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# THE MYTH OF THE SHARING ECONOMY AND ITS IMPLICATIONS FOR REGULATING INNOVATION

Abbey Stemler\*

## ABSTRACT

*A deflated air mattress rests in the corner of Airbnb's world headquarters. It symbolizes how Airbnb allows regular, local people to earn extra income by renting out space in their homes. Yet, this symbolism fails to represent what the company has become—a unicorn receiving much of its revenue from professionals with full-time listings. The poorly folded wad of plastic exemplifies the Myth of the Sharing Economy, which has been consistently used to subvert regulation.*

*The Myth convinces people that the sharing economy is comprised of self-regulating Platforms, which allow microentrepreneurs to utilize their excess capacity in an altruistic manner. However, the sharing economy is actually comprised of companies driven as much by market forces and failures as any taxicab company or hotel chain. The Myth possesses an appeal that is simple and seductive. It takes the familiar idea of sharing to make the claim that Platforms are unique and should be subject to new and different regulation or no regulation at all. This Myth not only harms Platform users, the environment, and the culture and diversity of communities, but it has enabled sharing economy Platforms to become powerful influencers in Silicon Valley, state legislatures, and beyond.*

*While much has been written regarding the benefits of the sharing economy and how to regulate it, and disruptive innovations more broadly, this Article is the first to critique the sharing economy by exploring the intersection between narrative and regulation. It also distills lessons for regulating future*

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*innovations and demonstrates the importance of questioning the difference between rhetoric and reality to achieve public policy goals.*

## INTRODUCTION

If you walk through the sundrenched spaces of the world headquarters of Airbnb, the online accommodation Platform, you will notice that there are no private offices, not even for the CEO. Instead, collaboration spaces fill the 72,000-square-foot building, many of which are literal translations of Airbnb listings around the world.<sup>1</sup> If you look closely, you will stumble upon an unremarkable space: a perfect replica of Joe Gebbia and Brian Chesky's apartment circa 2007.<sup>2</sup> It was there that the two blew up air mattresses for the first time and allowed people to pay a small fee to sleep on their floor. It was also there that they monetized their excess capacity, made rent, and birthed a \$31 billion company.<sup>3</sup>

A deflated air mattress rests in the corner of the facsimile birthplace.<sup>4</sup> It symbolizes the inspirational story of Airbnb, where "regular, local people [can] make a little extra money by sharing their homes with respectful guests from around the world."<sup>5</sup> Yet this symbolism of "democratizing capitalism"<sup>6</sup> fails to represent what the company has become. Only approximately 1% of Airbnb revenues in New York City come from sharing rooms like Gebbia and Chesky did.<sup>7</sup> By contrast, much of Airbnb's revenues in many cities come from full-time Airbnb listings.<sup>8</sup>

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<sup>1</sup> Eva Hagberg, *Airbnb's San Francisco HQ Embodies a New Spatial Blurring*, METROPOLIS (Dec. 2, 2013), <http://www.metropolismag.com/December-2013/Rooms-with-a-View/?cparticle=2&siarticle=1>.

<sup>2</sup> See TOM SLEE, WHAT'S YOURS IS MINE: AGAINST THE SHARING ECONOMY 37 (2015).

<sup>3</sup> ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 7-9 (2016) (discussing the founding story of Airbnb); Ingrid Lunden, *Airbnb Closes \$1B Round at \$31B Valuation, Profitable as of 2H 2016, No Plans for IPO*, TECHCRUNCH (Mar. 9, 2017), <http://social.techcrunch.com/2017/03/09/airbnb-closes-1b-round-at-31b-valuation-profitable-as-of-2h-2016-no-plans-for-ipo/> (describing Airbnb's valuation as of March 2017).

<sup>4</sup> Hagberg, *supra* note 1.

<sup>5</sup> *Update from Barcelona*, AIRBNB CITIZEN (Mar. 17, 2015), <https://barcelona.airbnbicitizen.com/update-barcelona/>.

<sup>6</sup> AIRBNB, AIRBNB POLICY TOOL CHEST 2, 13 (2016), [https://www.airbnbicitizen.com/wp-content/uploads/2016/12/National\\_PublicPolicyTool-ChestReport-v3.pdf](https://www.airbnbicitizen.com/wp-content/uploads/2016/12/National_PublicPolicyTool-ChestReport-v3.pdf) ("Airbnb is democratizing capitalism by expanding the economic pie for ordinary people, allowing them to use their home, typically their greatest expense, to generate supplemental income to pay for costs like food, rent, and their children's education.").

<sup>7</sup> SLEE, *supra* note 2 (stating that in New York City 75% of Airbnb's revenue comes from entire home rentals and only 1% of revenue comes from shared room listings).

<sup>8</sup> See *infra* Section I.A.2.b.

Airbnb provides a platform that enables a cadre of new hoteliers to access customers. But, instead of utilizing excess capacity, these “hosts” are snatching up desired spaces solely for the purpose of listing them on the site. And in many places, at least initially, they benefit from loose or absent regulations made possible by Airbnb’s rhetoric.<sup>9</sup> This lack of regulation not only puts consumers at risk, damages the make-up of neighborhoods, and disrupts the existing accommodation industry, but it has helped Airbnb become a powerful influencer in Silicon Valley, city councils, state legislatures, and beyond.<sup>10</sup>

As Part I of this Article explains, in addition to Airbnb, other “unicorns”<sup>11</sup> within the Sharing Economy<sup>12</sup> convince communities, regulators, and courts that they are facilitating altruistic activities that utilize excess capacity, support job growth, and alter how we consume. This Myth helps these Platforms<sup>13</sup> avoid everything from employment laws (by claiming supply-side<sup>14</sup> users are independent contractors) to liability for consumer harm (by claiming they are technology companies shielded by the Communications Decency Act). As argued in Part II, this subversion produces numerous market failures and gives the dominant players in each modality the space they need to grow strong and powerful via network effects.

Once successful, these Platforms are armed with more than the cash necessary to influence regulators and courts via lobbyists and attorneys. They are fortified with formidable legions of users. These users are encouraged, largely through Platform interfaces, to advocate on behalf of the Platforms and

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<sup>9</sup> See *infra* Section I.B.

<sup>10</sup> For a complete discussion of the harms caused by Airbnb and other Sharing Economy Platforms, see *infra* Section II.B.

<sup>11</sup> A “unicorn” is a startup company valued at over a billion dollars. *Words We’re Watching: The Billion-Dollar Unicorn*, MERRIAM-WEBSTER, [https://www.merriam-webster.com/words-at-play/unicorn-words-we’re-watching](https://www.merriam-webster.com/words-at-play/unicorn-words-we-re-watching) (last visited Aug. 23, 2017).

<sup>12</sup> As discussed in Part I, there is no doubt that the word “sharing” is a misnomer. Out of a need for a term to describe the phenomenon, this Article uses the term “Sharing Economy,” and capitalizes the term to refer to all businesses that utilize platforms to connect people who have goods and services to offer with those who are willing to purchase them. It should be noted, however, that in previous scholarship, the author of this Article has defined Sharing Economy companies as companies with four key characteristics: (1) the company has an online platform; (2) that platform relies on microbusinesses to provide goods and services; (3) the goods and services offered by the microbusinesses consist of their excess capacity in their personal assets and schedules; and (4) the platform facilitates high-powered information exchange about user trustworthiness via reputation systems and other means. Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 *FORDHAM URB. L.J.* 31, 57–63 (2016). However, as we now can see, most successful Sharing Economy companies do not contain all four of these components (particularly excess capacity and microbusinesses). For a complete discussion of the definition, see *id.*

<sup>13</sup> The capitalized word “Platform” is used throughout this article to refer to companies within the Sharing Economy.

<sup>14</sup> “Supply-side users” are individuals who sell their excess capacity.

drive regulatory agendas. As a result, Part III demonstrates how most Sharing Economy regulations simply codify existing business practices, leaving concerns about consumer privacy, worker protections, anticompetitive behavior, and discrimination among other issues unaddressed. How Platforms have accomplished this type of regulatory avoidance is worth understanding, particularly as regulators prepare to tackle the market failures of future network technologies.

While much has been written about the benefits of the Sharing Economy and how to regulate it,<sup>15</sup> this Article is the first to critique the sharing economy by exploring the intersection between narrative and regulation.<sup>16</sup> In particular, it shines a light on *how* start-ups that defy existing legal norms and classifications achieve and maintain power. While excellent articles have been written about the strategy used by innovative firms to avoid regulations, this Article breaks down the rhetorical devices used by firms to avoid legal rules

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<sup>15</sup> See, e.g., Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1435 (2016) (applying pluralistic theory to the regulation of the Sharing Economy); Raymond H. Brescia, *Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to-Peer Economy*, 95 NEB. L. REV. 87, 91–93, 106, 133 (2016) (describing how regulators can adopt lessons learned from the regulation of the legal profession to regulate the Sharing Economy); Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA COMPUTER & HIGH TECH. L.J. 23, 27 (2015) (arguing in favor of co-regulatory approaches in which industry and government work together to develop and enforce regulations for the sharing economy); Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 117 (2015) (arguing how Platforms can self-regulate and address market failures); Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 288–89 (2015) (discussing how to view Sharing Economy Platforms as something distinct from traditional Coasian firms and regulate them accordingly); Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?*, 19 STAN. TECH. L. REV. 293, 295 (2016) (arguing that sharing economy policy “requires a regulatory framework that simultaneously allows the key efficiencies the platforms seek to offer and assures that they adequately address the rights of consumers and third parties”); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 117 (2016) (arguing that the Sharing Economy defies conventional regulatory theory); Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. LEGIS. 147, 184 (2016) (discussing current approaches to regulating the sharing economy); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 423 (2015) (analyzing the Sharing Economy and proposing regulations from an “innovation law” perspective).

<sup>16</sup> Cristiano Codagnone, Federico Biagi, and Fabienne Abadie do explore rhetoric’s role in the Sharing Economy in their extensive policy report for the European Union; however, they do not specifically address the impact rhetoric has had on the regulation of the Sharing Economy. Cristiano Codagnone et al., European Comm’n: Joint Research Ctr., *The Passions and the Interests: Unpacking the “Sharing Economy,”* EUR 27914 EN 6, 12 (2016). Similarly, Chris Martin describes the discourse and frames used within the Sharing Economy but does not focus specifically on their relation to regulation. Chris J. Martin, *The Sharing Economy: A Pathway to Sustainability or a Nightmarish Form of Neoliberal Capitalism?*, 121 ECOLOGICAL ECON. 149, 150–51 (2016).

and obligations.<sup>17</sup> The Article concludes by distilling key lessons for regulating future innovations and demonstrates the importance of questioning the difference between rhetoric and reality to achieve the desired ends of regulation.

## I. MYTH MAKING

This Part briefly describes the initial excitement surrounding the Sharing Economy. It then exposes the elements that make up its Myth. By clearly understanding the Myth, we can begin to see how it has contributed to the under-regulation of the Sharing Economy.

### A. *The Honeymoon Stage*

In the early 2010s, the Sharing Economy was considered a social, political, and economic transformation that was “democratizing how we produce, consume, govern, and solve social problems.”<sup>18</sup> Many thought, and some still do, that the Sharing Economy signaled a revolution that would empower ordinary people to utilize their personal excess capacity in a variety of ways.<sup>19</sup> Others believed it could present a new form of the American Dream.<sup>20</sup>

The Sharing Economy excited people, governments, and entrepreneurs around the world because it appeared to provide economic opportunities for a broad cross-section of society.<sup>21</sup> Many believed it allowed people to bridge the gap between permanent job opportunities and to pursue entrepreneurial endeavors and the creative arts.<sup>22</sup> And with some Platforms, that may be the

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<sup>17</sup> See, e.g., Eric Biber et al., *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561 (2017) (discussing how entrepreneurs exploit legal loopholes or challenge existing regulatory structures in order to grow creating “policy disruptions”); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 385 (2017) (discussing how innovative firms make “changing the law a material part of [their] business plan” and how firms identify this activity as “regulatory entrepreneurship”).

<sup>18</sup> SHAREABLE, HOW TO: SHARE, SAVE MONEY & HAVE FUN 6 (Tom Llewellyn & Neal Gorenflo eds., 2016).

<sup>19</sup> See Adam Trisk, *Why the Sharing Economy Is More Than a Trend—It’s a Revolution*, INC. (Apr. 8, 2016), <http://www.inc.com/adam-trisk/why-the-sharing-economy-is-more-than-a-trend-its-a-revolution.html>.

<sup>20</sup> Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 12 (2012).

<sup>21</sup> See Martin, *supra* note 16, at 153–54.

<sup>22</sup> The U.S. Conference of Mayors in June 2013 stated, “Sharing Economy companies have proven to be engines of innovation and job creation, driving economic development in the hearts of American cities, where joblessness is still most pervasive.” U.S. CONFERENCE OF MAYORS, ADOPTED RESOLUTIONS AT THE 81ST ANNUAL MEETING 187 (2013), <http://iiusa.org/blog/wp-content/uploads/2013/08/resolutions-adopted.pdf>. “Sharing leverages a wide variety of resources and lowers barriers to starting small businesses,” with the

case. For example, Airbnb reports that 45% of their hosts in Portland, Oregon are “self-employed, freelancers, or part-time workers, [and] 12% of [these] hosts . . . have used Airbnb income to support themselves while launching a new business.”<sup>23</sup> Uber reports that 74% of its drivers do so “to help maintain a steady source of income to supplement . . . unpredictable earnings.”<sup>24</sup> However, as described in the subsections below, there is more to the story because supply-side users either lack needed worker protections or are full-fledged businesses subverting regulations.

With regard to the environment, some thought that by tapping into excess capacity, the Sharing Economy could help save the world by allowing people to “meet the speed, scale, and local adaption requirements [necessary] to address climate change in time to prevent the catastrophic change that we’ve set in motion.”<sup>25</sup> In fact 76% of adults familiar with the Sharing Economy believe it is good for the environment.<sup>26</sup> Presumably the Sharing Economy can reduce the need for capital-intensive infrastructure (such as hotels) and durable goods (such as cars) since the excess capacity in these spaces and goods is exploited.<sup>27</sup> And, because people often have a personal interaction with the owner of assets in the Sharing Economy, they tend to be more considerate when using those assets. As Airbnb reports, guests in North America consume

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outsourcing of tasks and “innovations like shared workspaces, shared commercial kitchens, community-financed start-ups, community-owned commercial centers, and spaces for ‘pop-up’ businesses.” JANELLE ORSI ET AL., *SHAREABLE & SUSTAINABLE ECONS. LAW CTR., POLICIES FOR SHAREABLE CITIES: A SHARING ECONOMY POLICY PRIMER FOR URBAN LEADERS* 30 (2013).

<sup>23</sup> Molly Turner, *The Airbnb Community’s Economic Impact in Portland*, AIRBNB (Apr. 22, 2014), <https://perma.cc/M54J-PSGU>; see also Stemler, *supra* note 12, at 40.

<sup>24</sup> Jonathan Hall, *In the Driver’s Seat: A Closer Look at the Uber Partner Experience*, UBER NEWSROOM (Jan. 22, 2015), <https://newsroom.uber.com/in-the-drivers-seat-understanding-the-uber-partner-experience/>.

<sup>25</sup> ROBIN CHASE, PEERS INC, *HOW PEOPLE AND PLATFORMS ARE INVENTING THE COLLABORATIVE ECONOMY AND REINVENTING CAPITALISM* 4 (2015); see Sara Gutterman, *How the Sharing Economy Will Save Our Economy and the Environment*, GREEN BUILDER (June 19, 2014, 1:47 PM), <http://www.greenbuildermedia.com/blog/sharing-economy-revolution> (stating how the Sharing Economy presents a better form of consumption by “blend[ing] the world of profitability and sustainability”); Harald Heinrichs, *Sharing Economy: A Potential New Pathway to Sustainability*, 22 GAIA 228 (2013); Jim Pickell, *How the Sharing Economy Helps in the Fight Against Climate Change*, HUFFPOST (Dec. 10, 2015, 10:27 AM), [http://www.huffingtonpost.com/jim-pickell/how-the-sharing-economy-h\\_b\\_8761184.html](http://www.huffingtonpost.com/jim-pickell/how-the-sharing-economy-h_b_8761184.html).

<sup>26</sup> PRICEWATERHOUSECOOPERS, *THE SHARING ECONOMY: CONSUMER INTELLIGENCE SERIES 9* (2015), [http://www.pwc.com/en\\_US/us/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf](http://www.pwc.com/en_US/us/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf).

<sup>27</sup> The Sharing Economy can also address peak load problems within the transportation and accommodation industries when demand is unusually high (e.g., for a sporting event, convention, etc.). See *EconTalk: Michael Munger on the Sharing Economy*, LIBR. ECON. & LIBERTY (July 7, 2014), [http://www.econtalk.org/archives/2014/07/michael\\_munger.html](http://www.econtalk.org/archives/2014/07/michael_munger.html).

63%–71% less energy than traditional hotel guests.<sup>28</sup> However, we are only seeing part of the story because many of the environmental benefits of the Sharing Economy have yet to fully materialize.

While the benefits of the Sharing Economy were and are many, the honeymoon phase of the Sharing Economy revolution is certainly over.<sup>29</sup> The Sharing Economy’s “dark side”<sup>30</sup> has been revealed in many ways—lack of worker protections,<sup>31</sup> discrimination among participants,<sup>32</sup> damage to the fabric of local communities,<sup>33</sup> and threats to consumer safety<sup>34</sup> and fair competition.<sup>35</sup> While these kinds of market failures are not uncommon among burgeoning industries, what is troubling is the role rhetoric has played in convincing people that the Sharing Economy need not be regulated.

### B. Elements of the Myth

In Plato’s *Gorgias*, Gorgias defined “rhetoric” as “the art of persuasion.”<sup>36</sup> This Article employs a similarly expansive definition of rhetoric and includes all speech used with the intent to persuade. This broad definition is necessary because rhetoric, as applied to public opinion formation, is a topic of study for a variety of disciplines (political science, psychology, communication, sociology, economics, etc.). This Article draws upon several of these disciplines, but most heavily relies on contributions from the field of political science.<sup>37</sup> Generally speaking, and from whatever angle, rhetoric is powerful because it can be used to shape arguments and preclude socially acceptable

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<sup>28</sup> CLEANTECH GROUP, ENVIRONMENTAL IMPACTS OF HOME SHARING: PHASE 1 REPORT (2014).

<sup>29</sup> Codagnone et al., *supra* note 16, at 13; *see also* Martin, *supra* note 16, at 149 (arguing that views on the Sharing Economy now tend to rest on one of two extremes: a “niche of socio-digital experiments” or a “niche . . . integrating digital technologies into socio-technical structures”).

<sup>30</sup> Arvind Malhotra & Marshall Van Alstyne, *Economic and Business Dimensions: The Dark Side of the Sharing Economy . . . and How to Lighten It*, 57 COMM. ACM, Nov. 2014, at 24, 24.

<sup>31</sup> Because most Platforms view supply-side users as independent contractors, they are not eligible for a host of employment-related benefits—such as health and unemployment insurance—and protections from discrimination. Gillian B. White, *In the Sharing Economy, No One’s an Employee*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/>.

<sup>32</sup> *See infra* note 151.

<sup>33</sup> Malhotra & Van Alstyne, *supra* note 30, at 24 (describing how tourists do not always respect communities and how renting out homes may drive up housing prices).

<sup>34</sup> *See infra* note 154.

<sup>35</sup> Stephen P. King, *Sharing Economy: What Challenges for Competition Law?* 6 J. EUR. COMPETITION L. & PRAC. 729, 730 (2015) (describing the competition law implications of the Sharing Economy).

<sup>36</sup> Plato, *GORGIAS* 10 (Watchmaker Publ’g, 2010). For a full discussion of this definition, see Anthony T. Kronman, *Rhetoric*, 67 U. CIN. REV. 677, 677 (1999).

<sup>37</sup> The many fields that study rhetoric and public opinion remain largely siloed. *See* James N. Druckman, *What’s It All About?: Framing in Political Science*, in PERSPECTIVES ON FRAMING 279, 279–302 (Gideon Keren ed., 2011).



rebuttals, which can force people to endorse stances that go against their or society's best interests.<sup>38</sup>

The use of rhetoric in the sphere of public discourse to influence public policy runs parallel to the birth of public policy itself. As historian James Burns explains, the more democratic societies become, the more important rhetoric is to convince individuals of what they should believe and whom they should follow.<sup>39</sup> "Leadership over human beings is exercised when persons with certain motives and purposes mobilize, in competition or conflict with others, institutional, political, psychological, and other resources so as to arouse, engage, and satisfy the motives of followers."<sup>40</sup> Effective rhetoricians convince their audiences by using particular terms that cause visceral reactions in listeners and by framing arguments in precise ways.<sup>41</sup>

If we look backward in time (although we need not go too far), we can see how disruptive and ambitious Platforms grew using the most positive and inspiring characteristics of the Sharing Economy to distort perceptions and avoid regulation. As demonstrated in the subsections below, framing and precise wording confused and overemphasized the positive aspects of the Sharing Economy and compelled the public and lawmakers to support this nascent and fast-moving industry. These two elements of rhetoric, frames and word choice, make up the Myth of the Sharing Economy.<sup>42</sup>

### 1. Word Choice

Word choice influences how people perceive issues and in turn how they feel about those issues.<sup>43</sup> This is why policymakers carefully leverage the power of words, and politicians often conduct research studies to determine the

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<sup>38</sup> See generally Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT'L REL. 35, 38, 42 (2007) (discussing the centrality of rhetoric to political processes and outcomes).

<sup>39</sup> JAMES MACGREGOR BURNS, LEADERSHIP 11, 26 (1978).

<sup>40</sup> *Id.* at 18.

<sup>41</sup> David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 659–60 (2010) (describing how frames and word choice influence our understanding of intellectual property law).

<sup>42</sup> Note that the word "myth" in this Article is used generally to indicate the powerful, consequential, and dominate discourse used by Sharing Economy Platforms. As with other terms used in this Article, such as "rhetoric" and "frames," I do not delve into their metaphysics; however, there are several sources that are helpful to appreciate the complexity of these terms. See, e.g., THE CAMBRIDGE COMPANION TO NARRATIVE 5 (David Herman ed., 2007); BRUCE LINCOLN, THEORIZING MYTH: NARRATIVE, IDEOLOGY, AND SCHOLARSHIP ix (1999); Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 103–21 (2007).

<sup>43</sup> Elspeth Gustavson, *Rhetoric: How Politicians Manipulate Language and the Media to Shape Public Thought*, 8 HINCKLEY J. POL. 29, 29–30 (2007).

precise language capable of creating a wanted public reaction and often conduct research studies to determine the precise language capable of creating a wanted public reaction.<sup>44</sup> For example, in 2003, pollster Frank Luntz advised the Republican Party:

It's time for us to start talking about "climate change" instead of global warming . . . . "*Climate change*" is less frightening than "*global warming*." As one focus group participant noted, climate change "sounds like you're going from Pittsburgh to Fort Lauderdale." While global warming has catastrophic connotation attached to it, climate change suggests a more controllable and less emotional challenge.<sup>45</sup>

Other areas where word choice has been used to drive regulation include the "death tax"<sup>46</sup> and "pro-life."<sup>47</sup> Invoking rhetorical tropes makes arguments accessible and colors them with shades of morality.<sup>48</sup>

The term "Sharing Economy" is a model of how word choice can influence perceptions. Adopted by most Platforms, the term invokes notions of "helping others" and "community."<sup>49</sup> A Pew Research study found that 40% of respondents who had heard of the term Sharing Economy and could give a classifiable description of it focused more on the sharing part of the phrase than the economy aspect.<sup>50</sup> Indeed, many of these participants thought of sharing literally, with individuals sharing resources in a charitable manner.<sup>51</sup> Others associated the term with neighborliness, "frequently using words like 'community' or 'friends' in their responses."<sup>52</sup>

Platforms have been eager to position themselves under the Sharing Economy umbrella because of the "positive symbolic meaning of sharing, the magnetism of innovative digital technologies, and the rapidly growing volume of sharing activity."<sup>53</sup> As Cristiano Codagnone, Federico Biagi, and Fabienne Abadie argue, the term encompasses so many activities that it confuses the issues surrounding how to regulate the Sharing Economy because "[i]t is at times difficult to ascertain whether advocates, opponents, regulators, and policy makers are discussing the same phenomenon."<sup>54</sup> This confusion helps highly-profitable Platforms better associate themselves with firms that are voluntary gift exchanges such as CouchSurfing—a Platform that facilitates "free" homes stays—or Freecycle, a sharing site that allows you to gift

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<sup>44</sup> *Id.*

<sup>45</sup> STEVEN POOLE, UNSPEAK: HOW WORDS BECOME WEAPONS, HOW WEAPONS BECOME A MESSAGE, AND HOW THAT MESSAGE BECOMES REALITY, 42 (2006) (emphasis omitted); see Gustavson *supra* note 43, at 30.

unwanted goods as opposed to throwing them away.<sup>55</sup> When euphemistically associated with such positive and altruistic images, it is no wonder that Platforms can mobilize their millions of users to advocate on their behalf, and politicians become hesitant to appear hostile to the sacrosanct concept of sharing.<sup>56</sup>

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<sup>46</sup> MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH, 76–78 (2005) (“Estate tax sounds like it only hits the wealthy but ‘death tax’ sounds like it hits everyone. They focus grouped this a lot, and people viewed a ‘death tax’ as very unfair. You don’t have to be really rich to be worried about a death tax.”); see Gustavson *supra* note 43, at 30.

<sup>47</sup> The transition in terminology from “right to life” to “pro-life” has “successfully put abortion in the frame of ‘life’ and not ‘choice’ because life holds a higher moral priority than choice. In other words, if anti-abortionists are ‘pro-life,’ than [sic] pro-choice advocates must be ‘anti-life.’” Gustavson *supra* note 43, at 30–31.

<sup>48</sup> Fagundes, *supra* note 41, at 666.

<sup>49</sup> Kenneth Olmstead & Aaron Smith, *How Americans Define the Sharing Economy*, PEW RES. CTR. (May 20, 2016), <http://www.pewresearch.org/fact-tank/2016/05/20/how-americans-define-the-sharing-economy/>. Throughout its blog *Uber Newsroom*, Uber refers to itself as part of the Sharing Economy. See, e.g., *Uber and the American Worker; Remarks from David Plouffe*, UBER NEWSROOM (Nov. 3, 2015), <https://newsroom.uber.com/1776/>. Similarly, throughout its *Airbnb Blog*, Airbnb refers to itself as a part of the Sharing Economy. See, e.g., *Learning at Airbnb Open 2014*, AIRBNB: BLOG (Dec. 9, 2014), <http://blog.airbnb.com/learning-airbnb-open-2014/>. In fact, Brian Chesky, Airbnb’s founder and CEO, said he wants the Airbnb logo to become a “universal symbol of sharing”. Austin Carr, *Airbnb Unveils a Major Rebranding Effort that Paves the Way for Sharing More Than Homes*, FAST COMPANY (July 16, 2014), <https://www.fastcompany.com/3033130/airbnb-unveils-a-major-rebranding-effort-that-paves-the-way-for-sh> (emphasis added). EatWith, a Platform that matches diners with home chefs, describes itself as a part of the “Sharing Economy” throughout its Facebook page. E.g., EatWith, FACEBOOK (Oct. 24, 2014), [https://www.facebook.com/pg/EatWith/posts/?ref=page\\_internal](https://www.facebook.com/pg/EatWith/posts/?ref=page_internal) (featuring a photo with a banner stating, “Celebrating the sharing economy in Barcelona,” marked with the hashtag “#sharingeconomy”).

<sup>50</sup> Olmstead & Smith, *supra* note 49.

<sup>51</sup> *Id.* (noting that responses include “[h]elping others with what you are able when they are in need,” and “[h]elping the less fortunate to try and get them back on their feet and be successful”).

<sup>52</sup> See *id.* (reporting that responses include “[h]aving a set of friends and neighbors who borrow each other’s stuff, so everyone doesn’t need to buy their own rarely used items” and “[c]ommunities owning one item that is only occasionally used, and sharing it . . . [like a] lawnmower, for example” (third alteration in original)).

<sup>53</sup> Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE (Oct. 2014), <http://www.greattransition.org/publication/debating-the-sharing-economy>. Positioning Platform activities under the umbrella of “sharing” may also be considered “sharewashing.” Anthony Kalamar, *Sharewashing Is the New Greenwashing*, OPEDNEWS (May 13, 2013, 6:10 PM), <http://www.opednews.com/articles/Sharewashing-is-the-New-Gr-by-Anthony-Kalamar-130513-834.html> (coining the term “sharewashing” to refer to misappropriation of the word “sharing” when talking about traditional economic exchanges).

<sup>54</sup> Codagnone et al., *supra* note 16, at 13.

<sup>55</sup> *Id.* at 14.

<sup>56</sup> For example, Uber organized riders to send at least 17,000 e-mails to New York City Mayor Bill de Blasio in response to a proposed temporary cap on ride-company growth. See Carolyn Said, *Airbnb, Uber Cast Themselves as Saviors of the Middle Class*, S.F. CHRON. (Nov. 10, 2015, 8:16 PM), <http://www.sfchronicle.com/business/article/Airbnb-Uber-We-are-the-saviors-of-the-middle-6620729.php>. When New York City placed regulations on Airbnb hosts, an Airbnb user was able to get over 200,000 signatures to support a “legalize sharing” campaign. SUNDARARAJAN, *supra* note 3, at 133. See also *infra* Part III.

Despite the common perception, the term “Sharing Economy” is clearly a misnomer.<sup>57</sup> As described in further detail below, dominant companies within the Sharing Economy (Uber, Lyft, Airbnb, etc.) rarely enable sharing as it is commonly understood. Instead, cash, as opposed to altruism, motivates supply-side user behavior. It is more appropriate to classify these companies as part of the “gig economy,” “peer-to-peer economy,” or “on-demand economy,” but these terms do not spark the positive emotions associated with sharing.<sup>58</sup> The term “Sharing Economy” muddles our ability to see it for what it is, and hinders a rational debate about policy and regulation.

Sharing Economy firms carefully select other terms to elicit specific responses. For example, in the 2015 campaign to defeat San Francisco’s Proposition F, which sought to limit Airbnb rentals to seventy-five days a year and increase enforcement and penalties of licensing requirements, Airbnb consistently used the term “home sharing” to refer to its activities.<sup>59</sup> And hosts were presumably encouraged to use the term “home sharer” when they testified about how Airbnb helped them make ends meet, despite the fact that over 30% of Airbnb revenue in San Francisco comes from commercial listings.<sup>60</sup> The terms “home sharer” and “home sharing” are used throughout Airbnb press releases and policy materials.<sup>61</sup> Uber is also careful with its word choice.

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<sup>57</sup> See Aloni, *supra* note 15, at 1406–08 (discussing how the term “Sharing Economy” is a misnomer because people participate in the Sharing Economy for self-interested reasons); Giana M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn’t About Sharing at All*, HARV. BUS. REV. (Jan. 28, 2015), <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all> (discussing how the Sharing Economy is not about sharing, it is about access to goods and services); Alex Hern, *Why the Term “Sharing Economy” Needs to Die*, GUARDIAN (Oct. 5, 2015, 4:43 AM), <https://www.theguardian.com/technology/2015/oct/05/why-the-term-sharing-economy-needs-to-die> (arguing that the term “Sharing Economy” is “actively obfuscatory, lumping together a hugely disparate bunch of companies, many of which push the definition to its limits, and the biggest examples of which have nothing to do with ‘sharing’ at all”).

<sup>58</sup> Lobel, *supra* note 15, at 89 (listing out the various names given to the Sharing Economy).

<sup>59</sup> Biz Carson, *Airbnb Has Spent More Than \$8 Million Fighting a Proposed Law in San Francisco*, BUS. INSIDER (Sept. 28, 2015, 4:02 PM), <http://www.businessinsider.com/airbnb-spends-8-million-against-prop-f-2015-9>.

<sup>60</sup> Carolyn Said, *Uber, Lyft, Airbnb Harness Users to Lobby Lawmakers for Them*, GOV’T TECH. (Jan. 12, 2015), <http://www.govtech.com/dc/articles/Uber-Lyft-Airbnb-Harness-Users-to-Lobby-Lawmakers-for-Them.html> (describing that at public hearings on the San Francisco propositions, Airbnb hosts used “remarkably similar language that they were ‘home sharers’ who made ends meet by renting to visitors”); Ariel Stulberg, *Airbnb Probably Isn’t Driving Rents Up Much, at Least Not Yet*, FIFTEENTH (Aug. 24, 2016, 7:00 AM), <https://fifteenth.com/features/airbnb-probably-isnt-driving-rents-up-much-at-least-not-yet/>.

<sup>61</sup> See, e.g., AIRBNB, *supra* note 6 (using the term “home sharing” sixty-four times in the thirty-one-page document); *New Study Reveals a Greener Way to Travel: Airbnb Community Shows Environmental Benefits of Home Sharing*, AIRBNB (July 31, 2014), <https://www.airbnb.com/press/news/new-study-reveals-a-greener-way-to-travel-airbnb-community-shows-environmental-benefits-of-home-sharing>; *SF Needs Clear Rules for Home Sharing*, AIRBNB: S.F. (May 4, 2015, 4:01 PM), <https://www.airbnbsf.com/> (“[H]ome sharing

Instead of simply using the word “driver,” Uber uses the term “driver partner.”<sup>62</sup> This strategic parsing of words ensures that drivers are viewed as independent contractors and not employees.<sup>63</sup> Platforms are skilled at using words that help them obfuscate their true characteristics and present them in a favorable light.

## 2. *Frames*

Framing involves “selecting and highlighting some facets of events or issues, and making connections among them so as to promote a particular interpretation, evaluation, and/or solution.”<sup>64</sup> Speakers who succeed in defining the boundaries of an issue can shape public opinion and ultimately influence policy decisions.<sup>65</sup> For example, people’s opinions concerning a potential Ku Klux Klan rally can be heavily influenced by whether the issue is framed as one of free speech or of public safety.<sup>66</sup> As Dennis Chong argues, the “essence of public opinion formation” generally relies on framing.<sup>67</sup>

Examples of how advocates and policymakers use framing are plentiful.<sup>68</sup> Take for instance the “War on Terrorism” frame, which emerged after the September 11 attacks, and allowed policymakers to shape the debate about privacy and military spending issues in terms of war and national security.<sup>69</sup> Frames are especially powerful in emerging technology situations because

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is under attack. City bureaucrats want to make it harder for regular San Franciscans to share their homes while contributing to the community.”); *Women Hosts Have Earned Over \$10 Billion on Airbnb*, AIRBNB NEWSROOM (Mar. 6, 2017), <https://press.airbnb.com/women-hosts-have-earned-over-10-billion-on-airbnb/>.

<sup>62</sup> *Become a Driver-Partner*, UBER: HELP, <https://help.uber.com/h/3362f824-b3de-4cc3-979d-6bafcb24290> (last visited Aug. 23, 2017).

<sup>63</sup> See *infra* Section I.B.2.b.ii.

<sup>64</sup> ROBERT M. ENTMAN, PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY 5 (2004) (emphasis omitted).

<sup>65</sup> See Gustavson, *supra* note 43, at 30; Krebs & Jackson, *supra* note 38, at 38; see also Druckman, *supra* note 37.

<sup>66</sup> Thomas E. Nelson et al., *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567 (1997).

<sup>67</sup> Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 AM. J. POL. SCI. 867, 870 (1993).

<sup>68</sup> The importance of framing can be seen in a variety of “issues such as campaign finance (free speech or democratic corruption?), abortion (rights of mother or rights of unborn child?), gun control (right to bear arms or public safety?), affirmative action (reverse discrimination or remedial action?), welfare policy (humanitarianism or overspending?), hate group rallies (free speech or public safety?).” James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225, 235 (2001). See also Chong & Druckman, *supra* note 42, at 108–09.

<sup>69</sup> Karen Callaghan & Frauke Schnell, *Introduction: Framing Political Issues in American Politics*, in FRAMING AMERICAN POLITICS, 1–17 (Karen Callaghan & Frauke Schnell eds., 2005).

there is ambiguity about the right course of action and people often are looking for ways to easily understand the situation and form opinions.<sup>70</sup>

Framing issues is a common, useful, and effective rhetorical tool. However, policymakers and constituents should question frames that are manipulative in the sense that they prompt people to form opinions that go against their values and self-interests, or prompt people to form opinions that differ from what their opinions would be with complete information.<sup>71</sup> In the sections below, this Article identifies five frames commonly used by Sharing Economy Platforms. These frames have helped Platforms mobilize proponents, demobilize opponents, and avoid burdensome regulations. In part, as a result of these frames, numerous market failures have been left unaddressed; thus, they present a good opportunity to examine the manipulative effect of framing on regulating innovation.

#### *a. The Excess Capacity Frame*

“Excess capacity” is a manufacturing term used to refer to an underutilized asset.<sup>72</sup> Sharing Economy Platforms assert that they help unlock the excess capacity people have in their underutilized things (homes, schedules, etc.), and indeed, Platforms do allow that unlocking to a degree.<sup>73</sup> However, many participants in the Sharing Economy are not using their excess capacity, or resurrecting “dead capital”;<sup>74</sup> instead, many supply-side users are putting new capacity online, and unfairly competing with incumbent firms. “Super hosts” on the Airbnb platform are a case-in-point. Airbnb claims that it “promote[s] efficient use of existing resources, as well as environmentally friendly ways of traveling.”<sup>75</sup> It cites internal studies to suggest that most host income is used to

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<sup>70</sup> For example, in the 1960s, the “faith in progress” frame was used to allow the use of nuclear power to spread. Francessa Polletta & M. Kai Ho, *Frames and Their Consequences*, in 5 THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS 187, 188 (Robert E. Goodin & Charles Tilly eds., 2006).

<sup>71</sup> Druckman, *supra* note 37.

<sup>72</sup> RP Siegel, *Is the Sharing Economy an Opportunity or a Threat to Existing Paradigms?*, in THE RISE OF THE SHARING ECONOMY 20, 20 (TriplePundit.com ed., 2013).

<sup>73</sup> For instance, one of Uber’s investors, Shervin Pishevar, calls Uber an example of an “excess capacity” company. He said, “eBay, which lets people sell unneeded stuff from their garages, was the original excess-capacity company . . . This is the next generation.” Alexia Tsotsis, *For Limo Service Uber, Downtime and Idle Resources Are Fuel for Profits*, WIRE (June 22, 2012, 12:30 PM) [https://www.wired.com/2012/06/mf\\_uber/](https://www.wired.com/2012/06/mf_uber/).

<sup>74</sup> Dan Rothschild, *How Uber and Airbnb Resurrect “Dead Capital,”* ÜMLAUT (Apr. 9, 2014), <http://www.theumlaut.com/2014/04/09/how-uber-and-airbnb-resurrect-dead-capital>.

<sup>75</sup> *Environmental Impacts in Athens*, AIRBNB: BLOG (Apr. 22, 2015), <http://blog.airbnb.com/environmental-impacts-in-athens/>.

pay for regular household expenses.<sup>76</sup> However, according to New York State Attorney General Eric T. Schneiderman, 37% of all Airbnb's revenue from New York City in 2010 came from hosts with three or more listings.<sup>77</sup> Studies analyzing other cities have found similar results.<sup>78</sup>

Similarly, Lending Club and Prosper, which both launched as Facebook applications aimed at "democratizing finance," initially relied on social networks and the trust they engendered to attract borrowers and lenders.<sup>79</sup> At first, the businesses avoided federal and state banking regulations to develop the traction necessary to pursue venture capital funds; Lending Club claimed it provided "affordable funding alternatives to the masses": a "worthy goal."<sup>80</sup> It even encouraged people to loan out idle cash from savings accounts and stimulus checks.<sup>81</sup> Yet, most of the money for Lending Club loans now comes from large institutional investors and not individuals with "excess capacity" in their bank accounts.<sup>82</sup> Likewise, Uber drivers are no longer simply using the

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<sup>76</sup> See *The Economic Impacts of Home Sharing in Cities Around the World*, AIRBNB, <https://www.airbnb.com/economic-impact> (last visited Nov. 17, 2017).

<sup>77</sup> RESEARCH DEP'T & INTERNET BUREAU, OFFICE OF THE N.Y. STATE ATT'Y GEN., AIRBNB IN THE CITY 10 (2014).

<sup>78</sup> According to the American Hotel & Lodging Association, which opposes Airbnb, nearly 30% of Airbnb's revenue in fourteen of the United States' largest cities comes from individuals or entities offering spaces 360 days per year. AM. HOTEL & LODGING ASS'N, FROM AIR MATTRESSES TO UNREGULATED BUSINESS: AN ANALYSIS OF THE OTHER SIDE OF AIRBNB (2016); see also SLEE, *supra* note 2, at 37 (reviewing data from New York City and finding that 40% of all Airbnb revenue comes from hosts with more than one listing).

<sup>79</sup> See Peter Renton, *P2P Lending in the USA Turns Ten Years Old*, LEND ACAD. (Feb. 9, 2016), <http://www.lendacademy.com/p2p-lending-in-the-usa-is-ten-years-old/>; Dan Kaplan, *Lending Club Brings Person-to-Person Loans to Facebook*, VENTUREBEAT (May 24, 2007, 10:28 PM), <https://venturebeat.com/2007/05/24/lending-club-brings-person-to-person-loans-to-facebook/>.

<sup>80</sup> *Welcome to New Peer-to-Peer Lending (P2P Lending) Users*, LENDINGCLUB: BLOG (Sept. 21, 2007), <http://blog.lendingclub.com/welcome-to-new-peer-to-peer-lending-p2p-lending-users/>. Two years after its founding, Lending Club complied with Securities and Exchange Commission rules and filed an S-1 statement seeking registration of \$600 million in "Member Payment Dependent Notes" to be issued on its website. Jason Kincaid, *Lending Club Files for SEC Registration, Hopes to Resume Service*, TECHCRUNCH (June 20, 2008), <https://techcrunch.com/2008/06/20/lending-club-files-for-sec-registration-hopes-to-resume-service/>. However, "[o]ver the last few years, federal regulators have largely taken a wait-and-see approach with respect to alternative lending." Colin Wilhelm, *Regulatory Road Likely to Get Bumpier for Alternative Lenders*, AM. BANKER (May 15, 2015), <https://www.americanbanker.com/news/regulatory-road-likely-to-get-bumpier-for-alternative-lenders>. For a timeline of Lending Club's activities, see Pymnts, *A Brief History of Lending Club*, PYMNTS.COM (May 13, 2016), <http://www.pymnts.com/news/alternative-financial-services/2016/lending-club-timeline/>.

<sup>81</sup> *Put Your Economic Stimulus Check to Good Use*, LENDINGCLUB: BLOG (Feb. 7, 2008), <http://blog.lendingclub.com/put-your-economic-stimulus-check-to-good-use/> (describing how individuals receiving a stimulus check who are debt-free, or have limited "bad debt," have a way to add the extra money from their rebate check to the person-to-person loan portfolio on Lending Club).

<sup>82</sup> Amy Cortese, *Loans That Avoid Banks? Maybe Not*, N.Y. TIMES (May 3, 2014), [http://www.nytimes.com/2014/05/04/business/loans-that-avoid-banks-maybe-not.html?\\_r=0](http://www.nytimes.com/2014/05/04/business/loans-that-avoid-banks-maybe-not.html?_r=0); see Shelly Banjo, *Wall Street Is*

excess capacity in their own cars because Uber is helping drivers rent, lease, and buy new cars, under what some consider predatory terms.<sup>83</sup>

Framing the Sharing Economy in the context of sharing excess supply-side capacity is disingenuous. Most of the time, users are not utilizing their excess capacity; instead, they are using Platforms to market their newly acquired property or full-time services for a profit, but Platforms shy away from exposing that part of the picture. Focusing on the small scale and efficient use of time, space, and property is, in part, what encourages regulators to take a hands-off approach, and allows Platforms to grow without any real restraint.<sup>84</sup>

*b. The Microentrepreneur Frame*

Related to the excess capacity frame is the middle-class, microentrepreneur frame. This frame has two distinct boundaries. The first relates to the extent to which supply-side users utilize Platforms. The second relates to the classification of these supply-side users as independent contractors as opposed to employees. As this section demonstrates, some supply-side users tip more easily into the full-fledged business side of the spectrum (as opposed to microentrepreneurs), and others are more entrenched in, controlled by, and dependent on Platforms, which pushes them into the employee side of the spectrum. Either way, very few supply-side users are truly independent contractors who earn small amounts of extra “money by providing [their] skills, time or property.”<sup>85</sup>

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*Hogging the Peer-to-Peer Lending Market*, QUARTZ (Mar. 4, 2015), <http://qz.com/355848/wall-street-is-hogging-the-peer-to-peer-lending-market/>.

<sup>83</sup> Mark Williams, a lecturer at Boston University, stated that the terms of Uber’s leases “are predatory and are very much driven toward profiting off drivers rather than to facilitate an increase in drivers.” Eric Newcomer & Olivia Zaleski, *Inside Uber’s Auto-Lease Machine, Where Almost Anyone Can Get a Car*, BLOOMBERG (May 31, 2016, 11:00 AM) <https://www.bloomberg.com/news/articles/2016-05-31/inside-ubers-auto-lease-machine-where-almost-anyone-can-get-a-car>.

<sup>84</sup> For example, an Anchorage, Alaska assembly person stated that he sees “Uber and Lyft as independent companies that cater much more to drivers who occasionally use their personal vehicles for the companies to supplement income,” and that measures to regulate Uber and Lyft like taxis would “destroy” this income-generating alternative. Devin Kelly, *Uber and Lyft get Anchorage Assembly’s OK, but the Companies are Awaiting State Action*, ALASKA DISPATCH NEWS (Mar. 21, 2017), <https://www.adn.com/alaska-news/anchorage/2017/03/21/assembly-allows-uber-and-lyft-in-anchorage-but-those-ride-booking-companies-are-awaiting-state-action/>.

<sup>85</sup> Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), [https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?mcubz=3&\\_r=0](https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?mcubz=3&_r=0).



*i. Full-Fledged Businesses*

Platforms employ the middle-class, microentrepreneur frame to reinforce the notion that participants on their Platforms are microentrepreneurs “struggling to pay the bills” or “transitioning between jobs.”<sup>86</sup> Via these microbusinesses, users offer the little excess capacity they have for sale, and they, as managers, assume responsibility for all parts of the business that are not outsourced to the Platforms.<sup>87</sup> Since margins are so thin for these hard-working, middle-class microentrepreneurs, and resources are so limited, Platforms argue that they must not be overly burdened by regulations. Chris Lehane of Airbnb put it bluntly:

Cities recognize where the world is going, right, they understand that you’re either going to go forward or you’re going to go backward . . . . They understand that in a time of economic inequality, this is a question of whose side are you on: Do you want to be on the side of the middle class, or do you want to be opposed to the middle class?<sup>88</sup>

Nevertheless, a growing portion of some Platforms’ revenue comes from full-fledged businesses that can be burdened by existing regulatory regimes.<sup>89</sup> As previously mentioned, much of Airbnb’s revenue in major cities is generated by people running full-time rentals without complying with various regulations, such as taxes and health and safety requirements.<sup>90</sup> The company

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<sup>86</sup> Ted Karczewski, *Tech Giants as Lobbyists: Politics Meets the Sharing Economy*, SKYWORD: CONTENTSTANDARD (Nov. 16, 2015), <https://www.skyword.com/contentstandard/marketing/tech-giants-as-lobbyists-politics-meets-the-sharing-economy/> (quoting David Plouffe, *Uber and the American Worker*, MEDIUM (Nov. 5, 2015), <https://medium.com/@davidplouffe/uber-and-the-american-worker-bdd499ec5323>).

<sup>87</sup> Airbnb’s Brian Chesky created a photo essay called the “Shared City,” which stated, “Imagine if you could build a city that is shared. Where people become micro-entrepreneurs, and local mom and pops flourish once again. Imagine a city that fosters community, where space isn’t wasted, but shared with others.” Brian Chesky, *Shared City*, MEDIUM (Mar. 26, 2014), <https://medium.com/@bchesky/shared-city-db9746750a3a>. In an information sheet created by the political lobbying organization of which Airbnb, Lyft, and Uber are members, the Internet Association stated: “Through the Sharing Economy, microentrepreneurs are able to work for themselves and control their own schedules to earn extra income.” INTERNET ASS’N, *THE SHARING ECONOMY 1* (2016), <https://internetassociation.org/wp-content/uploads/2016/03/SharingEcon2Pager5.pdf>.

<sup>88</sup> Conor Dougherty & Mike Isaac, *Airbnb and Uber Mobilize Vast User Base to Sway Policy*, N.Y. TIMES (Nov. 4, 2015), [http://www.nytimes.com/2015/11/05/technology/airbnb-and-uber-mobilize-vast-user-base-to-sway-policy.html?\\_r=0](http://www.nytimes.com/2015/11/05/technology/airbnb-and-uber-mobilize-vast-user-base-to-sway-policy.html?_r=0).

<sup>89</sup> See FED. TRADE COMM’N, *THE “SHARING” ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS 24–26* (2016) (discussing how, over time, more supply-side users are professional suppliers); RUDY TELLES JR., OFFICE OF CHIEF ECONOMIST, U.S. DEP’T OF COMMERCE, *ISSUE BRIEF #01-16, DIGITAL MATCHING FIRMS: A NEW DEFINITION IN THE “SHARING ECONOMY” SPACE 5* (2016) (discussing how some supply-side users are professionals).

<sup>90</sup> See *supra* notes 76–77 and accompanying text; Stulberg, *supra* note 60, (citing a study that found that almost half of Airbnb revenue in Los Angeles and Honolulu comes from full-time listings).

is therefore more than “a people-to-people platform and a lifeline for people who need supplemental income.”<sup>91</sup> Likewise, other Platforms like EatWith—which match diners and home chefs for meals—attract and sustain professional, full-time supply-side users.<sup>92</sup>

## ii. Platform Employees

Platforms utilize the microentrepreneur frame to classify their supply-side users as independent contractors as opposed to employees.<sup>93</sup> For example, on a sign-up page for drivers, Uber stated: “Drive with Uber and earn great money as an independent contractor. Get paid weekly just for helping our community of riders get rides around town. Be your own boss and get paid in fares for driving on your own schedule.”<sup>94</sup> Uber’s spokesman confirmed that drivers are “independent contractors” when he stated: “We don’t hire drivers. We’re a technology company. We provide the app that they use, that connects passengers with drivers. They have the flexibility of being their own boss.”<sup>95</sup> By claiming that supply-side users are independent contractors, Uber avoids a myriad of employment laws and liability for supply-side user harms.

However, the distinction between independent contractors and employees for drivers is not as clear as Uber would like it to be. While drivers are flexible as to when they can work, Uber does instruct drivers on many aspects of the service, including the condition of the driver’s car,<sup>96</sup> performance standards,<sup>97</sup>

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<sup>91</sup> Airbnb, *No on Proposition F: A People-to-People Movement*, (November 2015), <https://www.documentcloud.org/documents/2504734-airbnb-prop-f-reduced.html>.

<sup>92</sup> For example, a search on the EatWith website for a dinner in Barcelona on February 24, 2017 yielded eight results. Of those eight hosts, five hosted dinners ten or more times per month. See EATWITH, <https://www.eatwith.com> (last visited Nov. 13, 2017).

<sup>93</sup> For an excellent discussion related to the distinction between independent contractors and employees in the Sharing Economy, see Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53 (2015); see also Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1056 (2016) (arguing that “some Uber drivers should be classified as independent contractors, while others should be classified as employees”).

<sup>94</sup> *Uber Needs Partners Like You*, UBER, <https://get.uber.com/p/legacy-cl-base/> (last visited Aug. 25, 2017).

<sup>95</sup> Dick Hogan, *Uber Ride Service Would Bring Controversy*, NEWS-PRESS (Sept. 10, 2014, 10:53 PM), <http://www.news-press.com/story/money/2014/09/10/uber-ride-service-bring-controversy/15421511/>.

<sup>96</sup> See, e.g., *Uber Vehicle Requirements Indianapolis*, UBER <https://www.uber.com/drive/indianapolis/vehicle-requirements/> (describing the minimum requirements for the car such as model year and size) (last visited Oct. 1, 2017).

<sup>97</sup> Alex Rosenblat, *The Truth About How Uber’s App Manages Drivers*, HARV. BUS. REV. (Apr. 06, 2016), <https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers> (describing how Uber sets performance targets for ride acceptances and cancellations).

and payment terms.<sup>98</sup> Uber can also deactivate drivers if their passenger ratings fall below a particular target.<sup>99</sup> Because control is the most important factor in major tests for distinguishing between employees and independent contractors, Uber drivers begin to look more like employees.<sup>100</sup>

Furthermore, while Uber claims that over half of its drivers worked for Uber fewer than nine hours per week,<sup>101</sup> much of its revenue comes from full-time drivers.<sup>102</sup> As UCLA law professor Noah Zatz points out, based on a report written in part by an Uber executive, a “marginal group of full-time drivers actually are doing about half the work, far more than those driving the fewest hours.”<sup>103</sup> These workers are likely to be economically dependent on Uber for their livelihood, thereby satisfying the “economic realities” test used by federal courts in cases involving the Fair Labor Standards Act.<sup>104</sup>

The classification of drivers as employees has been confirmed by several governmental agencies,<sup>105</sup> and courts have refused to find Uber and Lyft drivers to be independent contractors as a matter of law.<sup>106</sup> Regardless of

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<sup>98</sup> *Id.* (describing how Uber sets the rates for drivers).

<sup>99</sup> *Understanding Ratings*, UBER, <https://help.uber.com/h/95002b97-6e18-45de-a9ac-b69413cca2ab> (last visited Nov. 2, 2016). *See also* Rosenblat, *supra* note 97.

<sup>100</sup> *See* Gabrielle Wirth, *Independent Contractor Classification*, Westlaw Practical Law Practice Note 4-503-3970 (2017) (describing the various tests for independent contractor classification including the control test, the economic realities test, and the ABC test, all of which have control as a main factor).

<sup>101</sup> Kia Kokalitseva, *Uber CEO: Most Drivers Work Too Little to Be Considered Full Time Employees*, FORTUNE (Oct. 20, 2015), <http://fortune.com/2015/10/21/travis-kalanick-part-time-drivers/> (“More than half of Uber’s drivers work nine hours or less per week.”).

<sup>102</sup> *See* Noah Zatz, *Is Uber Wagging the Dog with Its Moonlighting Drivers?*, ON LAB. (Feb. 1, 2016), <https://onlabor.org/2016/02/01/is-uber-wagging-the-dog-with-its-moonlighting-drivers/>.

<sup>103</sup> *Id.*

<sup>104</sup> *Barlow v. C.R. Eng., Inc.*, 703 F.3d 497, 506 (10th Cir. 2012) (“The ‘economic realities’ test seeks to look past technical, common-law concepts of the master and servant relationship to determine whether, as a matter of economic reality, a worker is dependent on a given employer.”); *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 75 (Kan. 2014) (holding the state’s answer binding); *Anfinson v. FedEx Ground Package Sys., Inc.*, 244 P.3d 32, 37 (Wash. Ct. App. 2010), *aff’d*, 281 P.3d 289, 293 (Wash. 2012).

<sup>105</sup> *See* *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at \*6 (Cal. Dep’t Labor June 3, 2015) (finding that Uber drivers are employees of Uber because “Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation” when “[t]he reality, however, is that Defendants are involved in every aspect of the operation.”); ALJ’s Decision and Notice of Decision, *Uber Techs., Inc.*, Docket No. 016-23858, at \*15 (N.Y. Dep’t of Labor June 9, 2017) (upholding determinations that Uber drivers were employees for the purposes of unemployment insurance finding that Uber “exercised sufficient supervision and control over substantial aspects of their work as Drivers”); Chris Roberts, *Another Uber Driver Awarded Unemployment Benefits*, SF WEEKLY: THE SNITCH (Mar. 4, 2016, 1:17 PM), <https://archives.sfwweekly.com/thesnitch/2016/03/04/uber-driver-awarded-unemployment-benefits-first-known-case-in-state> (stating that a former Uber driver in California was classified as an employee for the purposes of unemployment benefits).

<sup>106</sup> *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

whether a supply-side user is an employee or a full-fledged business, many of the most profitable users for the Platform are not simply microentrepreneurs. Classifying users as microentrepreneurs in name only allows businesses to initially escape regulatory requirements, which is both unfair and dangerous.

*c. The “Tech” Company Frame*

Running in tandem with the microentrepreneur frame is the “tech” company frame. By defining themselves by what they are not, (i.e., not transportation, accommodation, food companies, etc.), Platforms seek to avoid responsibility for compliance with a broad range of state and federal laws,<sup>107</sup> as well as any other harm caused by their transactions.<sup>108</sup> Platforms claim they are selling “access to the software, the matching algorithms, and a digital system of reputation and trust between their users,” and not the services or assets

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<sup>107</sup> For example, in a memorandum of a voluntary agreement between Airbnb and the California Department of Fair Employment and Housing regarding housing law violations, Airbnb stated that it “provides its services on a neutral basis to third-party users, [therefore] Airbnb cannot itself be held directly or secondarily liable for the third-party users’ allegedly discriminatory conduct” because of Section 230 of the Communications Decency Act (described below). Voluntary Agreement at 5, Dep’t of Fair Emp’t & Hous. v. Airbnb, Inc., Nos. 574743-231889/574743-231624 (Apr. 19, 2017). In addition, Airbnb defended that it “has not engaged in any conduct that violates” state antidiscrimination laws. *Id.*; see also Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1307 (2017) (arguing that laws should not immunize Platforms, although this remains an open question). In addition, Uber unsuccessfully tried to get an Americans with Disabilities Act (ADA) case against it dismissed by arguing that it is not a “public accommodation” under ADA’s “travel service” category. Nat’l Fed’n of the Blind of Cal. v. Uber Techs., Inc., 103 F. Supp. 3d 1073, 1076, 1083 (N.D. Cal. 2015). This case was later settled between the National Federation of the Blind of California and Uber, thus allowing Uber to avoid classification, at this time, as a public accommodation under the ADA. Suevon Lee, *Uber Settles ADA Suit Over Treatment of Blind Riders*, LAW360 (May 2, 2016, 5:11 PM), <http://www.law360.com/articles/791427/uber-settles-ada-suit-over-treatment-of-blind-riders>; see also Nina Strohlic, *Uber: Disability Laws Don’t Apply to Us*, DAILY BEAST (May 21, 2015, 5:15 AM), <http://www.thedailybeast.com/uber-disability-laws-dont-apply-to-us>.

<sup>108</sup> Uber and Airbnb disclaim all liability for harm in its terms of service. *U.S. Terms of Use*, UBER, <https://www.uber.com/legal/terms/us/> (last visited Aug. 23, 2017); *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms#sec17> (last visited Aug. 25, 2017). Furthermore, Airbnb continues to disclaim liability for injuries at Airbnb properties. For example, a Canadian woman died in Taiwan because of carbon monoxide poisoning during her stay; Airbnb settled with the woman’s family for “humanitarian reasons,” but said there was “no basis for liability.” Zak Stone, *Living and Dying on Airbnb*, MEDIUM: MATTER (Nov. 8, 2015), <https://medium.com/matter/living-and-dying-on-airbnb-6bf8d600c04>. Similarly, Uber has settled out of court for injuries to passengers, but continues to disclaim liability. Bob Egelko, *Uber May Be Liable for Accidents, Even If Drivers Are Contractors*, S.F. CHRON. (Apr. 27, 2016, 3:27 PM), <http://www.sfchronicle.com/bayarea/article/Uber-may-be-liable-for-accidents-even-if-drivers-7377364.php>; see also Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 176 (2016) (arguing that tort liability should apply to Sharing Economy Platforms).

themselves.<sup>109</sup> As founder and former Uber CEO, Travis Kalanick consistently stated, Uber is a “technology platform that connects riders and drivers.”<sup>110</sup>

The tech company frame also allows Platforms to hide behind federal law that immunizes Internet companies from liability for improper user behavior. Based on their self-defined status as purely online actors, Platforms argue they are interactive computer service providers (ICSP) under Section 230 of the Communications Decency Act (CDA), which means they cannot “be treated as the publisher or speaker of any information provided” by users of their Platforms.<sup>111</sup>

The CDA is a 1996 law originally motivated by a desire to encourage ICSPs to moderate user-provided content without fear of being considered “publishers” responsible for defamation claims<sup>112</sup> and by a desire to halt efforts by ICSPs to unjustifiably over-censor user content based on similar liability concerns.<sup>113</sup> However, over the decades since its enactment, it has been broadly interpreted and has moved well beyond protecting ICSPs from liability for defamation. Its immunity now protects ICSPs (broadly defined)<sup>114</sup> from a wide array of claims ranging from defamation to negligence.<sup>115</sup>

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<sup>109</sup> Lobel, *supra* note 15, at 100; *see also* SLEE, *supra* note 2, at 90–93.

<sup>110</sup> Laurie Segall, *Uber CEO: “Our Growth is Unprecedented,”* CNN TECH (June 12, 2014, 8:32 AM), <http://money.cnn.com/2014/06/12/technology/innovation/uber-ceo-travis-kalanick/>; *see also* Jim Kerstetter, *Why Some Start-Ups Are Called Tech Companies and Others Are Not*, N.Y. TIMES: BITS (Aug. 2, 2015, 5:30 AM), <https://bits.blogs.nytimes.com/2015/08/02/in-search-of-the-slippery-definition-of-the-modern-tech-company/?mcubz=3>.

<sup>111</sup> 47 U.S.C. § 230 (2012). According to the CDA, an “interactive computer service provider” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” *Id.* § 230(f)(2). The law also provides immunity for liability that results from “any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” *Id.* § 230(c)(2)(A); *see also* Lobel, *supra* note 15, at 145 (explaining that technology companies such as Uber and Airbnb “are arguing that they fall under the definition of the Act, which thereby protects them from civil liability”).

<sup>112</sup> Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 148 (2008) (describing how conservative members of congress were afraid that intermediaries would have “a strong incentive to never exercise editorial control, thus increasing the risk that children and others would be exposed to highly offensive or inappropriate Internet content”).

<sup>113</sup> *Id.* (“Such over-censorship could ruin the Internet’s potential as a vibrant marketplace for the exchange of ideas, as ideas that may offend even just one individual might be removed by an Internet intermediary fearing litigation.”).

<sup>114</sup> *Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003) (finding that an ICSP can include “‘any’ information services or other systems, as long as the service or system allows ‘multiple users’ to access ‘a computer server’”).

<sup>115</sup> *See* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 653 n.58 (2014) (detailing a thorough list of CDA cases).

The CDA has been used by Platforms as a regulatory shield. For example, based on Section 230 immunity, Airbnb convinced the City of Anaheim, California not to impose penalties on the company for facilitating illegal rentals.<sup>116</sup> Airbnb also filed multiple lawsuits against regulations on short-term rentals asserting that the CDA protects them.<sup>117</sup> And Airbnb typically only agrees to drop the lawsuits when the jurisdictions agree that the Platform will not be held responsible for the illegal listings.<sup>118</sup>

The CDA could also be used as a shield against responsibility for harm caused by Platform users. While Platforms have not directly asserted a CDA defense in public litigation, many people, including the general counsel for Lyft, are of the opinion that Platforms would or should be protected.<sup>119</sup> For example, U.S. Senator Ron Wyden of Oregon argued that Uber should be protected by the CDA so that it is not weighed down by a “barrage of liability suits.”<sup>120</sup> CDA immunity is powerful, and by framing themselves as mere facilitators akin to other technology companies such as Facebook and eBay, Platforms can attempt to avoid regulation and liability.

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<sup>116</sup> Lily Leung, *Anaheim Won't Fine Websites Like Airbnb for Illegal Short-Term Rental Listings*, ORANGE COUNTY REG. (Aug. 23, 2016), <http://www.oregister.com/articles/city-726671-term-short.html> (quoting Anaheim City's spokesperson Mike Lyster stating that “[a]fter considering federal communications law, we won't be enforcing parts of Anaheim's short-term rental rules covering online hosting sites”).

<sup>117</sup> Complaint at 1, 2, *Airbnb, Inc. v. Schneiderman, et al.*, No. 1:16-CV-08239 (S.D.N.Y. Oct. 21, 2016); *see also* *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066, 1070 (N.D. Cal. 2016); Complaint for Declaratory and Injunctive Relief at 1, *Airbnb, Inc. v. City of Santa Monica*, No. 2:16-CV-6645 (C.D. Cal. Sept. 2, 2016).

<sup>118</sup> Katie Benner, *Airbnb Ends Fight with New York City over Fines*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/technology/airbnb-ends-fight-with-new-york-city-over-fines.html>; Elizabeth Dwoskin, *Airbnb's Battle with San Francisco Shows the Payoff to Going Up Against Regulators*, WASH. POST (May 2, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/05/02/airbnbs-battle-with-san-francisco-shows-the-payoff-to-going-up-against-regulators/?utm\\_term=.145c528c201e](https://www.washingtonpost.com/news/the-switch/wp/2017/05/02/airbnbs-battle-with-san-francisco-shows-the-payoff-to-going-up-against-regulators/?utm_term=.145c528c201e).

<sup>119</sup> *See* Keith St. Aubin, *The Ride-Sharing Economy: Keeping Liability in the Rearview*, ILL. BUS. L.J. (Nov. 27, 2014), [https://publish.illinois.edu/illinoisblj/2014/11/27/the-ride-sharing-economy-keeping-liability-in-the-rearview/#\\_ftn9](https://publish.illinois.edu/illinoisblj/2014/11/27/the-ride-sharing-economy-keeping-liability-in-the-rearview/#_ftn9); 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), <https://www.forbes.com/sites/ellenhuet/2014/09/30/uber-driver-hammer-attack-liability/#563a0ef559ca>; Stephanie Francis Ward, *Internet Car Companies Offer Convenience, but Lawyers See Caution Signs*, A.B.A. J. (Jan. 2014), [http://www.abajournal.com/magazine/article/internet\\_car\\_companies\\_offer\\_convenience\\_but\\_lawyers\\_see\\_caution\\_signs/](http://www.abajournal.com/magazine/article/internet_car_companies_offer_convenience_but_lawyers_see_caution_signs/).

<sup>120</sup> Nancy Scola, *Sen. Ron Wyden: Uber Should Be as Unfettered as Facebook*, WASH. POST (July 10, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/07/10/sen-ron-wyden-uber-should-be-as-unfettered-as-facebook/>.

*d. The Self-Regulation Frame*

According to Airbnb's founder and CEO Brian Chesky, Sharing Economy Platforms have these "magical things called reputation systems."<sup>121</sup> He argues that these systems can screen out bad behavior better than governments can, and that the "government should exist as the place of last recourse."<sup>122</sup> Uber argues that its "rating system works to make sure that the most respectful riders and drivers are using Uber."<sup>123</sup> Likewise, scholars like University of Chicago law professor Lior Strahilevitz assert reputation systems create a "diminished need for regulatory oversight and legal remedies because consumers [could] police misconduct themselves."<sup>124</sup> Unfortunately, reputation systems have their flaws and are not a perfect substitute for regulation.

The purpose of a reputation system is to allow users "to correctly infer the likelihood" of a positive interaction without having any prior experience with the user on the other side.<sup>125</sup> Reputation systems rely on three basic assumptions to predict future performance: "(1) reputation information accurately represents the quality of past transactions; (2) the reputation system cannot be manipulated by fraudulent reviews or irrelevant information; and (3) users accurately interpret reputation information."<sup>126</sup> Each of these assumptions may be at times incorrect, which "could lead consumers down frustrating and potentially dangerous paths."<sup>127</sup>

First, past transactions are often overly inflated. Approximately "95% of Airbnb properties boast an average user-generated rating of either 4.5 or 5 stars (the maximum)."<sup>128</sup> Similarly, only 1% of Uber drivers receive below three

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<sup>121</sup> Jason Clampet, *Airbnb CEO Responds to Illegal Rentals Story: "First of All, It's Not Illegal Everywhere,"* SKIFT (Jan. 11, 2013, 3:00 AM), <https://skift.com/2013/01/11/airbnb-responds-to-illegal-rentals-story-first-of-all-its-not-illegal-everywhere/>.

<sup>122</sup> *Id.*

<sup>123</sup> *I Would Like to Know My Rating*, UBER: HELP, <https://help.uber.com/h/0539e772-747c-49a7-8c26-f28c65e6f14d> (last visited Oct. 2, 2017).

<sup>124</sup> Lior Jacob Strahilevitz, *Less Regulation, More Reputation*, in *THE REPUTATION SOCIETY* 63, 71 (Hassan Masum & Mark Tovey eds., 2011).

<sup>125</sup> See Chris Nosko & Steven Tadelis, *The Limits of Reputation in Platform Markets: An Empirical Analysis and Field Experiment* 34 (Nat'l Bureau of Econ. Research, Working Paper No. 20830, 2015).

<sup>126</sup> Abbey Stemler, *Feedback Loop Failure: Implications for the Self-Regulation of the Sharing Economy*, 18 MINN. J.L. SCI. & TECH. 673, 687–88 (2017) (citing Nosko & Tadelis, *supra* note 125).

<sup>127</sup> Stemler, *supra* note 126, at 688. For a complete discussion of how the reputation systems are flawed, see *id.*

<sup>128</sup> Georgios Zervas et al., *A First Look at Online Reputation on Airbnb, Where Every Stay Is Above Average*, 1, 2 (Apr. 12, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2554500](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554500).

stars (out of five).<sup>129</sup> This over-inflation is likely to do with the personal nature of Sharing Economy transactions, which trigger several well-documented cognitive biases that inflate reviews.<sup>130</sup> These biases include the reporting bias, which causes people to provide reviews for extremely good transactions more frequently than mediocre ones;<sup>131</sup> the fear of retaliation, which causes people to avoid giving negative reviews out of a fear that they will be punished;<sup>132</sup> and the herding effect, which causes people to provide inflated reviews if they see prior positive reviews.<sup>133</sup>

Second, while Platforms take measures to prevent review manipulation, for example by allowing only parties who have actually had an interaction to review one another, confederate and other forms of fake reviews still exist on Platforms.<sup>134</sup> In addition, irrelevant information about the transaction or user can make systems inaccurate. This irrelevant information can come in one of two ways: (1) from external sources, such as an Uber passenger giving a five-star review because the weather was nice and there was little traffic despite poor service by a driver, or (2) from the algorithms that Platforms incorporate into their reputation systems that analyze large swaths of user information. These algorithms may utilize inputs that have nothing to do with the quality of the user. For example, the neighborhood where a Lending Club applicant lives may impair that applicant's ability to get a loan despite her ability to pay.<sup>135</sup>

And finally, the way review information is presented can confuse users, which can lead to inaccurate interpretations of review data.<sup>136</sup> For example, people tend to rely more on the overall score of a user (e.g., 4.7 stars out of 5) than the weight of the score. This means a user with a 4.7 stars out of 5 based on three reviews might be preferred by a user over an individual with 4.6 stars based on three-hundred reviews.

Reputation systems are an excellent way to capture information about transactions and encourage users to act responsibly. However, they are not

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<sup>129</sup> See Nairi, *Feedback Is a Two-Way Street*, UBER NEWSROOM (Apr. 24, 2014), <https://newsroom.uber.com/2014/04/feedback-is-a-2-way-street/>.

<sup>130</sup> Stemler, *supra* note 126, at 688–98.

<sup>131</sup> *Id.* at 689; see also Chrysanthos Dellarocas & Charles A. Wood, *The Sound of Silence in Online Feedback: Estimating Trading Risks in the Presence of Reporting Bias*, 54 MGMT. SCI. 460, 474 (2008).

<sup>132</sup> Stemler, *supra* note 126, at 691–92.

<sup>133</sup> Lev Muchnik et al., *Social Influence Bias: A Randomized Experiment*, 341 SCI. 647, 649 (2013).

<sup>134</sup> See Stemler, *supra* note 126, at 698–702.

<sup>135</sup> *Id.* at 701; see CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 3 (2016) (noting that algorithms may embed “human prejudice, misunderstanding, and bias into the software systems”).

<sup>136</sup> Stemler, *supra* note 126, at 702–03.



without their faults. When reviews are overly positive, false, or difficult to understand, the utility of reputation systems to self-regulate Platforms is diminished. Therefore, regulators should not overly rely on the premise that these systems can magically replace the need for various forms of regulation.

*e. Innovation Frame*

Similar to the self-regulation frame, Sharing Economy Platforms claim that they are disrupting existing industries by offering new ways to solve problems.<sup>137</sup> This self-proclaimed positioning in the market allows them to portray themselves as innovative and their competition as stagnant rent-seeking incumbents.<sup>138</sup> As the *Washington Post* opinion writer Roger Cohen writes, “Uber manage[s] to cast itself as progress incarnate and the taxi industry as a bunch of thick-headed peasants who didn’t know that its time had passed.”<sup>139</sup> By emphasizing the newness of their business, Platforms avoid existing regulations by distinguishing themselves from traditional firms<sup>140</sup> and by working with communities to develop novel and favorable regulations.<sup>141</sup> As stated by William Adkinson Jr., Attorney Advisor at the Federal Trade Commission Office of Policy Planning, “It’s important that . . . regulations permit peer-to-peer ridesharing platforms to flourish, because they represent

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<sup>137</sup> See Morgan Brown, *Uber—What’s Fueling Uber’s Growth Engine?*, GROWTHHACKERS, <https://growthhackers.com/companies/uber/> (suggesting Uber is an example of a “truly disruptive idea[] that completely redefine[s] an industry”); David Hantman, Opinion, *The Push to Regulate the “Sharing Economy,”* N.Y. TIMES (Apr. 24, 2014), <https://www.nytimes.com/2014/04/30/opinion/the-push-to-regulate-the-sharing-economy.html> (writing in response to New York’s Attorney General Eric T. Schneiderman’s op-ed, Uber’s head of global public policy wrote that “New York has always been at the forefront of personal empowerment and innovation, and we hope that leaders here recognize how troubling it would be to lag behind the rest of the world”).

<sup>138</sup> *Driving Innovation at Uber*, UBER (Oct. 24, 2016), <https://www.uber.com/en-PK/blog/innovation/> (“Innovation is in our DNA at Uber.”); SLEE, *supra* note 2, at 127.

<sup>139</sup> Richard Cohen, *Uber Mows Down Bill de Blasio*, WASH. POST. (July 27, 2015), [https://www.washingtonpost.com/opinions/ubers-bare-knuckle-battle-against-the-taxi-industry/2015/07/27/e0e7be98-3483-11e5-8e66-07b4603ec92a\\_story.html?utm\\_term=.fac0e162c433](https://www.washingtonpost.com/opinions/ubers-bare-knuckle-battle-against-the-taxi-industry/2015/07/27/e0e7be98-3483-11e5-8e66-07b4603ec92a_story.html?utm_term=.fac0e162c433).

<sup>140</sup> Companies exploit legal gray areas to argue that existing rules do not apply to them. Pollman & Barry, *supra* note 17, at 398–400 (“Even if existing regulations or statutes use broad language that, when read literally, prohibit the company’s activity, the company can take the view that officials were not considering the company’s activity when they wrote those rules—how could they, when the technology the business is built on did not yet exist?”); see also Lobel, *supra* note 15, at 116 (describing an “overarching ethos of newness, innovation, and empowerment” among Platform companies).

<sup>141</sup> For example, the California Public Utilities Commission adopted a specific set of rules to govern Transportation Network Company services to protect public safety while “encouraging innovation and utilization of technology to better the lives of Californians.” Cal. Pub. Utils. Comm’n, Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry: Rulemaking No. 12-12-011 (July 30, 2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K112/77112285.PDF>.

one of the first real, purpose-built innovations in an industry that hasn't seen much innovation for decades."<sup>142</sup>

Taken as a whole, the Myth of the Sharing Economy encourages people to believe that the Sharing Economy is made up of self-regulating Platforms that encourage microentrepreneurs to utilize their excess capacity in an altruistic manner. As described in the next Part, the seductive appeal of this Myth allows regulators to make sense of the novel, technology-driven business practices of platforms, while preventing them from truly understanding the nature of these companies and by extension how to regulate them.

## II. DEMYSTIFYING THE MYTH

In the early stages of the Sharing Economy (roughly 2006 to 2014), most jurisdictions simply let the issue of regulation play out.<sup>143</sup> Survey reports from 2014 show that twenty-five of the thirty most populous cities in the United States had yet to enact home-sharing regulations,<sup>144</sup> and only thirteen of the fifty most populous cities in the United States had taken action in the form of cease-and-desist letters to stop ride-sharing apps (and in many places these were ignored).<sup>145</sup> The rest either turned a blind eye or began to implement regulation tailored to the Platforms. While it is impossible to control for the various variables that led to this hands-off regulatory approach, based on the evidence provided in Part I, rhetoric clearly played a part.

Lack of regulation would not be a problem if the scale of the Sharing Economy were not so large—that is if the Sharing Economy just consisted of ordinary people sharing their “little bit” of excess capacity. However, we know

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<sup>142</sup> Fed. Trade Comm'n, Transcript of Sharing Economy Workshop 104 (June 9, 2015), [https://www.ftc.gov/system/files/documents/public\\_events/636241/sharing\\_economy\\_workshop\\_transcript.pdf](https://www.ftc.gov/system/files/documents/public_events/636241/sharing_economy_workshop_transcript.pdf).

<sup>143</sup> Katie Stancombe, *Airbnb-Style Rentals Bill Moves Ahead to Indiana Senate*, HERALD TIMES ONLINE (Feb. 15, 2017), [http://www.heraldtimesonline.com/news/local/airbnb-style-rentals-bill-moves-ahead-to-indiana-senate/article\\_8019e632-f33a-11e6-9bb8-6f43f166c41d.html](http://www.heraldtimesonline.com/news/local/airbnb-style-rentals-bill-moves-ahead-to-indiana-senate/article_8019e632-f33a-11e6-9bb8-6f43f166c41d.html) (quoting Indiana State Representative Matt Pierce).

<sup>144</sup> NICOLE DUPUIS & BROOKS RAINWATER, NAT'L LEAGUE OF CITIES CTR. FOR CITY SOLS. & APPLIED RESEARCH, *THE SHARING ECONOMY: AN ANALYSIS OF CURRENT SENTIMENT SURROUNDING HOMESHARING AND RIDESHARING* 10–11 (2014) (listing the cities that either had policy interventions pending or took no action towards home-sharing as of 2014).

<sup>145</sup> ANDREW MOYLAN ET AL., R STREET INST., *RIDESCORE 2014; HIRED DRIVER RULES IN U.S. CITIES* 1, 3–4 (2014); see, e.g., Jeremy Allen, *Uber, Lyft Ignore Ann Arbor's Cease and Desist Demand; No Tickets Issued Following City's Orders*, MLIVE (July 7, 2014, 9:57 AM) [http://www.mlive.com/business/ann-arbor/index.ssf/2014/07/uber\\_lyft\\_ignore\\_ann\\_arbors\\_ce.html](http://www.mlive.com/business/ann-arbor/index.ssf/2014/07/uber_lyft_ignore_ann_arbors_ce.html); Ashley Dejean, *Uber and Lyft Ignore Virginia's Demand to Cease and Desist*, WAMU (June 6, 2014), [http://wamu.org/story/14/06/06/uber\\_and\\_lyft\\_refuse\\_virginias\\_demand\\_to\\_cease\\_and\\_desist/](http://wamu.org/story/14/06/06/uber_and_lyft_refuse_virginias_demand_to_cease_and_desist/); see also DUPUIS & RAINWATER, *supra* note 144, at 10–11 (listing thirteen cities that either had policy interventions pending or took no action towards ridesharing as of 2014).

that the Sharing Economy is motivated by profit, not altruism. We know that people are putting new capacity online, not simply utilizing what they already have. And we know that many supply-side users are likely either employees or full-fledged, illegal businesses, not microenterprises. The size and impact of the Sharing Economy (mostly through its two main players, Airbnb and Uber) present real harms to society. These harms manifest themselves as market failures, which the following section surveys. The section concludes by demonstrating how under-regulation of these market failures, has allowed a few Platforms to grow exponentially.

### A. *Market Failures in the Sharing Economy*

According to the public-interest theory of regulation, markets generally put scarce resources to their highest and best use.<sup>146</sup> However, regulatory intervention may be necessary when the pricing system alone cannot efficiently allocate resources.<sup>147</sup> In these situations, market failures occur, and in the Sharing Economy, in particular, they occur in two main ways—clean and messy.<sup>148</sup>

#### 1. *Clean Market Failures*

Clean market failures are those capable of being addressed quickly through the design of Platforms and the internalization of costs. These market failures include, but are not limited to: asymmetric information, discrimination, some forms of negative externalities, and the provision of public goods.

Asymmetric information occurs when a party has exclusive information about the quality of a transaction.<sup>149</sup> Reputation systems help reduce asymmetric information, but they can be improved to prevent the disappointment and fraud that still occurs on platforms.<sup>150</sup> For example,

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<sup>146</sup> See Susan Dudley et al., *Economic Regulation: Price, Entry, and Exit*, in REGULATION: A PRIMER 12 (Susan Dudley & Jerry Brito eds., 2d ed. 2012).

<sup>147</sup> See Johan den Hertog, *Review of Economic Theories of Regulation* 1, 5 (Utrecht Sch. of Econ. Tjalling C. Koopmans Research Inst. Discussion Paper Series 10-18, Dec. 2010), <https://dspace.library.uu.nl/handle/1874/309815>.

<sup>148</sup> Similarly, in her 2016 article, Orly Lobel classifies regulatory challenges in the Platform Economy into “easy” and “hard” cases. Lobel, *supra* note 15, at 93.

<sup>149</sup> LALIT WANKHADE & BALAJI DABADE, QUALITY UNCERTAINTY AND PERCEPTION 14 (2010).

<sup>150</sup> See, e.g., David Pope, *Ways to Prevent Sharing Economy Fraud*, TNOOZ (July 18, 2016), <https://www.tnooz.com/article/ways-to-prevent-sharing-economy-fraud/> (describing various frauds in the sharing economy); see also *Airbnb Guest Stories*, AIRBNBHELL, <http://www.airbnbhell.com/airbnb-guest-stories> (last visited Aug. 24, 2017); *Airbnb Host Stories*, AIRBNBHELL, <http://www.airbnbhell.com/airbnb-host-stories/> (last visited Aug. 24, 2017); *Airbnb Reviews*, TRUSTPILOT, <https://www.trustpilot.com/review/>

regulators could require platforms to simultaneously reveal feedback. Under such a system, feedback would only be available after both users provide it or after a set period of time. Thus, the fear of retaliation would be reduced and reviews would be more accurate.

Discrimination occurs throughout the Sharing Economy.<sup>151</sup> For example, Airbnb guests with African-American sounding names are significantly less likely to have a reservation request accepted than guests with white-sounding names.<sup>152</sup> To reduce discrimination, Airbnb now encourages instant booking so hosts cannot review reservation requests.<sup>153</sup> Other design choices, such as reducing the prominence of pictures and names, can be used to further reduce discrimination by removing opportunities to make decisions based on discriminatory characteristics.

Regulations can also force Platforms to internalize many of the costs they have avoided, especially those related to ensuring safety via direct and vicarious liability.<sup>154</sup> California law, for example, requires transportation network companies (TNC) to have a zero-tolerance policy for drunk driving.<sup>155</sup> If a drunk-driving complaint is received by a TNC, it must suspend the driver until further investigation.<sup>156</sup> When TNCs do not comply, they face fines.<sup>157</sup> Furthermore, if tort liability is shifted to Platforms while users are using

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www.airbnb.com (last visited Aug. 24, 2017). Note that the complaints on www.AirbnbHell.com are unverified.

<sup>151</sup> See, e.g., Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J., Apr. 2017, at 1, 2; Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 FORDHAM URB. L.J. 1023, 1026 (2016) (discussing gender discrimination in the Sharing Economy). See generally NAT'L EMP'T LAW PROJECT, *THE ON-DEMAND ECONOMY & ANTI-DISCRIMINATION PROTECTIONS* (2017) (surveying how Sharing Economy users may experience discrimination).

<sup>152</sup> Edelman et al., *supra* note 151, at 1–3.

<sup>153</sup> Sage Lazzaro, *9 Things Airbnb Is Now Doing to Prevent Hosts from Discriminating Against Renters*, OBSERVER (Sept. 8, 2016, 3:23 PM), <http://observer.com/2016/09/9-things-airbnb-is-now-doing-to-prevent-hosts-from-discriminating-against-renters/>.

<sup>154</sup> Injuries occur in the Sharing Economy. E.g., *Reported List of Incidents Involving Uber and Lyft, WHO'S DRIVING YOU?*, <http://www.whosdrivingyou.org/rideshare-incidents.html> (last visited Oct. 24, 2017); Ron Lieber, *Death in Airbnb Rental Raises Liability Questions*, N.Y. TIMES (Nov. 13, 2015), [https://www.nytimes.com/2015/11/14/your-money/death-in-airbnb-rental-raises-liability-questions.html?\\_r=0](https://www.nytimes.com/2015/11/14/your-money/death-in-airbnb-rental-raises-liability-questions.html?_r=0) (discussing safety and insurance questions in the Sharing Economy). Note that the ride-sharing incidents list is compiled by the Taxicab, Limousine & Paratransit Association, which is opposed to ridesharing. *About, WHO'S DRIVING YOU?*, <http://www.whosdrivingyou.org/about> (last visited Oct. 24, 2017).

<sup>155</sup> Cal. Pub. Utils. Comm'n, *supra* note 141, at 3.

<sup>156</sup> *Id.* at 27. For another example of a state zero-tolerance policy, see FLA. STAT. ANN. § 627.748 (West 2017).

<sup>157</sup> In April 2017, the California Public Utilities Commission recommended assessing Uber over \$1.3 million for over 150 violations of the zero-tolerance rules. Order Instituting Investigation and Order to Show Cause Why the Commission Should Not Impose Appropriate Fines and Sanctions on Rasier-CA LLC at 1, No. I.17-04-009 (Cal. P.U.C. Apr. 6, 2017).

Platform services, Platforms will have a greater incentive to prevent harms through broader background checks and safety inspections.

Each year, Platforms avoid reporting and collecting millions of dollars in tax revenues to all levels of government.<sup>158</sup> Consequently, public goods such as roads, parks, and law enforcement may be underfunded. However, as suggested by the fact that Airbnb remits over \$110 million in taxes in over 200 jurisdictions, Platforms can collect taxes with relative ease.<sup>159</sup>

While clean market failures within the Sharing Economy are more straightforward to address than messy market failures, regulation has still been piecemeal.<sup>160</sup> Thus unsurprisingly, consumers have been defrauded, discriminated against, and injured within the sharing economy, and taxes, which finance public goods, have gone unpaid.

## 2. *Messy Market Failures*

Messy market failures are far harder to address than clean market failures. This is because some of these market failures are ambiguous and not readily apparent (e.g., environmental and community harms); some must be addressed beyond the local level of government (e.g., privacy harms); and others may be indirect (e.g., economic harms).

### a. *Ambiguous Harms*

While Platforms present themselves as good community members and eco-friendly businesses, they can cause unintended yet broad harms to communities and the environment. For example, accommodation Platforms' disregard for zoning and licensing requirements can go well beyond nuisance harms, as

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<sup>158</sup> See ZACH SCHILLER & CARL DAVIS, INST. ON TAX & ECON. POLICY, TAXES AND THE ON-DEMAND ECONOMY 2–3 (2017).

<sup>159</sup> AIRBNB POLICY TOOL CHEST, *supra* note 6, at 4.

<sup>160</sup> See Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. LEGIS. 147, 184–94 (2016) (describing current regulations of the Sharing Economy); Pollman & Barry, *supra* note 17, at 398–400; Andrew J. Hawkins, *Massachusetts Becomes the First State to Tax Uber and Lyft*, VERGE (Aug. 22, 2016, 2:30 PM), <https://www.theverge.com/2016/8/22/12585976/massachusetts-uber-lyft-tax-taxi-ride-hail> (reporting that Uber is also beginning to collect taxes); Stancombe, *supra* note 143. Airbnb does collect taxes for some jurisdictions that have reached an agreement with the company. As of December of 2016, Airbnb claims it has collected and remitted more than \$110 million in taxes for over 200 jurisdictions. AIRBNB POLICY TOOL CHEST, *supra* note 6, at 4. See also Leigh Gallagher, *Airbnb's Profits to Top \$3 Billion by 2020*, FORTUNE (Feb. 15, 2017, 6:00 AM), <http://fortune.com/2017/02/15/airbnb-profits/> (noting that Airbnb's projected revenues in 2017 are \$2.8 billion, which shows that the amount Airbnb collects in taxes is underwhelming).

demonstrated by the horror stories listed on sites like [www.AirbnbHell.com](http://www.AirbnbHell.com).<sup>161</sup> They can impact the affordability of housing<sup>162</sup> and the culture of communities.<sup>163</sup>

The environmental impacts associated with the Sharing Economy are equally complex. Despite widespread beliefs that the Sharing Economy is reducing the demand for new goods and spaces, apart from research on car-sharing, there is no empirical evidence that these beliefs are true.<sup>164</sup> To the contrary, a study by Rayle et al. interviewed two groups of people in three neighborhoods in San Francisco: (1) individuals who had just completed a ride with Uber/Lyft and (2) individuals who had used Uber/Lyft within the previous two weeks.<sup>165</sup> They asked, among other things, how the individual would have traveled had Uber/Lyft not been available.<sup>166</sup> They found a small “(8%) induced travel effect,” suggesting that the presence of Uber/Lyft leads to rides that would otherwise not have taken place.<sup>167</sup> Furthermore, for those who would have made the trip in the absence of Uber/Lyft, 33% of respondents said that they would have used a bus or rail, which are typically more environmentally friendly forms of transportation.<sup>168</sup>

As for anticompetitive behavior, problems arise in two main respects: the concentration of power among Platforms and the coordination of prices. First, with Internet-based activities and networked technology, competition is far

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<sup>161</sup> Although, nuisance harms are also real. *See, e.g.,* Lara Williams, *When Airbnb Renters Turn Into Nuisance Neighbours*, *GUARDIAN* (Sept. 18, 2016, 5:09 AM), <https://www.theguardian.com/technology/2016/sep/17/airbnb-nuisance-neighbours-tribunal-ruling>.

<sup>162</sup> *See, e.g.,* Stephen Sheppard & Andrew Udell, *Do Airbnb Properties Affect House Prices?*, *WILLIAMS COLLEGE* 29–30 (Oct. 30, 2016), <http://web.williams.edu/Economics/wp/SheppardUdellAirbnbAffectHousePrices.pdf> (finding a correlation between Airbnb listings and home values in New York City).

<sup>163</sup> Neringa Sinkeviciute, *Tourism Boom in Barcelona: Strengthening the Economy or Troubling Local Residents?*, *CATALAN NEWS AGENCY* (Oct. 7, 2014, 3:29 PM), <http://www.catalannews.com/life-style/item/tourism-boom-in-barcelona-strengthening-the-economy-or-troubling-local-residents> (describing the impact of Airbnb rentals on neighborhoods in Barcelona, Spain).

<sup>164</sup> Unlike ride-sharing, car-sharing involves either renting a car from a peer or from an app as opposed to a centralized rental office. With car-sharing, substantial reductions in CO<sub>2</sub> emissions have been documented. *See* HANS NIJLAND ET AL., *PBL NETH. EVNTL. ASSESSMENT AGENCY, IMPACT OF CAR SHARING ON MOBILITY AND CO<sub>2</sub> EMISSIONS* 1, 10–11 (July 2015); Eliot Martin et al., *Impact of Carsharing on Household Vehicle Holdings: Results from North American Shared-Use Vehicle Survey*, 2143 *TRANSP. RES. REC.* 150, 150 (2010) (demonstrating that households participating in car-sharing programs “reduce their vehicle holdings to a degree that is statistically significant”).

<sup>165</sup> Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco* 6–7 (Nov. 1, 2014) (unpublished manuscript) (on file with the University of California Transportation Center).

<sup>166</sup> *Id.* at 6–12.

<sup>167</sup> *Id.* at 13.

<sup>168</sup> *Id.*

from a simple “click away.”<sup>169</sup> As described below, the network and data network effects will only allow a few players to emerge in each modality, thus competition is limited.<sup>170</sup> Second, Platforms, like Uber, are able to unilaterally set prices (including surge prices) for all supply-side users. These activities have been challenged as unreasonable restraints on trade under the Sherman Act,<sup>171</sup> but are yet to be resolved because Uber now insists on submitting the dispute to arbitration.<sup>172</sup>

How regulators should address the harms caused by the Sharing Economy to the vibrancy and diversity of communities, the environment, and markets is a very open question, primarily because we have yet to see how those harms will manifest over time.

*b. Beyond Local Regulation*

Certain market failures are inappropriate for purely local regulation. For example, due in large part to their classification as independent contractors, which reduces employment security and benefits, many Sharing Economy workers are part of a “precariat class.”<sup>173</sup> Local jurisdictions alone cannot provide for the social services to aid these workers in times of need or when they relocate.

Furthermore, because Platforms connect people from different places, gather large amounts of user data, and store information remotely, harms related to privacy are magnified across borders. Currently, Platforms use contract law to dictate privacy protections, or lack thereof, but abuse still occurs.<sup>174</sup> To illustrate, there were widespread reports that Uber shared access

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<sup>169</sup> FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 83 (2015).

<sup>170</sup> *Id.* (arguing that alternatives to dominate players are “demonstrably worse” as the dominate players’ “self-reinforcing data advantage grows”); see also FED. TRADE COMM’N, *supra* note 89, at 25–29 (describing competition issues in the Sharing Economy); JOÃO E. GATA, *COMPETITION POLICY INT’L, THE SHARING ECONOMY, COMPETITION AND REGULATION* 1, 4–6 (2015).

<sup>171</sup> *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 820 (S.D.N.Y. 2016), *motion for partial reconsideration denied*, 185 F. Supp. 3d 448, 451 (S.D.N.Y. 2016).

<sup>172</sup> *Meyer v. Kalanick*, 200 F. Supp. 3d 408, 411 (S.D.N.Y. 2016), *vacated sub nom. Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).

<sup>173</sup> GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* 24 (2011); TREBOR SCHOLZ, *UBERWORKED AND UNDERPAID: HOW WORKERS ARE DISRUPTING THE DIGITAL ECONOMY* 129–30 (2017).

<sup>174</sup> Sabreena Khalid, *Privacy Concerns in the Sharing Economy: The Case of Uber*, *JOLT DIGEST* (Dec. 16, 2014), <http://jolt.law.harvard.edu/digest/privacy-concerns-in-the-sharing-economy-the-case-of-uber>.

to its “God View” with attendees of a launch event.<sup>175</sup> The God View showed the whereabouts of notable users.<sup>176</sup> In response, the Federal Trade Commission (FTC) stepped in and filed a complaint against Uber, asserting that the company violated Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”<sup>177</sup> Uber and the FTC later settled,<sup>178</sup> but still the program demonstrates how technology companies have the ability to decimate individual privacy and why the response to privacy harms cannot be piecemeal.

### c. *Indirect Harms*

When the Sharing Economy first took off, the economic effects were expected to be incredibly positive, and to some degree they have been.<sup>179</sup> A recent study using almost fifty million individual-level observations of Uber riders estimated that the service generated approximately \$6.8 billion in consumer surplus in the United States in 2015, meaning that consumers are enjoying a large degree of the value created by the service.<sup>180</sup> However, “the distribution of increased income and welfare are likely to be uneven.”<sup>181</sup> This is in no small part because supply-side users are more likely affluent to begin with (they are the ones who already have fancy cars and second homes next to beautiful beaches).<sup>182</sup> The Sharing Economy simply gives this group the ability to make more off of what they have or invest in new assets to make even more money, a process identified as the “Piketty-effect” of the Sharing Economy.<sup>183</sup>

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<sup>175</sup> Kashmir Hill, “God View” Uber Allegedly Stalked Users for Party-Goers’ Viewing Pleasure, FORBES (Oct. 3, 2014, 11:32 AM), <https://www.forbes.com/sites/kashmirhill/2014/10/03/god-view-uber-allegedly-stalked-users-for-party-goers-viewing-pleasure/#117e63d83141>.

<sup>176</sup> *Id.*

<sup>177</sup> Complaint at 6, *In re Uber Techs., Inc.* (F.T.C. 2017) (No. C-); see 15 U.S.C. § 45(a)(1) (2012).

<sup>178</sup> Fed. Trade Comm’n, *Uber Settles FTC Allegations That It Made Deceptive Privacy and Data Security Claims* (Aug. 15, 2017), <https://www.ftc.gov/news-events/press-releases/2017/08/uber-settles-ftc-allegations-it-made-deceptive-privacy-data>.

<sup>179</sup> PRICEWATERHOUSECOOPERS, *supra* note 26, at 14 (projecting that the Sharing Economy could be worth \$335 billion in global revenue by 2025).

<sup>180</sup> Peter Cohen et. al., *Using Big Data to Estimate Consumer Surplus: The Case of Uber* (Nat’l Bureau of Econ. Research, Working Paper No. 22627, 2016), [https://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/ConsumersurplusatUber\\_PR.PDF](https://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/ConsumersurplusatUber_PR.PDF).

<sup>181</sup> Koen Frenken & Juliet Schor, *Putting the Sharing Economy into Perspective*, 23 ENVTL. INNOVATION SOCIETAL TRANSITIONS 3, 7 (2017). *Contra* Samuel Fraiberger & Arun Sundarajan, Peer-to-Peer Rental Markets in the Sharing Economy (Sept. 10, 2017) (unpublished manuscript), <https://ssrn.com/abstract=25743374> (finding below-median income consumers are able to disproportionately benefit from the Sharing Economy).

<sup>182</sup> Frenken & Schor, *supra* note 181. *Contra* Fraiberger & Sundarajan, *supra* note 181.

<sup>183</sup> Frenken & Schor, *supra* note 181. *Contra* Fraiberger & Sundarajan, *supra* note 181. *See generally*



In the end, it is predicted that the wealthier supply-side users will crowd out the work opportunities typically completed by lower-educated, manual laborers.<sup>184</sup>

Existing firms and their employees are also likely to experience lower earnings in response to the public's desire to take advantage of lower-cost transactions in the Sharing Economy.<sup>185</sup> One study found that the revenue of hotels in Texas reduced significantly as Airbnb grew in that state.<sup>186</sup> Another found that in New York City, traditional cab rides were reduced by 2.1 million rides in the same time period that the number of Uber rides jumped from 300,000 to 3.5 million.<sup>187</sup> While it is not the role of government to protect existing industries at the expense of innovation, new firms must not be allowed to unfairly escape all forms of costly regulation.

Messy regulatory failures will require open and thoughtful debate to address, but as demonstrated below, because Platforms are relatively unregulated in the startup stages, network effects will allow a few to grow very powerful. These powerful firms will then use their vast arsenal of users and cash to avoid addressing both clean and messy market failures.

### *B. The Breeding Grounds for Unicorns*

The Sharing Economy appears to present a diverse set of Platforms—from clothes sharing to pet sitting—but this is not an entirely accurate picture. In reality, the Sharing Economy is mostly comprised of only a few firms.<sup>188</sup> And despite popular belief, the Sharing Economy as a whole is not growing by leaps and bounds. Yes, there has been an incredible influx of Uber-like businesses receiving venture capital investments, but the true success stories of the Sharing Economy are few and far between.<sup>189</sup>

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THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harv. Univ. Press 2014).

<sup>184</sup> Juliet B. Schor, *Does the Sharing Economy Increase Inequality Within the Eighty Percent?: Findings from a Qualitative Study of Platform Providers*, 10 *CAMBRIDGE J. REGIONS, ECON. & SOC'Y* 263, 270 (2017).

<sup>185</sup> Frenken & Schor, *supra* note 181, at 6.

<sup>186</sup> Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (Boston Univ. Sch. of Mgmt., Research Paper No. 2013-16, 2016), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2366898](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2366898).

<sup>187</sup> Casey Leins, *Who's a Sharing Economy Worker?*, U.S. NEWS & WORLD REP.: DATA MINE (Aug. 21, 2015, 1:49 PM), <https://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers>.

<sup>188</sup> SLEE, *supra* note 2, at 24.

<sup>189</sup> As of 2015, \$12 billion had been invested in the Sharing Economy, which is twice the amount social networking Facebook and Twitter had received. Luke Zobrist & Michael Grampp, *The Sharing Economy:*

Tracking the 154 companies identified on Jeremiah Owyang's (founder of the brand council Crowd Companies) master list of Sharing Economy companies in 2013,<sup>190</sup> fewer than 60% of those companies survived until 2016.<sup>191</sup> Of those, fewer than ten were still functioning as successful, stand-alone companies with a value of over \$1 million in 2016. Over twenty-five were acquired, and the rest have experienced a minimal amount of success or failure.

Many academic papers about the Sharing Economy mention other Sharing Economy Platforms such as TaskRabbit,<sup>192</sup> HomeJoy,<sup>193</sup> and DogVacay,<sup>194</sup> without delving into great detail about the companies themselves because they have only seen limited success, if they have seen success at all. The network and data network effects can, in part, explain this phenomenon. A standard network effect involves a situation in which a service becomes more valuable the more people use it.<sup>195</sup> Credit card companies are a well-known example; the more people who use a particular card (American Express, Visa, etc.), the more sellers will begin to accept that card and the more buyers will, in turn, use that card more often.<sup>196</sup> The same principle applies to the Sharing

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*Share and Make Money: How Does Switzerland Compare* 3, DELOITTE (2015), <https://www2.deloitte.com/content/dam/Deloitte/ch/Documents/consumer-business/ch-cb-shared-economy-share-and-make-money.pdf>; see also SLEE, *supra* note 2, at 88–101. The venture capital investment trend may be slowing. Leslie Hook, *Venture Capital Starts to Tune Out of On-Demand Services*, FIN. TIMES (Feb. 24, 2016, 3:51 PM), <https://www.ft.com/content/88fb17c2-da12-11e5-98fd-06d75973fe09>.

<sup>190</sup> Jeremiah Owyang, *The Master List of the Collaborative Economy: Rent and Trade Everything*, WEB-STRATEGIST (Feb. 24, 2013), <http://www.web-strategist.com/blog/2013/02/24/the-master-list-of-the-collaborative-economy-rent-and-trade-everything>. Certain companies on Owyang's list of 200 Sharing Economy companies, were not tracked. This is because these companies did not appear to be capitalizing on the excess capacity of microentrepreneurs and thus did not appear to be Sharing Economy companies. Examples include commercial car rental services such as Car2Go and textbook, fashion, and art rental companies. Furthermore, there was no available data for several of the companies. Therefore, they were excluded.

<sup>191</sup> Jeremiah Owyang is the founder of the brand council Crowd Companies and an active writer about the Sharing Economy. See *About Jeremiah Owyang*, WEB-STRATEGIST, <http://www.web-strategist.com/blog/about/> (last visited Aug. 24, 2017).

<sup>192</sup> TaskRabbit is a Platform that allows users to outsource small jobs, such as grocery shopping and home repairs, to others. See *About Us*, TASKRABBIT, <https://www.taskrabbit.com/about> (last visited Sep. 3, 2017).

<sup>193</sup> HomeJoy was a cleaning company that shut down in 2015. Ellen Huet, *What Really Killed Homejoy? It Couldn't Hold On to Its Customers*, FORBES (July 23, 2015, 3:10 PM), <http://www.forbes.com/sites/ellenhuet/2015/07/23/what-really-killed-homejoy-it-couldnt-hold-onto-its-customers/#1b09eca3114c>.

<sup>194</sup> See *How It Works*, ROVER, <https://www.rover.com/become-a-sitter/> (explaining that DogVacay was a pet-sitting service provider that recently merged with Rover, a dog-sitting service provider) (last visited Sept. 3, 2017).

<sup>195</sup> See Matt Turck, *The Power of Data Network Effects*, MATTTURCK (Jan. 4, 2016), <http://mattturck.com/the-power-of-data-network-effects/>.

<sup>196</sup> Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EURO. ECON.

Economy: competition is reduced because the more people use a particular Platform, the more people want to use that Platform.

Furthermore, data network effects work in a similar way. The more users that provide data to a system, the more efficient the system becomes, typically through machine learning.<sup>197</sup> Sharing Economy platforms have benefited enormously from the data network effect to provide a seamless user experience via fine-tuned matching algorithms and iterative quality improvements.<sup>198</sup>

Thus, compounding these network effects is the fact that dominant Sharing Economy firms often acquire their competition or prospective competition.<sup>199</sup> For example, Trip4Real, a Platform that allows users to connect with locals (for a fee) for events like tours, cooking classes, and photo shoots, was acquired by Airbnb in 2016.<sup>200</sup> And in China there was a heated battle in the ride-sharing space between Didi Chuxing and Uber China. Uber China ultimately sold to Didi Chuxing due to the winner-takes-all nature of Platforms.<sup>201</sup>

The limited success enjoyed by the vast majority of Sharing Economy Platforms is also likely because self-interest drives business. Successful Sharing Economy startups are often “those that get in early” and appeal to “consumers’ laziness and desire to save money [rather] than their actual desire to share and be green.”<sup>202</sup> As a result, the companies built around sharing tools, bikes, cars, and pets are usually more hassle than they are worth for consumers. The Sharing Economy is not a wide-open realm of opportunity; thus, we must observe the Unicorns carefully in order to regulate them, paying more attention to what they do than what they say.

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ASS’N 990, 1013 (2003).

<sup>197</sup> Turck, *supra* note 195.

<sup>198</sup> Bruno Carballa Smichowski, *Data as a Common in the Sharing Economy: A General Policy Proposal* 15, 19 (Centre d’économie de l’Université Paris Nord, Working Paper No. 2016-10, 2016), [https://vecam.org/IMG/pdf/carballa\\_smichowski\\_bruno\\_2016\\_-\\_data\\_as\\_a\\_common\\_in\\_the\\_sharing\\_economy\\_a\\_general\\_policy\\_proposal\\_cepn\\_wp\\_.pdf](https://vecam.org/IMG/pdf/carballa_smichowski_bruno_2016_-_data_as_a_common_in_the_sharing_economy_a_general_policy_proposal_cepn_wp_.pdf). See generally Bjarke Staun-Olsen, *What You Need to Know About Network Effects*, MEDIUM: CREANDUM (Dec. 23, 2016), <https://medium.com/creandum-family/what-you-need-to-know-about-network-effects-b7f594d7b011#huvj6b6xw>.

<sup>199</sup> See *Acquisitions in Sharing Economy*, INDEX BY TNW, <https://index.co/market/sharing-economy/acquisitions> (providing a comprehensive list of Sharing Economy acquisitions) (last visited Aug. 24, 2017).

<sup>200</sup> Natasha Lomas, *Airbnb Acquires Travel Activities Marketplace, Trip4real*, TECHCRUNCH (Sept. 19, 2016), <https://techcrunch.com/2016/09/19/airbnb-acquires-travel-activities-marketplace-trip4real/>.

<sup>201</sup> Lulu Yilun Chen, *Uber Might Have the Last Laugh Over China*, BLOOMBERG (Nov. 14, 2016, 4:00 PM), <https://www.bloomberg.com/news/articles/2016-11-14/uber-s-kalanick-might-have-last-laugh-amid-new-chinese-rules>.

<sup>202</sup> See Catherine Clifford, *Is the Sharing Economy High Over?*, ENTREPRENEUR (Feb. 29, 2016), <https://www.entrepreneur.com/article/271692>.

### III. UNICORN MAGIC: HOW SHARING ECONOMY PLATFORMS MAKE THEIR OWN RULES

As demonstrated in the Parts above: Sharing Economy firms use rhetoric to avoid regulation. Some grow powerful, and those dominant players, the Unicorns, work their magic to fend off burdensome regulation and write their own rules. This Part describes how Unicorns accomplish their particular form of “magic.”

Unicorns are able to avoid regulation and dictate the rules that will govern them in traditional and nontraditional ways. On the traditional side, once the Unicorns acquire venture capital and begin generating revenue, they can buy advertising, armies of lobbyists, and commission studies from prominent politicians and academics to write favorable reports in support of their activities.<sup>203</sup> For example, as of 2014, Uber had at least a third more lobbyists than Wal-Mart (not including municipal lobbyists).<sup>204</sup> Uber’s founder and former CEO, Travis Kalanick once said, “[W]e are running a political campaign and the Candidate is Uber. . . . And this political race is happening in every major city in the world. And because this isn’t about a democracy, this is about a product, you can’t win 51 to 49. You have to win 98 to 2.”<sup>205</sup>

Perhaps more concerning than Unicorns’ capacity to flex their muscles through spending, however, is their ability to outmuscle and outsmart governments by mobilizing their powerful user base.<sup>206</sup> For example, when two bills that would toughen ride-sharing requirements were proposed in

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<sup>203</sup> See Donald McNeill, *Governing a City of Unicorns: Technology Capital and the Urban Politics of San Francisco*, 37 URB. GEOGRAPHY 494, 496 (2016) (describing lobbying efforts by Airbnb and Uber); Codagnone et al., *supra* note 16, at 33 (“[B]oth Airbnb and Uber commissioned reports by influential academics, who had formerly held important governmental posts: (a) Gene Sperling was a White House Economic Advisor; (b) Alan Krueger was formerly Chairman of President Barack Obama’s Council of Economic Advisers; (c) Justus Haucap, was formerly Chairman of the German Monopolies Commission.”). For an excellent discussion about the role of regulatory affairs in startups who, as part of their business model, must disrupt current regulatory regimes, see Elizabeth Pollman, *The Rise of Regulatory Affairs in Innovative Startups*, in THE HANDBOOK OF LAW AND ENTREPRENEURSHIP IN THE UNITED STATES, (D. Gordon Smith & Christine Hurt, eds., forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2880818](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880818).

<sup>204</sup> Karen Weise, *This Is How Uber Takes Over a City*, BLOOMBERG BUSINESSWEEK (June 23, 2015, 6:06 PM), <http://www.bloomberg.com/news/features/2015-06-23/this-is-how-uber-takes-over-a-city>.

<sup>205</sup> Kara Swisher, *Man and Uber Man*, VANITY FAIR (Dec. 2014), <http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy>.

<sup>206</sup> Matt Stempeck, *Are Uber and Facebook Turning Users Into Lobbyists?*, HARV. BUS. REV. (Aug. 11, 2015), <https://hbr.org/2015/08/are-uber-and-facebook-turning-users-into-lobbyists>; see also Pollman & Barry, *supra* note 17, at 403–06; Rosalind S. Helderman, *Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network*, WASH. POST (Dec. 13, 2014), [https://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7\\_story.html](https://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7_story.html).

California, Lyft used a company called Phone2Action to send e-mails and manipulate the Lyft interface to help people contact their elected officials.<sup>207</sup> From e-mails alone, Lyft was able to get a staggering 28% conversion rate (compared to the normal 2% response rate for advocacy e-mails).<sup>208</sup> The bills either failed or were modified to the ride sharing company's satisfaction.<sup>209</sup>

Platforms advocate hard by utilizing atypical yet effective tactics ranging from Twitter campaigns to ice cream deliveries as a way of pressuring cities to adopt industry-friendly regulations.<sup>210</sup> For example, when New York City Mayor Bill de Blasio proposed legislation that would limit the number of ride-sharing vehicles in the City, Uber responded by adding a "de Blasio" mode to its app.<sup>211</sup> The mode showed users the long wait times and car unavailability they would be subject to if the legislation passed.<sup>212</sup> The company's gambit succeeded and the City stopped pursuing the cap proposal.<sup>213</sup>

This new form of "Platform advocacy" or "new power" allows large groups to collectively influence lawmakers.<sup>214</sup> Platforms are masters at harnessing and nurturing that power. The problem, however, is oversimplification. By controlling the terms of engagement and frames, Sharing Economy companies do not seek to facilitate debate around nuanced and emerging issues. Their self-interest inspires them to present the same one-sided narratives used to influence regulators, and their user base gets behind that message, even if they are ultimately hurt by the hands-off regulatory approach.

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<sup>207</sup> Said, *supra* note 60.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Edward T. Walker, Opinion, *The Uber-ization of Activism*, N.Y. TIMES (Aug. 6, 2015), <https://www.nytimes.com/2015/08/07/opinion/the-uber-ization-of-activism.html> (describing how Uber delivered ice cream in Portland when it was not allowed to operate); Weise, *supra* note 204.

<sup>211</sup> Amanda Schupak, *Uber App Mocks New York City Mayor Bill de Blasio*, CBS NEWS (July 17, 2015, 4:43 PM), <http://www.cbsnews.com/news/uber-app-mocks-new-york-city-mayor-de-blasio/>; Fitz Tepper, *Uber Launches "De Blasio's Uber" Feature in NYC with 25-Minute Wait Times*, TECHCRUNCH (July 16, 2015), <https://techcrunch.com/2015/07/16/uber-launches-de-blasios-uber-feature-in-nyc-with-25-minute-wait-times/>.

<sup>212</sup> Schupak, *supra* note 211; Tepper, *supra* note 211.

<sup>213</sup> Matt Flegenheimer, *De Blasio Administration Dropping Plan for Uber Cap, for Now*, N.Y. TIMES (July 22, 2015), <https://www.nytimes.com/2015/07/23/nyregion/de-blasio-administration-dropping-plan-for-uber-cap-for-now.html>. For additional examples of platform advocacy, see Pollman & Barry, *supra* note 17, at 403–06.

<sup>214</sup> Said, *supra* note 56 (describing "new power"); Stempeck, *supra* note 206 ("New startup delivers a creative and delightful new service which breaks the old rules, ignoring those rules until they have [a] critical mass of happy customers; regulators and incumbents respond by trying to shut down the new innovation; startups and their happy users rain hellfire on the regulators; questions arise about the actual impact of the new innovation; a tiny amount of data is shared to settle the dispute. Rinse and repeat, over and over.").

Furthermore, if regulations are imposed, Unicorns will work to make sure the regulations are not overly burdensome, preferring to pull out of a jurisdiction rather than submit to a series of regulations that address clean and messy market failures.<sup>215</sup> This is clear in the many jurisdictions that recognize Uber and Lyft as transportation network companies and have adopted specific, although light-in-touch, ordinances for them.<sup>216</sup> As reporter Karen Weise puts it, “Each government, whether municipal or state, goes through its own process to craft rules, but in the end, officials generally codify the insurance coverage, background-check policies, and inspection protocols Uber [and Lyft] already have in place. Uber makes the rules; cities fall in line.”<sup>217</sup>

The same is true for Airbnb. In the jurisdictions where the Platform is regulated, special rules have been crafted to treat the industry differently than traditional hotels.<sup>218</sup> Airbnb has even produced a thirty-plus page “Tool Chest” for regulators to make sure any regulations are “smart,” with the implied understanding that it is considered “smart” to allow “home sharing” to flourish.<sup>219</sup> However, other than tax collection, few jurisdictions place legal responsibility on Airbnb for facilitating illegal rentals.<sup>220</sup>

#### IV. LESSONS FROM THE SHARING ECONOMY “REVOLUTION”

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<sup>215</sup> In Austin, for example, Uber and Lyft pulled operations from the city for over a year in response to regulation requiring fingerprinting of drivers as a part of their background check. Andrew Liptak, *Lyft and Uber Will Return to Austin on Monday*, VERGE (May 27, 2017, 3:43 PM), <https://www.theverge.com/2017/5/27/15705060/lyft-uber-returning-austin-texas-fingerprinting-requirements>; see also Daniel E. Rauch & David Schleicher, *Like Uber, Like Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 945 (2015) (“Because they create mass producer and consumer surplus, sharing firms can generate the same sorts of mass popular support that often accompany pushes for stadiums. Indeed, while sharing firms do not have sports teams’ ability to threaten exit to extract gains, they do have the capacity to rally ‘fans’ for political gain.”).

<sup>216</sup> *Map of State-Level Ridesharing Laws*, R STREET INST., <http://www.rstreet.org/tnc-map/> (last updated June 1, 2016).

<sup>217</sup> Weise, *supra* note 204.

<sup>218</sup> A 2016 report conducted by R Street Institute, a libertarian think tank, found that twenty-one of the fifty-nine major U.S. cities analyzed had some sort of tailored legal framework that recognized short-term rentals and provided a foundation for their operation. ANDREW MOYLAN, R STREET INST., ROOMSCORE 2016: SHORT-TERM RENTAL REGULATION IN U.S. CITIES 5 (March 2016), <https://www.rstreet.org/wp-content/uploads/2016/03/RSTREET55.pdf>.

<sup>219</sup> AIRBNB POLICY TOOL CHEST, *supra* note 6, at 3–4.

<sup>220</sup> Even in San Francisco, which tried to place responsibility on homesharing platforms for facilitating illegal rentals, came to a special agreement with Airbnb. See *supra* note 117. See generally Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329 (2015); Johanna Interian, Note, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT’L & COMP. L. REV. 129 (2016); Dana Palombo, Comment, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 AM. U. BUS. L. REV. 287 (2015).

Rhetoric has driven regulatory agendas throughout history—from securities regulation to gun control and tax law.<sup>221</sup> In the Sharing Economy, it is no different, especially in the formative stages. Successful Sharing Economy Platforms have learned how to employ rhetoric to avoid the expense of ensuring safety, providing universal access, and treating supply-side users as employees, among other things. However, what makes this application of rhetoric most concerning is the concentration of power inherent in these firms. By ignoring the rules that would traditionally govern their activities, Platforms can grow more and more powerful.<sup>222</sup> Therefore, regulators need to heed the following lessons to effectively regulate future network technologies.

*A. Acknowledge the Knowledge Gap Between the Regulators and the Regulated*

In modern times, there is a growing knowledge gap between the regulated and the regulators. Sharing Economy companies, in particular, utilize sophisticated Internet-based technologies that regulators are at a loss to fully understand, much less question. Regulators need to acknowledge their lack of expertise and bring industry stakeholders to the table to better understand the nature of these new businesses.

Regulators may be well served to see through the rhetoric, address the technology gap, and encourage innovation by embracing the principles of the New Governance theory.<sup>223</sup> New Governance principles encourage an open and meaningful dialogue between industry and government to identify the goals of regulation and empower industry and other stakeholders to determine

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<sup>221</sup> See generally Steven M. Davidoff, *Rhetoric and Reality: A Historical Perspective on the Regulation of Foreign Private Issuers*, 79 U. CIN. L. REV. 619 (2010) (discussing the impact of rhetoric on the Security and Exchange Commission's deregulation of foreign private issuers); Daniel M. Filler, *Random Violence and the Transformation of the Juvenile Justice Debate*, 86 VA. L. REV. 1095 (2000) (reviewing JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* (1999) (discussing the role of rhetoric in shaping gun control policy after the Columbine shootings)); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987) (discussing the use of rhetoric to shape tax policy).

<sup>222</sup> Society has seen this pattern before. For example, Amazon avoided sales tax for many years, which gave it a significant advantage over "brick-and-mortar" stores. Amelia Landenberger, *How Battles over Collection of Sales Taxes on Online Sales Will Affect Small Businesses—Especially Affiliates of Large Sellers Like Amazon.com*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 225, 225 (2012).

<sup>223</sup> Other scholars including this Article's author have encouraged the use of New Governance principles to help regulate the Sharing Economy. See Brescia, *supra* note 15, at 91 (describing how the legal profession leans on New Governance approaches to regulate it, and applies those same principles of New Governance theory to propose ways to regulate the Sharing Economy); Abbey Stemler, *Regulation 2.0: The Marriage of New Governance and Lex Informatica*, 19 VAND. J. ENT. & TECH. L. 87 (2016).

ways to best achieve those goals.<sup>224</sup> As soon as regulators become aware of new innovations, especially those that rely on network effects, they should encourage key stakeholders to come to the table and begin a dialogue early about potential regulatory problems and solutions. Coming quickly up to speed about new business models will allow regulators to more easily see past rhetoric and prevent market failures.

### *B. Be Not Afraid of the CDA*

The CDA has been credited as the law that helped the “revolutionary growth” of the Internet because it removed the threat of litigation resulting from third-party behavior.<sup>225</sup> Without the protection of the CDA, it is unlikely that we would have robust platforms such as Google, Facebook, and Twitter.<sup>226</sup> However, regulators should not self-censor when it comes to the CDA. There is a growing body of scholarship and case law that suggests the CDA as it applies to the Sharing Economy may not completely immunize it from liability for user behavior or prevent it from being regulated.<sup>227</sup>

One case in particular, *Airbnb, Inc. v. City of San Francisco*, may signal the beginning of the end for broad CDA immunity. In 2015, the San Francisco Board of Supervisors adopted a city ordinance, known as the “Airbnb Law.”<sup>228</sup> The Airbnb Law was so named because it was tailored to support the platform

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<sup>224</sup> Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 *FORDHAM URB. L.J.* 1611, 1623 (2001) (arguing that New Governance principles are necessary because regulatory issues “have become too complex for government to handle on its own, because disagreements exist about the proper ends of public action, and because government increasingly lacks the authority to enforce its will on other crucial actors without giving them a meaningful seat at the table”).

<sup>225</sup> Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230’s Evolution Over Two Decades*, 18 *COLUM. SCI. & TECH. L. REV.* 1, 1–3 (2016).

<sup>226</sup> Kosseff, *supra* note 225.

<sup>227</sup> See, e.g., *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008); *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066, 1076 (N.D. Cal. 2016); see Adeline A. Allen, *Uber and the Communications Decency Act: Why the Ride-Hailing App Would Not Fare Well Under § 230*, 18 *N.C. J.L. & TECH.* 290, 293–95 (2017) (arguing that Uber is ineligible for Section 230 immunity because it heavily controls interactions between users and thus provides content to the platform); see also David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 *LOY. L.A. L. REV.* 373, 493 (2010) (finding that the CDA fails as a defense approximately a third of the time); *Internet Firms’ Legal Immunity Is Under Threat*, *ECONOMIST* (Feb. 11, 2017), <http://www.economist.com/news/business/21716661-platforms-have-benefited-greatly-special-legal-and-regulatory-treatment-internet-firms>.

<sup>228</sup> See S.F., CAL., ADMIN. CODE ch. 41A, §§ 41A.5(e), 41.A5(g)(4)(C)–(D), 41A.7(b)(1)–(3) (2017); see also Katie Benner, *Airbnb in Disputes with New York and San Francisco*, *N.Y. TIMES* (June 28, 2016), <http://www.nytimes.com/2016/06/29/technology/airbnb-sues-san-francisco-over-a-law-it-had-helped-pass.html>.



and it requires hosts renting out their entire homes to register with the city.<sup>229</sup> However, more than a year after the law took effect, only 25% of Airbnb hosts required to register had done so.<sup>230</sup>

“San Francisco’s Budget and Legislative Analyst’s Office reported that enforcement of the registration requirement was ‘hampered by the City’s lack of information’ because short-term rentals ‘operate in private residences without any commercial signage posted’ and because hosting platforms ‘do not disclose addresses or booking information about their hosts.’”<sup>231</sup> As stated by David Campos, a Board of Supervisors member, “Airbnb is proving that it wants to play by its own rules, that it believes . . . it is entitled to something no business has, absolute freedom to operate free of responsibility and oversight . . . It’s their way or the highway.”<sup>232</sup> In response, San Francisco enacted Ordinance 104-16, which amended the original Airbnb Law (Original Modification) to require Airbnb and others like it to monitor and verify user information or face civil and criminal penalties.<sup>233</sup>

Airbnb and Homeway (a Platform similar to Airbnb) promptly filed a lawsuit in response the Original Modification, claiming it violated Section 230, and moved for a preliminary injunction.<sup>234</sup> The city changed the Original Modification via Ordinance 178-16 (Updated Modification) and abandoned any requirement or restrictions on the publication of rental listings, which more squarely fit within the purview of the CDA.<sup>235</sup> Airbnb and Homeaway argued, however, that the ordinance still “squarely violates Section 230 by imposing liability on Hosting Platforms for third-party transactions that directly result from their publication of third-party listings.”<sup>236</sup>

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<sup>229</sup> Benner, *supra* note 228.

<sup>230</sup> *Airbnb, Inc.*, 217 F. Supp. 3d at 1070.

<sup>231</sup> *Id.* (citing Declaration of Jonathan H. Blavin in Support of Plaintiffs’ Joint Motion for Preliminary Injunction at Ex. G, *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD)).

<sup>232</sup> Benner, *supra* note 228.

<sup>233</sup> S.F., Cal., Ordinance 104-16 (June 24, 2016).

<sup>234</sup> Plaintiffs’ Joint Notice of Motion and Motion for Preliminary Injunction; Memorandum of Points & Authorities in Supp. Thereof, *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-CV-03615-JD).

<sup>235</sup> S.F., Cal., Ordinance 178-16 (Aug. 12, 2016).

<sup>236</sup> Plaintiffs’ Joint Notice of Motion, *supra* note 234, at 14. The CDA includes a preemption cause: “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3) (2012).

Judge Donato, the United States District Judge hearing the plaintiffs' motion for preliminary injunction, disagreed.<sup>237</sup> For Section 230 immunity to apply, a law must "inherently require[] the court to treat" a provider of an interactive computer service as "the 'publisher or speaker' of content provided by another."<sup>238</sup> Judge Donato found that in no way did the Updated Modification "treat[] plaintiffs as the publishers or speakers of the rental listings provided by hosts. It does not regulate what can or cannot be said or posted in the listings. It creates no obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts."<sup>239</sup>

Judge Donato's argument has raised eyebrows among technology scholars who find his distinction to be one without a difference. "If a[] rental advertising service is structured as a marketplace, it makes no sense to display listings for services that can't be purchased," writes Santa Clara law professor Eric Goldman.<sup>240</sup> Regardless, it is clear that the CDA may be losing its power. As stated in a court opinion in another CDA case related to a roommate matching site, "[t]he [CDA] was not meant to create a lawless no-man's-land on the Internet."<sup>241</sup> Regulators should not allow their actions to be governed by fear that the CDA will nullify all regulations that impact Platforms, especially regulations that do not directly regulate the publication of information, but instead regulate Platforms' ability to profit from undesirable transactions.

Lastly, as Platforms expand their offerings, utilizing Section 230 immunity will become virtually impossible. Uber states that its mission is "to make transportation as reliable as running water—everywhere and for everyone."<sup>242</sup> And it is making strides in the driverless car arena (although true to form, Uber has decided to "[a]sk forgiveness, not permission" from regulators when testing its new cars).<sup>243</sup> These technological steps may come at a steep price; the moment Uber develops a fleet of self-driving cars will unequivocally be the

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<sup>237</sup> *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066, 1069, 1076 (N.D. Cal. 2016).

<sup>238</sup> *Id.* at 1072 (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)).

<sup>239</sup> *Id.*

<sup>240</sup> Eric Goldman, *Section 230 Ruling Against Airbnb Puts All Online Marketplaces at Risk—Airbnb v. San Francisco, TECH. & MARKETING L. BLOG* (Nov. 14, 2016), <http://blog.ericgoldman.org/archives/2016/11/section-230-ruling-against-airbnb-puts-all-online-marketplaces-at-risk-airbnb-v-san-francisco.htm>.

<sup>241</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).

<sup>242</sup> Karima Berkani, *Driving Innovation at Uber*, UBER NEWSROOM (Aug. 1, 2016), <https://newsroom.uber.com/saudi-arabia/innovation/>.

<sup>243</sup> See Mike Isaac, *Uber Defies California Regulators with Self-Driving Car Service*, N.Y. TIMES (Dec. 16, 2016), [http://www.nytimes.com/2016/12/16/technology/uber-defies-california-regulators-with-self-driving-car-service.html?\\_r=0](http://www.nytimes.com/2016/12/16/technology/uber-defies-california-regulators-with-self-driving-car-service.html?_r=0). Uber continued to use driverless cars on San Francisco streets even though regulators considered the use illegal because Uber had not obtained the necessary permits. See *id.*

moment Uber can no longer call itself just a technology company.<sup>244</sup> Regulators should stay clear-eyed and avoid the tech company frame and the allure of Internet exceptionalism—the notion that the Internet is inherently different and thus needs special legal treatment—to tackle the market failures presented by such innovations.<sup>245</sup>

### C. *Stay Focused on the Ends and Not the Means of Regulation*

Sharing Economy Platforms are disrupters because they help provide wants and needs—transportation, accommodation, access to capital, etc.—in cheaper and more efficient ways. When Platforms disrupt existing ways of doing things, regulators should be open to the idea that these new ways can sometimes achieve the desired ends of regulation. As Orly Lobel writes, innovative firms

provide new ways to address some of the very same social goals that law has attempted to reach. We are accustomed to thinking in terms of a new industry followed by a new set of regulations, but market innovation also offers an opportunity for more foundational thinking about the role of regulation.<sup>246</sup>

Regulators should embrace new ideas and ways to solve problems; however, as previously discussed, they should also avoid blind reliance on new innovations to address market failures. For example, innovations like reputation systems, while perhaps more effective than licensing requirements, are not perfect and should not be treated as such.

In adherence to New Governance principals, regulators should try to incorporate a decentralized stakeholder group to create performance standards. Performance standards focus on the ends rather than the means of regulation.<sup>247</sup> They specify a desired outcome, but leave the *how* to the specific regulated entity.<sup>248</sup> New York's zero-tolerance policy for drunk driving is a

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<sup>244</sup> Lyft is also working on developing a fleet of driverless cars in partnership with General Motors. Marco della Cava, *In 5 Years, Expect Your Lyft to Drive Itself, Says Cofounder*, USA TODAY (Sept. 18, 2016, 2:19 PM), <http://www.usatoday.com/story/tech/news/2016/09/18/lyft-cofounder-says-self-driving-dominates-2021/90620612/>.

<sup>245</sup> See Eric Goldman, *The Third Wave of Internet Exceptionalism*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 165, 165 (Berin Szoka & Adam Marcus eds., 2010).

<sup>246</sup> Lobel, *supra* note 15, at 117.

<sup>247</sup> Traditional design standards specify exactly how a regulated entity should achieve compliance in order to address market failures.

<sup>248</sup> See, e.g., Cary Coglianese et al., *Performance-Based Regulation: Prospects in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 711 (2003).

good example of this.<sup>249</sup> Complaints about drunk TNC drivers must be zero, and TNC platforms must figure out how to achieve that goal. Performance-based standards encourage creativity and flexibility, and allow people closest to the problems to figure out the ways to solve them.<sup>250</sup>

The dispute between San Francisco and home-sharing platforms discussed in the previous section also provides good insight into the utility of performance standards.<sup>251</sup> After Airbnb and Homeaway's motion for preliminary injunction was denied, the plaintiffs resumed talks with the city. Eventually, Airbnb and Homeaway agreed to do what they do best: set up an online portal. This portal will allow hosts to easily comply with San Francisco's registration laws, which were previously "impossible" to navigate in many cases.<sup>252</sup> Now, San Francisco is capitalizing on the unique competencies of Platforms to achieve its goal of removing dangerous and illegal hosts from the Platforms.

For performance standards to be effective, they must be monitored. This requires sharing data, which is something Platforms have been loath to do.<sup>253</sup> But, as Platforms are beginning to learn, sharing information is often better than the imposition of legal liability. Case in point is Airbnb's dealings with the City of New Orleans.<sup>254</sup> To operate in the city, Airbnb agreed to share data and let the city enforce registration requirements (aided by a \$1-a-night fee collected by Airbnb).<sup>255</sup> Airbnb was let off the hook for facilitating illegal rentals, but the city's goals were still achieved.

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<sup>249</sup> See *supra* notes 156–57.

<sup>250</sup> See Lobel, *supra* note 15, at 159.

<sup>251</sup> See *supra* Section IV.C.

<sup>252</sup> Davey Alba, *Airbnb's San Francisco Deal Puts Storyline Over Bottom Line*, WIRED (May 4, 2017, 7:00 AM), <https://www.wired.com/2017/05/airbnbs-san-francisco-deal-puts-storyline-bottom-line/>; Caroline O'Donovan, *Airbnb Just Settled Its Lawsuit Against San Francisco*, BUZZFEED (May 1, 2017, 4:50 PM), [https://www.buzzfeed.com/carolineodonovan/airbnb-just-settled-its-lawsuit-against-san-francisco?utm\\_term=.foWMOoB831#.voM85gGepj](https://www.buzzfeed.com/carolineodonovan/airbnb-just-settled-its-lawsuit-against-san-francisco?utm_term=.foWMOoB831#.voM85gGepj).

<sup>253</sup> Steven Hill, *Opinion, How Airbnb Routinely Hoodwinks Your City*, OBSERVER (Dec. 19, 2016, 8:26 AM), <http://observer.com/2016/12/how-airbnb-routinely-hoodwinks-your-city/> (discussing Platforms' reluctance to share data).

<sup>254</sup> *Id.*

<sup>255</sup> Katie Benner, *New Orleans Becomes New Model for Airbnb to Work with Cities*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/technology/new-orleans-airbnb-model.html>.

*D. If It Walks Like a Duck, Treat It Like a Duck*

When companies “move fast and break things,” rhetoric is more powerful because it is necessary to make sense of the chaos.<sup>256</sup> This causes people to believe that the Sharing Economy is something that “defies conventional regulatory theory.”<sup>257</sup> In some ways it does, but in many others, it takes the form of traditional firms. When activities within the sharing economy appear similar to traditional economic activities, they probably are, and should be treated as such. For example, an Airbnb host with ten listings should have to meet the same standards as a small hotel or bed and breakfast. When an EatWith chef hosts meals four or more days a week at her house, she should meet the same food safety standards as a restaurant.

Regulators should articulate which characteristics of Sharing Economy Companies are similar to or different than their off-line analogues. When sufficient characteristics are similar, the two types of firms should have to meet the same standards.

#### CONCLUSION

In the course of every high-tech startup’s path to profitability, there will be a point when something the company wants to do will arguably violate existing regulations. As demonstrated by the success of the few Unicorns in the Sharing Economy, it is an effective strategy to use opportunistic and often-contradictory self-characterizations, which leave individual users and regulators vulnerable to manipulation. This vulnerability can open the door for regulatory avoidance and a host of unintended consequences and harms to consumers, providers, and communities. Regulators should be cautious and alert the next time they feel the zeitgeist of a new network technology promising to change the world overnight.

It was easy for us as a society to be mystified by the Myth of the Sharing Economy because it hit from both sides—Platforms themselves and Platform users. Furthermore, the forces driving networked technologies create natural monopolies, which enable firms to command attention to promote their own views. However, by bringing stakeholders to the table, avoiding the

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<sup>256</sup> “Move fast and break things” was Facebook CEO Mark Zuckerberg’s motto for many years. Christian Zibreg, *Mark Zuckerberg Says You Need to “Move Fast and Break Things,”* GEEK (Oct. 2, 2009, 3:50 PM), <https://www.geek.com/news/mark-zuckerberg-says-you-need-to-move-fast-and-break-things-922432/?amp=1>.

<sup>257</sup> Lobel, *supra* note 15, at 90.

intimidation of federal law, focusing on the ends instead of the means of regulation, and articulating the differences and similarities of new and old methods, regulators can avoid the persuasive power of myth and other rhetorical techniques, thereby putting the public interest above the interest of private firms. Awareness will improve regulators' abilities to adopt measured, innovation-friendly approaches to address market failures before companies become too large to regulate easily, if at all.