engineering Trust: Reciprocity in the Production of Reputation Information*, 59 MGMT. SCI. 265, 269 (2013) (noting that of 742,829 studied eBay users who had received feedback at least once, 67 percent had a percentage positive 100 percent while 80.5 percent have a percentage positive greater than 99 percent).

78. Michael Anderson & Jeremy Magruder, *Learning From the Crowd: Regression Discontinuity Estimates of the Effects of an Online Review Database*, 122 ECON. J. 957, 966 (2012).

79. Tom Slee, *In Praise of Fake Reviews*, WHIMSLEY (Oct. 5, 2014), <<http://tomslee.net/2014/10/in-praise-of-fake-reviews.html>>. Other packaging effects include prioritizing users according to their number of views and, more problematically, prioritizing them by their willingness to purchase revenue-generating ads from the platform. *Id.*

80. Packaging effects and spite grading are also not the only problems in online rating systems, but many other problems do not apply evenly across platforms. See Shrihari Sridhar & Raji Srinivasan, *Social Influence Effects in Online Product Rating*, 76 J. MARKETING 70 (2012) (arguing that online product ratings are influenced by previous ratings, and that previous ratings

advocates stake a great deal on the idea that reputational feedback is a *better* way of regulating the market than government intervention because it *as effectively* realizes regulatory goals without inserting the state into commercial transactions.⁸¹ So it's not enough that reputational feedback "only" be vulnerable to the same weaknesses. Moreover, "no regulation" advocates overstate the reliability of this substitute and simplify the way it affects decision-making.

Of course, many platforms don't just leave users to rely on peer-generated feedback. Instead, they establish internal vetting systems – mostly to screen suppliers – as a way of adding to a consumer's sense of security. For instance, Feastly states that "All Feastly Cooks go through an extensive vetting process,"⁸² and assures diners that they "personally vet every cook that joins Feastly and reinforce our hosting guidelines to ensure the best experience from beginning to end."⁸³ Likewise, TaskRabbit announces on its homepage that "our Taskers undergo an extensive vetting process,"⁸⁴ and later reiterates, "[y]ou can trust our team of smart, talented Taskers, who have all been thoroughly vetted."⁸⁵ Uber, as previously noted, used to tell passengers that "within each city we operate, we aim to go above and beyond local requirements to ensure your comfort and security."⁸⁶ In a sense, whereas platforms tell potential suppliers that "*anyone* can be a part of our network," they tell potential consumers that "*not* just anyone can be a part of our network."

There's nothing inherently wrong with this double message, but its second half makes the efficacy of those vetting systems fair game for some serious vetting of its own. This is particularly true if (as they do) platforms claim that they protect non-economic goods like safety and non-discrimination on par with regulatory oversight. We just do

exacerbate subsequent ratings respecting product failure); Xinxin Li & Lorin M. Hitt, *Self-Selection and Information Role of Online Product Reviews*, 19 INFO. SYS. RES. 456 (2008) (arguing that online ratings suffer from self-selection bias that in turn affects consumer purchase behavior especially when earlier consumers have idiosyncratic preferences).

81. For instance, Koopman et al. state that "the Internet largely solves this problem [of market failure] by providing consumers with robust search and monitoring tools to *find more and better choices*." Koopman et al., *supra* note 57, at 540-41 (emphasis added).

82. *A Close-Knit Community*, FEASTLY, <<https://eatfeastly.com/info/trust-and-safety/>> (last visited Mar. 22, 2016) (scroll down to "Verified").

83. *FAQ Feasters*, FEASTLY, <<https://eatfeastly.com/info/faq/feasters/>> (last visited Mar. 22, 2016) (scroll down and click "How do you ensure good, clean food in a safe environment").

84. *We Do Chores. You Live Life*, TASKRABBIT, <<https://www.taskrabbit.com>> (last visited Mar. 22, 2016) (scroll down to "Trust and Safety").

85. *How TaskRabbit Works*, TASKRABBIT <<https://www.taskrabbit.com/how-it-works>> (last visited Mar. 31, 2015).

86. *See supra* note 36.

not have the data to determine whether personally vetting cooks via photos, questionnaires, and sample menus actually protects diner welfare as effectively as licensing and compliance checks.⁸⁷ Perhaps this *is* all it takes to ensure a safe and sanitary dining experience – in which case, at the very least, we may need to rethink some of our existing food and health regulations. But we don’t know.

Moreover, even if Feastly’s personal vetting system does the trick as well as existing health inspection schemes, Feastly cannot – and importantly, does not – guarantee that its vetting standards will always remain sufficiently protective of regulatory goods. In other words, platforms protect regulatory goods at their pleasure. (To make an extreme comparison, consider the disintegration of the Kimberley Process for preventing the sale of “blood diamonds.”)⁸⁸ The claim that platforms are *more* likely to protect those goods than incumbent industries depends on the idea that something in the platform model renders platform motivations vis-à-vis regulatory goods essentially irrelevant: they *have* to do things in a way that protects those goods. But it is not at all clear that what differentiates platforms from a quality control perspective – reputational feedback and internal vetting – *necessarily* protects either the people or the values we might want protected.

B. “Wait-and-See”

1. Surgical Intervention

A majority of commentators – including myself – advocate a

87. And it’s not clear that transportation platforms screen drivers as effectively as they claim to. Eight members of Congress recently issued a letter to the CEOs of Uber, Lyft, and SideCar acknowledging that these platforms “conduct private background checks when vetting potential drivers” but observing that “[following] multiple instances of sexual assault by drivers hired to work in your industry” the platforms should “take additional steps . . . [specifically] fingerprint-based background checks.” Letter from Rosa L. DeLauro et al., U.S. House of Representatives, to Travis Kalanick, Executive Officer, Uber Techs. et al. (Mar. 9, 2015) (on file with author). But transportation platforms aren’t the only ones coming under fire. *See, e.g., Julie Bort, Banned Airbnb Host Who Entered the House While His Guests Were Sleeping Was Back on Airbnb*, BUS. INSIDER (Oct. 6, 2014), <<http://www.businessinsider.com/banned-airbnb-host-was-back-on-the-site-2014-10>>.

88. Virginia Haufler, *The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention*, 89 J. BUS. ETHICS 403 (2009); Press Release, Charmian Gooch, Founding Director, Global Witness, *Why We Are Leaving the Kimberley Process* (Dec. 3, 2011) (on file with author) (announcing Global Witness’ withdrawal from participation in the Kimberley Process because the Process “failed to deal with the trade in conflict diamonds . . . turned an international conflict prevention mechanism into a cynical corporate accreditation scheme . . . [and] proved beyond doubt that voluntary schemes are not going to cut it”).

broad in-between position I call “wait-and-see.” Everyone in this camp agrees that some platform regulation is both desirable and inevitable, but we differ over the timing and content of regulatory intervention. On the one hand are those who think that we lack enough information about proper timing and content to productively intervene. Sundararajan, for instance, has moved from his original 2012 *Wired* position that “government intervention will continually become less critical”⁸⁹ to saying that “we should wait and see what the market actually provides and then sort of reframe our regulations so that the government’s intervention is surgical.”⁹⁰ But surgical intervention depends on the following difficult-to-support assumptions: (1) there will be a point when we have sufficient information to enact strategic regulations, (2) we’ll recognize that point when we reach it, (3) it won’t be too late by then, and (4) it is too early now.

Assumptions one and two are highly question-begging. How will we know that we have sufficient information without first determining the kinds of information we want? How can we decide what kinds of information we want without first developing a working statutory model? And even if we can resolve these issues, how would we gather information when platforms are not required – and are frequently unwilling – to share it?⁹¹ Surgical intervention, for all its overtones of targeted action, does not have good answers for these questions.

Assumption three has an implied referent: “it won’t be too late [to ensure that regulatory goods are protected].” But regulatory goods are not all that’s risked by waiting: *not* enacting moderate regulation can make it easier to shunt out platforms, as New York City and Portland have done, to differing success.⁹²

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

90. Arun Sundararajan, Professor of Info., Operations & Mgmt. Sci., N.Y.U. Stern Sch. of Bus., Panel discussion for the Congressional Internet Congress Advisory Committee: Should Congress Be Caring about Sharing? Regulation and the Future of Uber, Airbnb and the Sharing Economy (Dec. 8, 2014), *available at* <<http://m.stern.nyu.edu/faculty-research/professor-arun-sundararajan-speaks-about-regulation-of-the-sharing-economy-on-a-congressional-panel>>.

91. See Stein, *supra* note 45 (on Uber’s resistance to sharing information about requests for accessible vehicles); Zeynep Tufekci & Brayden King, *We Can’t Trust Uber*, N.Y. TIMES, Dec. 7, 2014, <http://www.nytimes.com/2014/12/08/opinion/we-cant-trust-uber.html?_r=0> (advocating “information fiduciaries,” or “independent, external bodies that oversee how data is used, backed by laws that ensure that individuals can see, correct and opt out of data collection”).

92. New York has been famously fighting Airbnb for some time. RES. DEP’T & INTERNET

The music file-sharing website Napster is a great example of waiting gone wrong. Napster also used new technology to enable more flexible and tailored consumption, and it also skirted existing laws virtually unopposed until, within two short years, it was effectively gone.⁹³ Of course, platforms are unlikely to face extinction at the hands of their incumbent opponents – Napster’s opponents had far deeper pockets and broader reach than the opponents of platforms, and Napster’s opponents also had national laws rather than local regulations to back them up.⁹⁴ But rapid and unregulated expansion has led some cities to turn away from platforms at the first sign of trouble, so surgical intervention must also show why waiting will not be too late for platforms themselves.

Finally, the intuition behind waiting to regulate is that early regulation discourages innovation. For argument’s sake, let’s grant that there *is* such a thing as premature regulation: even so, there are still three reasons why we needn’t play the guessing game of surgical intervention. First, it is not so very early to regulate platforms: Airbnb and TaskRabbit launched in 2008, while Uber and Getaround started in 2009. Enough time has passed that four important things have occurred:⁹⁵ (1) we can identify the core elements of a platform business model (participation and substitution to facilitate third party transactions);⁹⁶ (2) suppliers have identified some of the problems in platform models (insurance requirements, account termination, missing feedback opportunity, price fluctuations – there’s even a thriving message board devoted to disgruntled Uber drivers);⁹⁷ (3) some platforms have engaged in limited responses to those problems (the \$1 million secondary insurance policies offered by Uber, Airbnb, and Feastly, among others, as well as Uber’s latest settlement creating

BUREAU, ERIC T. SCHNEIDERMAN, N.Y. ATTORNEY GEN., AIRBNB IN THE CITY (2014) (on file with author). And a very few cities have banned or restricted transportation platforms. *See, e.g.*, ANDREW MOYLAN ET AL., R STREET POLICY STUDY NO. 29, RIDE SCORE 2014: HIRED DRIVER RULES IN U.S. CITIES (2014) (on file with author) (giving New York a “D” and Portland an “F” for hospitality to transportation platforms like Uber and Lyft).

93. *See generally* Tom Lamont, *Napster: The Day the Music Was Set Free*, THE GUARDIAN, Feb. 23, 2013, 19:05 EST), <<http://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing>>.

94. *See id.*

95. For instance, see New York’s estimate that, as of October 2014, 72 percent of the reservations made in New York City between 2010-14 (or 300,891 reservations in total) were in violation of building use and zoning laws. RES. DEP’T & INTERNET BUREAU, ERIC T. SCHNEIDERMAN, N.Y. ATTORNEY GEN., *supra* note 92, at 8.

96. *See* Section II(B).

97. *Uber Drivers Forum*, UBERPEOPLE, <<http://uberpeople.net>> (last visited Mar. 22, 2016).

a “drivers association” and ending automatic account termination); and (4) platforms’ growing lobbying power makes their battle with incumbents more like Hector and Ajax than like David and Goliath.⁹⁸

Second, the very rise of platforms suggests that moderate regulation will not impede innovation – platforms, after all, have ingeniously navigated legal grey (and sometimes red) zones in the pursuit of a new business model. That’s no reason to punish them via harsh regulation – and we shouldn’t – but it’s also no support for the idea that regulation pre-emptively quashes innovation. Moreover, platforms themselves don’t axiomatically oppose regulation: at a conference on the sharing economy, for instance, Lyft’s Director of Government Relations stated that the company actually prefers to absorb insurance acquisition costs because its research shows that potential drivers are turned off by the expense and time involved in getting or changing personal insurance.⁹⁹

Finally, we should keep in mind that cities themselves are reaching for regulatory responses. This isn’t itself an argument *for* regulation – let’s not infer an “ought” from an “is” – but it *is* an argument for thinking through potential regulatory responses on the double. Washington, D.C., Chicago, San Francisco, Seattle, Boston, Minneapolis – all of these cities have concluded that it is possible to regulate platforms without dooming them to extinction *and* that they need to impose some regulations *now*.¹⁰⁰

In the end, the biggest difference between surgical intervention and other “wait-and-see” approaches is not about when to intervene – that’s a decision that cities must make, and are making, based on their individual needs. Rather, the difference is about whether we can intelligently respond to the regulatory issues presented by platforms given what we already know, or whether we need to wait for an undetermined amount of time. I strongly suggest that we can and should start developing regulatory models for cities to use when they

98. See Jon Liss, *Uber the Job Destroyer*, THE NATION, Feb. 16, 2015, at 16, 20 (noting that besides “hiring President Obama’s lead strategist David Plouffe as a ‘campaign manager,’ Uber and Lyft have hired four of Richmond’s five largest lobbying firms for the 2015 legislative battle” and that in Virginia “[Uber] has the ear of Governor McAuliffe and Attorney General Mark Herring” granting it a “mix of traditional pocket-lining lobbying, slick PR campaigns and the bully power of billionaire backers”).

99. Joseph Okpaku, Director of Government Relations, Lyft, Inc., Presentation at the Fordham Urban Law Center Conference: Sharing Economy, Sharing City: Urban Law and the New Economy (Apr. 24, 2015).

100. See Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1084-92 (2015); Jon Brooks, *City by City, Lyft and Uber Take on Taxis, Regulators*, KQED (Mar. 3, 2014), <<http://www2.kqed.org/news/2014/03/03/lyft-uber-regulation/>>.

find them necessary – in other words, that we should “try and see” rather than continue waiting.

2. “Try-and-See”

The last group of commentators think that we *do* have enough information to begin formulating regulatory responses even if we can’t identify a time to intervene that is optimal across all contexts. Essentially these commentators ask, “in a world where local governments have already started to regulate platforms, what sort of regulations should they enact?”¹⁰¹

Suggestions so far have been industry-specific and mostly concerned with third party problems like “noisy neighbors” in the context of short-term rentals,¹⁰² how platforms affect industry incumbents,¹⁰³ and the tax implications of sharing rather than owning resources.¹⁰⁴ A few scholars have explicitly considered supplier concerns: Benjamin Edelman and Michael Luca, whose work on discrimination against black Airbnb hosts was cited in Section II(b),¹⁰⁵ and Eric Goldman, who has written about online account termination.¹⁰⁶ Goldman’s work is particularly interesting even though it is not specifically geared towards the sharing economy because unilateral account termination is an important supplier concern, and because section 230(c)(2) of the Communications Decency Act arguably immunizes platforms as “provider[s] . . . of an interactive computer service.”¹⁰⁷

But industry-specific regulation has its own shortcomings. Focusing on a particular industry like short-term rentals or ridesharing overlooks similarities in supplier concerns. Likewise, adapting existing legal tools to platforms underemphasizes the extent

101. 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 (2015); Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103 (2015).

102. Miller, *supra* note 6; Horton, *supra* note 52.

103. Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (Boston Univ. Sch. of Mgmt. Res. Paper No. 2013-16, Jan. 27, 2016) (on file with author).

104. Barry & Caron, *supra* note 58.

105. Edelman & Luca, *supra* note 40.

106. Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 671 (2012) (arguing that § 230 immunity helps guarantee “fast, cheap, and reliable” wins to online providers who police their premises and advocating that the immunity be strengthened by removing the statute’s “good faith” reference”).

107. 47 U.S.C. § 230 (2012).

to which platforms genuinely alter the nature of employment. We can circumvent both these problems by recognizing that suppliers face certain core challenges regardless of the industry in which they operate. That is to say, platforms really do challenge our fundamental assumptions about employment types and any proposed regulations will have to tackle the ways in which platform employment differs from various kinds of traditional employment. The rest of this section will articulate two important disjunctures between platforms and the current employment models under which they operate.

First, suppliers assume personal liability for mishaps in a way that their industry counterparts do not. The fact that *some* platforms provide suppliers with secondary insurance policies is no response, since not all platforms offer secondary insurance and they have no obligation to do so. Similarly, the argument that workers pay for amenities and are paid for disamenities doesn't explain what amenity suppliers are paying for, in comparison to "Independent Contractors," when they assume all of the same risks without even the benefit of a contract with their platforms. Many of the Independent Contractors in these comparisons – say, taxi drivers – have comparable freedom over their schedules, incur similar capital expenses, and (compared to some suppliers) have greater control over their profit margins as well as less stringent performance oversight. Others, like FedEx drivers, may have less freedom over their schedules and comparable capital expenses, but have greater financial and contractual security.¹⁰⁸

A second disjuncture between platform employment and current employment models is that suppliers must meet vetting and reputational feedback standards – which isn't just a matter of providing excellent customer service, as we saw in Section III(A)(ii) – and they must do so without any legal protections, financial security, or bargaining power.¹⁰⁹ The rationale is that platforms are more like facilitators of third party contracts than like "employers" of any kind,

108. See *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 985-86 (9th Cir. 2014) (observing that drivers are compensated "according to a somewhat complex formula that includes per day and per-stop components," that drivers contract with FedEx "for an initial term of one, two, or three years" followed by an automatic renewal option and that the relationship may be terminated "(1) by the parties' mutual agreement; (2) for cause, including a breach of any provision of the OA; (3) if FedEx stops doing business or reduces operations in all or part of the driver's service area; or (4) upon thirty days' written notice by the driver").

109. Again, although drivers associations are a good step forward, they do not resolve this issue since they lie outside the scope of the National Labor Relations Act and are not empowered to bargain collectively on behalf of platform suppliers.

so those protections are inapplicable to them.

But as we've already seen, that analogy is strained. Feastly decides whom to recognize as a cook, what expectations they must meet, when those expectations are met, whether to de-activate them from the network, and whether they will be eligible to engage in further transactions.¹¹⁰ It's true that Feastly doesn't pair individual diners and cooks or decide whether a given pair engages in repeat transactions – but it *does* make a threshold choice in both cases by determining who can participate in its network. This is a small but highly significant detail that belies arguments against the existence of any employment relationship between platforms and suppliers.¹¹¹

The take away is that employment in the sharing economy is just plain different. Platforms and suppliers *are* in an employment relationship, but where this relationship stands on the spectrum of legal categories ranging from “nothing” to “Employer-Employee” is open to interpretation. There are good reasons to think that suppliers are comparable to Independent Contractors and good reasons to think that suppliers are more like Employees. However, a few features of the platform-supplier relationship suggest that we may need to construct platform-specific regulations. In the final section of the article, I suggest some of the concerns that any such regulation must account for as well as concerns that regulatory responses can't or don't need to address given the broader landscape of employment law in the United States.

IV. REGULATING SHARING ECONOMY EMPLOYMENT

Given the analysis in Part II and Part III, we can imagine several distinct supplier concerns. Suppliers might be worried about safety, discrimination, and financial guarantees, among other things. However, not all of these can or should be part of a regulatory response to sharing economy employment.

110. De-activation is an especially sore point for suppliers. Platforms – especially transportation platforms – often contrast their de-activation standards with the specter of the rude and incompetent cab driver with the grimy car. But “the trade-off for the relatively low pay [from driving a cab] *was* job security” – with lower pay as well as the specter of de-activation persistently looming above them, platform drivers pay a high price for the flexibility offered by platforms. Liss, *supra* note 98, at 18.

111. An objection might go, “Feastly doesn't prevent you from being a for-hire cook – it just prevents you from being a for-hire cook on its platform! That's exactly like a potential client choosing to *not* hire an independent contractor.” Maybe. But then we should ask why, when Feastly *does* let you be a for-hire cook on its platform, it's not like a client *choosing* to hire an independent contractor.

A. Safety & Insurance

The reason platforms engage in internal vetting is to assure consumers of their personal safety when sitting in a car, renting an apartment, or letting a stranger into their house to clean their garage. Ensuring *supplier* safety might seem to be nothing more than the commonsensical inverse of this practice – after all, who would choose to welcome a stranger into their car without any assurances as to the stranger’s tendency to violence or property destruction? And yet, platforms mostly don’t vet consumers.

Although it may seem counterintuitive, personal safety is one area in which the “no-regulation” folks are probably right to say that we don’t need new legal protections. This is less because platforms’ interests regarding safety naturally align with supplier interests (although they likely do) and more because suppliers usually have the means to seek recourse under existing laws. Remember that the sharing economy operates by linking previously unknown strangers, not by preserving anonymity: if I rent my apartment to someone on Airbnb and she assaults me as I’m walking out the door, I can file a claim under state law because I have access to her name (and perhaps more). Much the same can be said for property destruction, even though many major insurance providers refuse to recognize claims stemming from the insurance holder’s commercial use of their property.¹¹² There are already insurance providers who specifically target platform suppliers and more are likely to tap into this growing market.¹¹³ In other words, suppliers already have the means to address many if not all of the personal and property safety issues they encounter. Granting them more benefits – like workers’ compensation or workplace health and safety protections – ignores the realities of platform employment and attempts to squeeze suppliers into the existing regulatory category of Employee.

The real reason why we should consider imposing some sort of mandatory insurance obligation on platforms is that platform activity creates risks for society at large, and the costs associated with those risks should not fall solely on suppliers. These risks are similar to the “noisy neighbors” problem that Miller and Horton have examined in

112. Carolyn Said, *Leaked Transcript Shows Geico’s Stance Against Uber, Lyft*, SFGATE (Nov. 23, 2014), <<http://www.sfgate.com/business/article/Leaked-transcript-shows-Geico-s-stance-against-5910113.php#next>>.

113. See, e.g., the insurance products available at Peers. *Portable Benefits*, PEERS, <www.peers.org> (last visited Mar. 22, 2016).

the short-term rental context, but they apply to more than short-term rentals and involve more than annoyance. Besides, “industry incumbents” like taxi medallion owners and hoteliers have to maintain commercial insurance on their properties for exactly this reason: they produce activity that creates social risks as well as social benefits. Why should platforms be any different?

Many of the most prominent platforms have already started providing secondary insurance in response to negative media coverage.¹¹⁴ But without an insurance *requirement*, smaller platforms (who are less likely to invite widespread media censure) may not offer secondary insurance, and bigger platforms remain free to roll back or eliminate insurance coverage when it’s no longer necessary from a public relations perspective.¹¹⁵

That’s not to say that providing insurance won’t affect platform pricing, but probably not in the way “no regulation” folks might think: platforms will incur the cost of policies and payouts, and they’ll most likely pass those costs on to suppliers via lower profit margins rather than to consumers via higher rates. This might still be preferable for suppliers whose personal insurance policies are inadequate (higher premiums or deductibles) or preclude claims incurred during unauthorized business activities.

*B. Guaranteed Earnings & Employment Benefits*¹¹⁶

One of the most common supplier complaints is that platform employment just doesn’t pay. (By contrast, the lack of benefits is not a common complaint.) This isn’t to say that suppliers end up in the red because of their work for platforms, but they often earn significantly less than what was advertised to them and, sometimes, at

114. Uber, Lyft, Airbnb, Feastly, and TaskRabbit all currently offer \$1 million in secondary insurance. *What Cooks Should Know*, FEASTLY, <<https://eatfeastly.com/info/cook-protection/>> (last visited Mar. 22, 2016); *Host Protection Insurance*, AIRBNB, <<https://www.airbnb.com/host-protection-insurance>> (last visited Mar. 22, 2016); Nairi, *Insurance for UberX with Ridesharing*, UBER NEWSROOM, <<https://newsroom.uber.com/insurance-for-uberx-with-ridesharing/>> (last visited Mar. 22, 2016); *The TaskRabbit Guarantee Terms*, TASKRABBIT, <<https://www.taskrabbit.com/guarantee>> (last visited Mar. 22, 2016); *We Go the Extra Mile for Safety*, LYFT, <<https://www.lyft.com/safety>> (last visited Mar. 22, 2016).

115. *But cf.* Rogers, *supra* note 44, at 93 (asking whether there is “any reason to think that problems of dangerous or underinsured Uber drivers will not be self-correcting” since “[a]ny rash of accidents will lead quickly to public ire and calls for regulation or will create an opening for Uber’s competitors”).

116. The distinction between guaranteed earnings and Employment benefits is clearly somewhat artificial, but since they’re usually discussed separately in conversations where economists aren’t present, I’ll do the same here.

or below the minimum wage of their locality.¹¹⁷

It could be that the opportunities afforded by any given platform don't generate sufficient income, as with Jennifer Guidry who found herself working three jobs via four platforms and a swapper (Craigslist).¹¹⁸ It could also be that net earnings per transaction are low, or – particularly in the case of transportation platforms – it could be that they're unstable because platforms engage in constant and unilateral price adjusting. There's certainly enough narrative and numerical data to make a compelling case that the arbitrariness of platform earnings is simply "unfair."

Regardless, there are three reasons why it's a bad idea to include Employment benefits and guaranteed earnings (whether in the sense of fixed earnings per time period or fixed net earnings per transaction) in any regulatory response. First, doing so misunderstands the nature of platform employment in a way that's equal and opposite to the claim that suppliers and platforms have *no* employment relationship whatsoever. Granting Uber drivers or Airbnb hosts Employment benefits would place them at an advantage relative to most half-time and many effectively full-time Employees – and on what basis?

Second, guaranteed earnings and Employment benefits are just too hard to implement. For one thing, platforms vary widely in how they set prices: compare Uber and Lyft's platform-dictated real-time pricing¹¹⁹ with Deliv's platform-dictated predetermined pricing¹²⁰ with Airbnb and TaskRabbit's *supplier*-dictated pricing.¹²¹ Coming up with

117. UberDriverMiami, *Dear Travis: A Miami Uber Driver Takes Exception to the Company's Rate Cuts*, PANDO (Jan. 26, 2015), <<http://pando.com/2015/01/26/dear-travis-a-miami-uber-driver-takes-exception-to-the-companys-rate-cuts/>> (calculating, for example, that Uber's advertised \$20/hr fares amounts to \$4.32/hr after subtracting operational expenses and Uber fees). Compare Fagin, *supra* note 71 (in which the author calculated hourly net earnings of \$8) with *History of the Hourly Minimum Wage*, N.Y. STATE DEP'T OF LABOR, <https://www.labor.ny.gov/stats/minimum_wage.asp> (last visited Mar. 22, 2016) (indicating that the minimum wage in New York was \$7.25 until Dec. 31, 2013, at which point it became \$8).

118. Singer, *supra* note 64.

119. See Kalev Leetaru, *The \$ 200 Uber Ride and the Realtime Data-Driven Sharing Economy*, FORBES (Jan. 2, 2016, 9:28 AM), <<http://www.forbes.com/sites/kalevleetaru/2016/01/02/the-200-uber-ride-and-the-realtime-data-driven-sharing-economy/#5e6e31c43056>>; *Prime Time for Drivers*, LYFT, <<https://help.lyft.com/hc/en-us/articles/214586017-Prime-Time-for-Drivers>> (last visited Mar. 22, 2016).

120. See *Same Day Local Courier Service*, DELIV, <<https://www.deliv.co/business/>> (last visited Mar. 22, 2016) (scroll down to "The details") ("We messenger multiple packages to the same destination for one price.").

121. See, e.g., *Hourly Rates and Negotiations*, TASKRABBIT, <https://www.taskrabbit.com/guidelines#hourly_rates> ("In your profile you have the ability to set your hourly rate for different task types.").

a sensible method to fix supplier earnings, let alone to identify a target amount or percentage, would be extremely difficult. And even if we could figure out the mechanics of implementing guaranteed earnings across platforms, the resulting system would most likely produce a degree of instability that isn't obviously preferable for suppliers. This is because any such system would likely be linked to a supplier's level of participation (hours or transactions per day, week, month) but that would create a world in which a supplier might have a fixed profit margin and/or benefits one week but not the next.

Third, some – though not all – financial concerns are a fair way to being fixed by the market itself. SherpaShare is a new service that allows suppliers on rideshare platforms to calculate their net earnings per ride, determine which areas allow them to earn the highest profit, and compare their earnings with other suppliers on the same platforms.¹²² (Of course, the “earnings per area” function of SherpaShare may dilute one of the consumer benefits that rideshare platforms most love to tout – that they make it easier for customers to get rides in typically underserved areas – but that's beyond the scope of this article.) Similarly, an app called Even allows suppliers to provide themselves with a regular income: the app uses a separate Even-managed savings account to bank weekly earnings above a certain threshold. When the user's weekly earnings fall below the threshold, the app pays them back the missing income out of the banked surplus.¹²³

It would take a small herd of social scientists to establish this, but there's reason to believe that suppliers don't consider themselves traditional Employees and don't expect the traditional perks of that status. What the conversation so far suggests is that suppliers want a recognition of their relationship with platforms that opens up the possibility of two-way engagement. Right now, in the words of a TaskRabbit Tasker, “Without us, [they're] just an empty app on a phone. I don't understand why they don't listen to us.”¹²⁴

122. Natasha Singer & Mike Isaac, An App That Helps Drivers Earn the Most From Their Trips, N.Y. Times, May 9, 2015, <http://www.nytimes.com/2015/05/10/technology/a-dashboard-management-consultant.html?hp&action=click&pgtype=Homepage&module=second-column-region®ion=top-news&WT.nav=top-news&_r=0>; see also The #1 Support Platform for On-Demand Workers, SherpaShare, <<https://www.sherpashare.com>> (last visited Mar. 22, 2016).

123. Anand Giridharadas, What a Steady Income? There's an App For That, N.Y. Times, Apr. 29, 2015, <<http://www.nytimes.com/2015/05/03/magazine/want-a-steady-income-theres-an-app-for-that.html>>; see also *Financial Stability in an App*, EVEN, <<https://even.me>> (last visited Mar. 22, 2016).

124. Harrison Weber, *TaskRabbit Users Revolt as the Company Shuts Down Its Bidding System*, VENTUREBEAT (July 10, 2014), <<http://venturebeat.com/2014/07/10/taskrabbit-users->

C. Discrimination & Contractual Security

Two other issues deserve mention, although neither demands regulatory response. As things stand, suppliers are not protected against discrimination based on federally protected categories. It's no use to say that platforms lack motivation to discriminate against suppliers. Non-discrimination protections (like those afforded by Title VII and the ADA) do not only apply to Employers who might have rational justification for discriminating – and anyway, as we saw earlier, platform interests and supplier interests aren't as aligned as they might first appear. Indeed, commentators have already noted a racial bias in platform advertising.¹²⁵

But granting suppliers federal anti-discrimination protections effectively places them on par with Employees, since Independent Contractors are not covered by most federal non-discrimination laws. And the truth is that we *don't know* whether or not suppliers are subject to unlawful discrimination by platforms. This certainly means that platforms need to share more information, but it does not mean that they should automatically be subject to the entire federal anti-discrimination apparatus.

Similarly, suppliers frequently bemoan the lack of security and transparency in their relationships with platforms.¹²⁶ Perhaps this will be taken care of via litigation – as in the recent Uber settlement – and if it is, so much the better. But to say that platforms *must* justify deactivations, either to the supplier in question or to a third party, is to say that platform employment is only subject to for-cause termination. It would give suppliers a greater degree of protection than many Employees, and consequently it presupposes a world in which at-will employment is the exception rather than the norm.¹²⁷ That just isn't the world, or at least the country, we live in.

revolt-as-the-company-shuts-down-its-bidding-system/>.

125. Brishen Rogers, Assoc. Professor of Law, Beasley Sch. of Law, Temple Univ., Presentation at the Fordham Urban Law Center Conference: Sharing Economy, Sharing City: Urban Law and the New Economy (Apr. 24, 2015).

126. Kel, Uber Driver (San Francisco), Comment to Q: "How Long Have You Worked for Uber?" A: "I Don't Work for Uber", UberPeople (Jan. 13, 2015), <<http://uberpeople.net/threads/q-how-long-have-you-worked-for-uber-a-i-dont-work-for-uber.11248/#post-141255>> (on file with author) (noting that "being a driver, you can't help but feel this "uneasy" every day you go to drive because "when is the next price cut" "what policies will uber change this time" "will there be too many drivers and I can't get a customer?" . . . [T]his constant feeling . . . changes you as a driver and you eventually get sick of it").

127. Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 54 (criticizing the at-will doctrine but acknowledging that the doctrine "seems natural and perhaps necessary in American culture").

V. CONCLUSION

Even if we acknowledge the existence of an “employment” relationship between suppliers and platforms, that relationship most likely doesn’t reach the level of the Employee-Employer tie under current laws. This leaves us with two problems. First, how do we respond to the employment concerns triggered by this new and exciting type of economic activity? As we’ve seen, some response is probably necessary – both to acknowledge the existence of a contractual employment relationship, and to ensure that risks created by that relationship don’t unfairly fall on suppliers. But given existing laws, Employment classification systems, as well as the development of a few market-based tools, many of the protections that suppliers may want seem either infeasible or unnecessary.

The second problem is much harder, since it entails sincere engagement with the basic assumptions of our economy and society. What would an economy increasingly populated by “Jennifers,” working multiple platform jobs with (as things stand now) no employment contracts, no protections, no fixed earnings and no benefits, look like? To what extent do we think technology has equalized asymmetries of power between workers and companies such that unionization is a superfluous privilege reserved for an increasingly select few? How much work are we willing to let people do before we call them workers?

These are difficult and longstanding questions in labor and employment law for which there are no easy answers.¹²⁸ But the idea that service providers in the sharing economy lack any employment relationship at all with their companies is just one more example of the “conceptual stretching” of work classifications in contemporary America. As more and more Americans become “Jennifers,” we will need to reconsider whether we are happy letting them work for multiple companies without ever having the recognition, or the safety, of having a “job.”

128. On the problem of categorizing employment relationships, *see generally* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 280 (2011) (arguing that “refinements to the employee/independent contractor distinction fail to confront employers’ power to shape their business practices to substitute contracting for employment and thereby reduce the threat of unionization”).

