Regulating Sharing: The Sharing Economy as an Alternative Capitalist System

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Regulating Sharing: The Sharing Economy as an Alternative Capitalist System

Rashmi Dyal-Chand*

In a country where good fences are believed to make good neighbors, sharing is surprisingly in vogue. The success of sharing economy icons such as Airbnb and Uber has generated a wave of commentary on the cultural, philosophical, and social impacts of sharing. In the legal realm, however, a disturbing dissonance exists between excitement over this seemingly new way of doing business and regulatory floundering. Is Airbnb a hotel chain, a rental agency, or a website provider? Is Uber a taxicab service employing hundreds of drivers or a developer of an app? These questions remain unanswered. Yet policy makers cannot regulate the sharing economy without answering them.

This legal dissonance is caused by the failure to recognize the sharing economy as a distinct capitalist system that requires new regulatory approaches. To date, both regulators and scholars have evaluated sharing against a Coasian norm that assumes the dominance of the traditional firm, the primacy of private ownership, and the asymmetrical leveraging of information. This approach obscures the answers to basic, but crucial, questions about how the sharing economy operates.

Using “varieties of capitalism” theory, this Article argues that the sharing economy is a nascent form of a coordinated market economy, a form that flourishes in some parts of Europe. The key task in regulating this alternative capitalist system is to understand and regulate the institutions that support it. On the basis of this theoretical insight, this Article proposes a regulatory model that prioritizes an inquiry into the institutions of the sharing economy as a means to answer the questions vexing policy makers. It also applies the model to two of the

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pressing problems of the sharing economy, namely concerns about worker equity and consumer safety:

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I. INTRODUCTION

Sharing has become a powerful force of market participation. By sharing access to extra bedrooms, back seats of cars, special camera or cooking equipment, and their own time and skills, urban dwellers have earned extra money and joined a community of like-minded sellers and consumers.1 In effect, websites and mobile phone applications have allowed such individuals to start up the tiniest of businesses to leverage the value of assets that would otherwise serve only their own personal uses.2 These micro—or perhaps one could say nano—businesses are only viable because their proprietors can share with a network of other microentrepreneurs the start-up costs of advertising, forming a customer base, developing products, and entering into contracts with customers.

For most urban dwellers, this is a familiar description of a new set of market practices that have variously been described as “the sharing economy,” “the peer-to-peer . . . economy,” and “collaborative consumption.”3 Yet to many American regulators, these practices appear to be alien and incomprehensible. What ordinary Americans who have rented rooms in their homes or charged for rides in their cars describe as a “lifesaver” that compensated for lost jobs and income

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5. Id.; Tomio Geron, The Share Economy, FORBES, Feb. 11, 2013, at 58.
during the Great Recession is described by many regulators and competitors as “deceptive,” “unfair,” and “illegal.” This dissonance presents a regulatory problem.

No doubt, one reason for the regulatory confusion is that the sharing economy appears so new and different that many people—both participants and regulators—still do not quite know what it is. Most of us know that Airbnb is different from a hotel chain or a booking service for bed-and-breakfasts, but we may not be able to pinpoint why. Similarly, we may not be able easily to articulate what distinguishes Uber from a traditional taxicab service. Regulators are similarly confounded. Is Airbnb a hotel, a rental agency, or a provider of a software product? Is Uber an employer, a taxicab company, or a software developer? Are those who rent homes through Airbnb or drive cars through Uber employees or independent businesses making use of a common resource? Is Kickstarter an investment advisor or a portal for small businesses to connect with individuals interested in investing in their success?

Examples of the regulatory dissonance abound. From San Francisco to Boston and cities in between, customers using ride-sharing services such as Uber and Lyft have complained of sexual and other harassment, invasions of privacy, and even assault and battery by drivers. The reflexive reaction from some local authorities has been to shut these ride-sharing services down completely on the grounds that they are operating as unlicensed taxicab services.

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6. Daniel E. Rauch & David Schleicher, Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the “Sharing Economy” (George Mason Univ. Law & Econs. Research Paper Series, Paper No. 15-01, 2015), http://ssrn.com/abstract=2549919 (noting that one of the factors driving the sharing economy was the Great Recession, which limited the resources of consumers and increased the availability of unemployed and underemployed “gig” workers).


10. See infra Part II.B.

11. See infra text accompanying notes 87-89.

12. See, e.g., Weiner, supra note 8 (“[Virginia] issued a ‘cease and desist’ order to the companies Uber and Lyft, saying they don’t have the proper permits to operate in the state.”); Michael B. Farrell, Uber Battle Goes to Heart of Cambridge, BOS. GLOBE, June 21, 2014, at A1 (reporting on a proposal by the Cambridge License Commission to subject ride-sharing services to the same requirements as taxis).
authorities have also banned individuals from running “unauthorized hostels.” 13 Meanwhile, the core challenge of protecting customer safety remains largely unaddressed because participants in these markets continue to operate in a gray market of sorts. 14 It may be the case that urban Americans are ready to embrace this way of doing business. But many of the regulators responsible for ensuring the safety and viability of these sharing markets are unprepared to rise to the regulatory challenge and are instead reflexively treating these new business practices as antibusiness. The consequence of the regulatory floundering thus far appears to be rent-seeking, especially by the providers of the technological platforms. 15 In recent months, an additional strain has emerged, namely that of scholars and advocates arguing that the potential of the sharing economy to redistribute resources and produce more equity in jobs and markets is being crowded out by players like Uber and TaskRabbit, which are effectively creating a form of marginalized work. 16 This critique has been especially effective in challenging the use of the term “sharing” to describe this new type of market, which some argue might better be understood as a “demand” economy. 17

In the flurry of reactions to the sharing economy, one truth has remained in the regulatory background. 18 The sharing economy is in fact a different form of market than what many Americans assume to be the norm. Indeed, the dissonance between participants in sharing markets and regulators goes to the very heart of Americans’ understanding of basic concepts such as “markets,” “business,” “entrepreneurship,” and “capitalism.” Thanks to the sharing economy, what many Americans may have thought of as the way of doing

13. See Airbnb in the City, supra note 9.
15. See infra Part II.B.
business now appears to be just one way of doing business. Prior to the rise of the sharing economy, entrepreneurs who could accumulate sufficient amounts of privately owned assets embodied the common understanding of capitalist success. Implicit in this assumption was the expectation that these entrepreneurs would successfully leverage privately held information about a steady market demand for such assets.

The sharing economy turns that assumption on its head. One way to view these markets is that they have developed a way for individuals to succeed by sharing privately owned assets—and by sharing information about a market demanding use of those assets. That is the model of success used by sharing networks such as Airbnb, Lyft, Uber, eBay, and Kickstarter. The concept of sharing markets is even more revolutionary if one adopts the viewpoint of this Article: individuals renting rooms, back seats, or specialty equipment are microentrepreneurs operating tiny, often part-time, businesses. Indeed, while regulators have already delved into the question of how to regulate the technology providers and consumers in sharing markets, the question of how (if at all) to regulate the individuals providing those goods and services has until very recently remained largely in the background. While some participants and policy makers have begun to argue that such individuals should be recognized and

19. Part III provides a detailed analysis of American-style capitalism as one example of a variety of capitalist forms.


21. See CASSON, supra note 20; see also ISRAEL M. KIRZNER, PERCEPTION, OPPORTUNITY, AND PROFIT 110-11 (1979) (noting that the imperfection of knowledge concerning product and market information constitutes an opportunity for profit); KNIGHT, supra note 20 (arguing that an entrepreneur's response to uncertainty generates profit).

22. Indeed, as I discuss in greater detail in Part II, many of the sharing networks discussed in this Article involve two sets of businesses sharing different things: the businesses providing technological platforms share information and technological resources, while the tiny businesses making use of those platforms share goods and services with consumers.

protected as employees of the technology providers, this Article argues that a fruitful regulatory alternative would be to recognize and protect them as the principals of tiny businesses. Doing so would provide a broader range of regulatory alternatives for achieving distributional fairness within sharing markets, with the ultimate goal of securing more direct benefits for these individuals.

This Article thus argues that the conceptual failure to understand the sharing economy as a different kind of market is the primary cause of regulatory failure in this arena. In short, policy makers do not recognize the sharing economy as the different form of capitalism that it is. They view it as breaking the rules of market behavior, rather than creating a new set of rules. Relying on a comprehensive (though implicit) set of assumptions about the way capitalism works, policy makers who encounter the sharing economy mark the ways that the sharing economy violates those assumptions. They are accustomed to hierarchies and formal contracts—a framework in which a company like Uber would either be an employer of hundreds of drivers or a software developer in a formal licensing arrangement with a large number of independent livery services. The problem for policy makers is that Uber does not comfortably conform to either category. Rather than considering the possibility that these differences amount to an alternative set of capitalist behaviors, policy makers instead conclude that such practices amount to unfair play.

The solution to this regulatory problem is to fix the conceptual failure. This is something that the current theoretical perspective on sharing fails to fix. Policy makers must begin to understand the sharing economy as a different form of capitalism. Outside of the law, varieties of capitalism are the subject of extensive study. This Article asserts that the sharing economy is a nascent version of a mature system of capitalism that has been labeled by “varieties of capitalism”


25. As Part III discusses, there is an extensive literature analyzing the power of these implicit assumptions about the way capitalism works. Peter Hall and David Soskice are foundational scholars in the analysis of the behavior of private businesses in a capitalist system. See VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001).


27. See id. at 21-27.

28. See infra Part II.B.

29. See infra text accompanying notes 158-173.
scholars as a “coordinated market economy,” a label that has been applied to national economies such as those of France and Germany.  

Although some sharing economy businesses in the United States appear to engage in rent-seeking, coordinated market systems are certainly capable of ensuring fairness and equal market access. Just as is the case in mature, coordinated economies, the sharing economy in the United States needs its own set of rules designed to ensure a fair and level playing field for its participants.

Understanding and regulating this different form of capitalism requires policy makers to understand the institutions of the sharing economy because such institutions do the work of achieving the collaboration, monitoring, and even sanctioning that define mature coordinated economies. In countries like Germany and France, these institutions include strong labor unions, powerful business associations, and a relational form of contracting.  

In the sharing economy, the key institutions that accomplish sharing are technological platforms that allow networks of individuals to connect with stable supplies of customers. As this Article discusses, the sharing economy fits within this different style of “coordinated capitalism.” But the fit is a tense one, especially when considering the business and operational behavior of the bigger and more well-known sharing economy names, such as Uber, Airbnb, and TaskRabbit. In these more well-known sharing networks, the technological platform providers have a great deal of power vis-à-vis the service providers (such as the drivers, hosts, and taskers). These power imbalances inhibit worker participation and contribute to rent-seeking by the platform providers. The differences in these institutions deeply impact both the mode of collaboration and the ability to achieve fairness and access. By regulating these institutions as intermediaries within a sharing network, policy makers can and should address the power and other imbalances in these microsystems of cooperation.

It may seem odd to compare a technology-enabled network for allowing ordinary individuals to rent extra rooms with a system that has allowed Germany to become an industrial juggernaut. But this Article will demonstrate that businesses within the U.S. sharing economy use many of the same market mechanisms as businesses within powerful German industrial sectors. These businesses share information critical to their market participation, rather than

31. Id. at 21-27.
proprietary leveraging it against each other in a competition for market dominance. As a regulatory matter, this critical difference in business operation distinguishes Airbnb from hotels and bed-and-breakfast booking services. Coordinated markets in the United States lack a regulatory model that allows such institutions and the networks they support to flourish in places such as Germany.

This Article presents such a model. The key task in developing this model is to understand and regulate the institutions that support the sharing economy. Presently, policy makers pay scant attention to the functions that Uber’s mobile application or Airbnb’s website serve in contributing to the success of these networks.32 The Sharing Institutions Model proposed here prioritizes this inquiry. It also provides a means for ensuring that the institutions of the sharing economy can flourish side by side with the institutions of the capitalist system that prevails in the United States.

Part II begins with an examination of the sharing economy as a different market form in the United States. Part II also discusses current regulatory failures in reacting to this capitalist form as well as the theoretical gaps in our understanding of marketized sharing. Part III argues that to understand sharing markets, policy makers must understand the institutions undergirding those markets. This in turn requires the adoption of a conceptual perspective that acknowledges that different forms of capitalism coexist and indeed flourish around the world.33 By applying varieties of capitalism theory to the sharing economy, Part III demonstrates its significant capacity to describe market relationships in the sharing economy in a way that current regulatory and scholarly perspectives have thus far failed to do.34 Finally, Part IV turns to prescription. It begins by presenting a model for regulating the sharing economy that is grounded in varieties of capitalism theory. By applying the model to two current regulatory conundrums, Part IV provides a range of superior regulatory possibilities that many U.S. regulators have thus far failed to try.35

It is certainly possible to use regulatory approaches other than one focused on capitalist institutions to fix regulatory problems such as consumer safety. For example, a perspective dedicated to protecting the intellectual property associated with the technological platforms of

33. See Hall & Soskice, supra note 26, at 1-11.
34. See infra Part III.B.
35. See infra Part IV.
many sharing networks could well address some of the same concerns. So too could a critical approach that considered the symbiosis between competition and collaboration in our complex capitalist system. However, by identifying and regulating a common feature of a broad variety of sharing networks in the United States, the Sharing Institutions Model proposes a regulatory approach dedicated to consistency and fair play across a range of regulatory issues. Moreover, it relies on robust examples of successful institutions in other collaborative economies as a foundation for designing appropriate institutions for ours. In short, it asks the right questions about how to regulate this different form of market participation.

II. CAPITALIST SHARING

Given Wikipedia’s status as one of the shining examples of our new, technologically enabled era of sharing, it is fitting to begin an examination of the sharing economy by considering Wikipedia’s definition:

A sharing economy takes a variety of forms, often leveraging information technology to empower individuals, corporations, non-profits and government with information that enables distribution, sharing and reuse of excess capacity in goods and services. A common premise is that when information about goods is shared (typically via an online marketplace), the value of those goods may increase, for the business, for individuals, and for the community.

It is clear even from this broad definition that a significant subset of the sharing economy comprises a market. This subset is the subject of this Article. The focus here is not on Wikipedia and similar examples of peer-to-peer sharing without expectation of profit. Rather, this Article is concerned with the phenomenon of individuals using technological platforms to share information and other critical business resources as an integral part of their business strategy. In doing so, this Article actively pursues the regulatory possibilities that flow from conceptualizing such individuals as businesses, rather than, say, as employees or workers. As this Part discusses, from this regulatory and theoretical perspective, the question of how to support,

38. See Hoffman & Mehra, supra note 36, at 157.
nurture, and more broadly regulate sharing markets remains completely open.

A. Sharing—For Profit

The purpose of this Subpart is to articulate a basic set of market behaviors that distinguish the sharing economy from traditional businesses operating in this country. In doing so, I will discuss a range of sharing businesses that, though they differ from each other, nonetheless all exhibit these characteristics. It may be useful to begin, however, by describing in detail the business models of a few sharing economy icons.

Consider the example of Airbnb. What we know of as Airbnb is a company that operates a website through which individuals can rent rooms in their homes.39 Airbnb describes itself as an online “community marketplace for people to list, discover, and book unique accommodations around the world.”40 If an individual wants to rent a property through Airbnb, she begins by typing her destination and travel dates into a search bar on the website, just as she would using Expedia and numerous other online travel services.41 After searching available properties, the customer can send a request to book a property to a particular host. Depending on the host’s preferences, the next step can involve a conversation between the host and guest, which can be carried out using a private messaging service on the website. Or the host can enable an instant booking feature on the website.42 In either case, the guest is asked to complete a profile and provide payment information.43 Once a host accepts a reservation, payment is typically processed through the website.44 Finally, after travel is completed, both the guest and host have an option of writing a review of each other for the benefit of other Airbnb users.45

According to Airbnb, from a host’s perspective, the process is largely under the control of individual hosts, who can choose the people to whom they wish to rent, set the rental price, and define the

39. About Us, supra note 1.
40. Id.
42. Id.
43. Id.
44. Id.
45. Id.
parameters of advertising and other details. A host begins by listing her property on the website, making her own determination about how to describe the property and what to charge for renting it. The host has the option to allow instant booking or instead to screen potential guests. Of course, one of the most unique features of Airbnb is that hosts regularly rent just an extra room or even just a couch, with the expectation of contemporaneously sharing their homes with strangers. This forcefully distinguishes many Airbnb rentals from hotels and even from the typical bed-and-breakfast.

Relying largely on smart phone applications, car-sharing services such as Uber and Lyft employ an even simpler process for those wishing to sell rides in their cars. In the case of Uber, for example, customers start by creating an account through Uber's website, which also entails entering their credit card information. Then, when a customer wants to hire a ride through Uber, the customer touches an app on her mobile phone, which uses a GPS device to find her location and to send a nearby Uber driver. The customer's credit card is charged for her ride once she arrives at her destination. Even this brief description suggests that the company that provides the Uber app controls many more aspects of the relationship between Uber drivers and customers than Airbnb controls between hosts and guests. This fact is explored in greater detail in Part IV of this Article.

Web-based businesses such as eBay take this basic concept of technology-based sharing to a new level by providing a centralized location where individuals can auction and buy a vast array of products. Peer-to-peer lending networks such as Kickstarter and

47. Id.
48. Id.
49. Elizabeth A. Harris, Short-Term Rentals via the Web: Lucrative but Often Illegal, N.Y. TIMES, Nov. 5, 2013, at A22 (“Almost 90 percent of our hosts have only one listing and it’s the home they live in . . . .”).
50. See Become a Driver, supra note 1; The Ultimate Guide to Driving Jobs, UBER, https://www.uber.com/driver-jobs (last visited Nov. 19, 2015); see also Farrell, supra note 24 (“Uber makes a smartphone app that riders use to hail a private car service. The company describes itself as a software platform that its ‘partners’—not drivers—use to build their own small businesses.”).
53. Id.
Indiegogo have found a way to introduce sharing into the marketplace for financing. These services also make extensive use of technology to provide crowdfunding, in which individual businesses can seek start-up and other funding from geographically dispersed strangers. In return for the services of advertising businesses’ needs and pooling a group of “backers,” the lending networks typically take a portion of the proceeds. For example, Kickstarter takes 5% of the funds raised for any particular business venture.

When it comes to regulating market participation, the sharing economy presents a challenge. Sharing businesses defy the image that typically comes to the American mind, namely that of an entrepreneur leveraging her business and personal assets as a means of developing new products or services. While this may be the business strategy for technology platform providers in sharing markets, the sellers of goods and services that use these platforms have a quite different strategy. They do not rely on the private use of resources, assets, or asymmetrically held information. What makes this a different story is not the absence or asymmetry of information, but rather its value as a good shared and managed by and among a group of tiny businesses. To overgeneralize, information gathering and exploitation, financing, contracting, and other key business functions are accomplished through sharing. In the areas of home and car sharing, and to some extent in peer markets such as eBay, individuals also share the excess capacity of assets that they do not fully use or need for themselves with strangers—for a price. Without the ability to share, these


57. See, e.g., CASSON, supra note 20, at 39 (arguing that the key advantage of an entrepreneur is having better information than others); KIRZNER, supra note 21, at 110-11 (arguing that entrepreneurial profit is only possible by identifying price divergences others have missed).

58. See McNamara, supra note 23; see also Carl Alviani, Uber Learned the Hard Way: Transparency Rules the Sharing Economy, WIRED (May 9, 2014, 6:30 AM), http://www.wired.com/2014/05/uber-learned-the-hard-way-transparency-rules-the-sharing-economy (arguing that sharing economy intermediaries rely on transparency to generate the required trust).


60. RACHEL BOTSMAN & ROO ROGERS, WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION 106 (2010); Koopman et al., supra note 59, at 4 (defining the sharing economy as “any platform that brings together distributed networks of individuals to
assets—for example, the back seats of cars—would have much less value.\textsuperscript{61} The start-up costs for each individual renting rooms or selling rides or unused items are negligible because the individuals rely on an intermediary to advertise their products, connect them to potential customers, establish a contractual relationship, and facilitate payment.\textsuperscript{62} This sharing undergirds the success of the network of individuals doing business in reliance on the technological platform.\textsuperscript{63} The network that relies on the platform also justifies redefining the role of the platform provider. It is not just a private firm leveraging its intellectual property, and it should not be regulated only as such.

What is known as the sharing economy today certainly has precursors in the United States. Local versions of sharing markets, such as consignment stores, farmers markets, lending circles, and even bulletin boards at local food co-ops, have existed for a very long time. Home-based businesses, such as day cares and cottage foods producers, are also important examples of sharing prior to its technological upsurge. So too, arguably, are day laborers. At a conceptual level, we could think of condominium and time-share arrangements as sharing economy predecessors because they revolutionized the ability to scale and leverage assets. Moreover, many examples of sharing businesses, such as vacation rental services, are not discussed in this Article, even though they fit within my definitional framework. My claim in this Article is not that the sharing economy is revolutionary in either its novelty or in its difference from its predecessors. Rather, my claim is that the technologically driven versions of sharing markets that I discuss in this Article put conceptual pressure on what Americans assume to be the norms of capitalist behavior. The precursors to the sharing economy existed in what appeared to be more local, even marginal, pockets, contributing to an assumption that these forms of doing business could not flourish on a large scale. The technological versions of the sharing economy challenge that assumption mightily. They also create the possibility of sharing new kinds of products and services—such as back seats of cars and expensive equipment—that could not easily be sold or rented on a large enough scale within local markets.

\textsuperscript{61} Koopman et al., supra note 59, at 4.
\textsuperscript{62} Rauch & Schleicher, supra note 6, at 11.
When considered together, several characteristics distinguish these examples of sharing markets as special and noteworthy. Although the remainder of this Article focuses on the market features of the businesses involved in the sharing economy, the nonmarket features of these communities are worth mentioning in part because they have garnered more attention thus far than the market features.

**Social and psychological rewards.** Sharing economy participants often appear motivated by the promise of social and psychological rewards instead of, or in addition to, economic rewards. This feature especially was the subject of commentary when some of the most prevalent examples of sharing were predominantly nonmarketized. But even in the market examples discussed here, a philosophy of social connection and reward imbues the marketing of services and products in the sharing economy.

**Noncapitalist values.** Wikipedia, Lisa Gansky, and many others have commented poignantly that the sharing economy is not about ownership, but rather about access. This broadly held and romantic image of the sharing economy turns on its head the “neoliberal” valorization of individualized ownership and contractual freedom. Philosophers of the sharing economy claim that increasing access to property can best capture the surplus value of property—not collateralizing it or excluding others from it. Sharing economy


65. See Benkler, supra note 36, at 384.


68. For a rich discussion of these neoliberal concepts, see Alvaro Santos, The World Bank’s Uses of the “Rule of Law” Promise in Economic Development, in THE NEW LAW AND ECONOMIC DEVELOPMENT 253, 282 (David M. Trubek & Alvaro Santos eds., 2006).

69. See, e.g., Gansky, supra note 67 (arguing that companies that can deliver goods and services exactly when they are needed will be successful); Koopman et al., supra note 59, at 4 (stating that the sharing economy brings together individuals in order to put “underutilized assets” or “dead capital” to use).
businesses also tout the values of trust among strangers and urban sustainability.  

While these characteristics of sharing communities are fascinating, they do not tell regulators everything they need to know for the purpose of regulating sharing markets. In particular, they do not explain why, as an economic matter, they succeed. Why do sellers and buyers gravitate toward these markets, sustaining them alongside their more traditional counterparts, such as hotels, taxis, and online catalog shopping? The answer, of course, is that there are market benefits on both sides of these types of transactions. In particular, several beneficial features of these markets stand out.

1. On the Demand Side

   Competitive pricing. One overriding feature of many of the markets in the sharing economy is that they sell products and services at lower prices than those demanded by their analogs in the nonsharing economy. Time and again, buyers and renters of rooms through Airbnb; rides through Uber, Lyft, and Sidecar; and services through Craigslist and TaskRabbit comment that they were motivated in large part by the price savings.

   Yochai Benkler has provided a thorough analysis of the “information collection cost” savings of peer-to-peer networks, and it appears that when such networks operate in a market

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70. See, e.g., Trust at Airbnb, AIRBNB, http://www.airbnb.com/trust (last visited Nov. 19, 2015) (boasting that “[t]rust is what makes it work”); see also Rauch & Schleicher, supra note 6, at 8-9 (arguing that digital ratings substitute for personal trust, enabling the sharing economy); Charles Green, Trusting and Being Trusted in the Sharing Economy, FORBES (May 2, 2012, 2:01 PM), http://www.forbes.com/sites/trustedadvisor/2012/05/02/trusting-and-being-trusted-in-the-sharing-economy/ (arguing that trust is the key to understanding the sharing economy); Hamm, supra note 64 (reporting personal experiences of trusting strangers in the sharing economy); Keld Jensen, Trust: A Fragile but Wealth-Building Commodity, FORBES (June 22, 2014, 9:35 AM), http://www.forbes.com/sites/keldjensen/2014/06/22/trust-a-fragile-but-wealth-building-commodity/ (arguing that trust accounts for up to 25% society’s wealth); The Rise of the Sharing Economy, supra note 3 (explaining that the Web enables trust in sharing networks); April Rinne, Sharing Economy in Cities: Moving Towards a More Inclusive Urban Future, GUARDIAN (June 26, 2014, 7:25 AM), http://www.theguardian.com/sustainable-business/circular-economy-policy-cities-inclusive-urban/ (arguing that the sharing economy can help make cities more sustainable).

71. See Neil Irwin, How Cheap Can a Car Trip Get?, N.Y. TIMES, July 13, 2014, § 4 (Sunday Review), at 3; see also Koopman et al., supra note 59, at 4-5 (arguing that the sharing economy creates value by cutting transaction costs); Fleura Bardhi et al., Four Myths on How Consumers React to the Share Economy, WALL STREET J.: ACCELERATORS (May 7, 2014, 1:54 PM), http://blogs.wsj.com/accelerators/2014/05/07/myth-and-reality-in-the-share-economy/ (asserting that cost savings, rather than things such as values, trust, and identity connection, are what drive consumers to the sharing economy).

(as distinguished from the nonprofit-seeking networks he discussed), these savings accrue partly to the benefit of buyers in the form of lower prices.\footnote{At the same time, some of the price advantage gained within these networks may indeed be a result of regulatory avoidance, an issue addressed infra Part IV.}

**Greater product and service variety.** Another oft-cited reason for the robust success of sharing markets is their Adam Smith-ian feature of product and service variety.\footnote{Dominic Basulto, *The Sharing Economy: How Do You Stop Something You Can’t Keep Up With?*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/news/innovations/wp/2013/05/24/the-sharing-economy-how-do-you-stop-something-you-cant-keep-up-with/; *Airbnb Picks*, AIRBNB, https://www.airbnb.gy/wishlists/airbnb_picks (last visited Nov. 19, 2015).} These are indeed examples in which many sellers provide a diverse array of products and services to meet the diverse needs and interests of buyers. As Airbnb advertises, you can rent anything from a room in a castle to a condo in an idyllic urban location through its service.\footnote{See *How it Works*, supra note 55; Kickstarter, https://www.kickstarter.com (last visited Nov. 19, 2015).} The market for financial investments is an even more startling example of this feature. In contrast to the quite standardized features of markets in both equity investing and debt financing, businesses and investors participating in crowdfunding can seek matches through a much more diverse array of financing opportunities.\footnote{Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco*, TRANSP. SUSTAINABILITY RES. CTR. 17 (Nov. 2014), http://tsrc.berkeley.edu/sites/default/files/RidesourcingWhitePaper_Nov2014Update.pdf (finding that ride-sharing services consistently had shorter wait times than traditional taxis); see also Geoffrey A. Fowler, *Race Is On: Ride-Sharing Car Services Versus a Taxi*, WALL STREET J., Mar. 12, 2014, at D1 (reporting that total trip time was shorter for ride-sharing services than taxis).}

**Speed, customization, and other collateral gains.** Finally, the markets in the sharing economy often exhibit other competitive advantages that consistently outcompete their traditional counterparts. One claim about car-sharing services, for example, is that it is faster to obtain cars through Uber or Lyft than to call a taxi.\footnote{Stories from the Airbnb Community, AIRBNB, https://www.airbnb.com/stories (last visited Nov. 19, 2015).} In the case of Airbnb, both “hosts” and renters claim to be able to find guests and rooms that are more suited to their comfort levels and needs.\footnote{Stories from the Airbnb Community, AIRBNB, https://www.airbnb.com/stories (last visited Nov. 19, 2015).} These markets often claim to outperform their nonsharing counterparts by consistently providing product features that their counterparts are not able to provide.
2. On the Supply Side

*Lower transaction costs by means of sharing.* On the supply side, one thing that makes these markets revolutionary is the outsourced sharing of key business functions by the individuals and tiny businesses involved in networks for peer-to-peer rentals, financing, and sales. For example, in the Airbnb network, individual hosts have outsourced to Airbnb the tasks of determining market demand, advertising their homes for rental, maintaining a stable supply of customers, and providing the platform through which deals are made.\(^{79}\) Information is clearly part of what is shared, but it is by no means all that is shared. Without this shared technological platform, each of the individuals would have to find means of performing each of these tasks on their own by, for example, advertising and inquiring at local tourist offices and writing and entering into individualized rental agreements with customers.\(^{80}\) For many people involved in these networks, the costs of performing such tasks on their own would be unacceptably prohibitive. One of the distinctive aspects of these sharing arrangements is that some of them also share the work of monitoring individual providers and sanctioning those who perform badly.\(^{81}\) Although the definition of transaction costs is the subject of some debate,\(^{82}\) all of this could be described as a distinctive approach to lowering transaction costs.\(^{83}\)

*Redistribution and democratic participation.* Another distinctive feature of these markets is their potential for achieving democratic participation and even redistribution. Thus far, this potential has been largely latent in the United States. Nevertheless, there is something behind the many claims by participants and scholars that peer-to-peer networks spread more resources to a broader range of individuals who are typically marginalized from robust market participation.\(^{84}\) Although some have noted that the sharing economy may be a more

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80. See Koopman et al., supra note 59, at 13; Geron, supra note 5.
83. Rauch & Schleicher, supra note 6, at 11.
84. See, e.g., GANSKY, supra note 67; Koopman et al., supra note 59, at 5 (arguing that the sharing economy “allows suppliers to create value for customers long under-served by incumbents”).
modern form of marginalization, it is worth considering whether such a result could be avoided by means of careful regulation.\(^\text{85}\)

These market features define the sharing businesses that I analyze and that I describe as the sharing economy. To oversimplify my claim, these features are also what current regulations ignore. Businesses such as Amazon, Expedia, and even Zipcar may be more mature versions of these businesses, but they likely fall outside my discussion because they do not rely on sharing as a basis for market success. To the contrary, they are traditional firms in most respects, such as their form of organization, ownership of business assets, and internalized use of information to leverage those assets for profit.\(^\text{86}\)

B. Current Regulatory Failures

Viewed from any perspective, regulation of the sharing economy is currently a muddle. As the four examples surveyed here reveal, the consequence is often rent-seeking and political failure.

1. Ensuring Safety

Among the most well-publicized regulations of the sharing economy are those responding to safety concerns raised by consumers, especially those who use home- and car-sharing services such as Airbnb and Uber. For example, a rash of recent reports has raised unsettling questions about the extent to which car services such as Uber and Lyft protect against sexual assault, harassment, and other forms of unsafe behavior by their drivers.\(^\text{87}\) While renters also have raised similar concerns with respect to home-renting services, some of Airbnb’s most prominent troubles were raised by hosts whose homes

\(^{85}\) See, e.g., Reich, supra note 16 (arguing that the sharing economy is returning workers to the nineteenth century); Schor, supra note 16, at 8-10 (arguing that while sharing economy intermediaries may have shifted risk onto individuals, this occurred at the same time as high unemployment was weakening employee bargaining positions).

\(^{86}\) See Boyd Cohen & Jan Kietzmann, Ride On! Mobility Business Models for the Sharing Economy, 27 ORG. & ENV’T 279, 283 (2014); Rauch & Schleicher, supra note 6, at 11-13; Geron, supra note 5.

were burglarized or misused by renters. Although it appears not yet to have been the subject of litigation, selling products through sites such as eBay also raises questions about product safety and its regulation.

In general, the regulatory response to safety concerns such as these has been either to ban sharing businesses from operating or to require them to obtain the same permits required of their competitors in the nonsharing economy for rooms, rides, and other services. Often these actions have been taken on grounds of consumer protection. Thus, for example, in early 2014, the Virginia Department of Motor Vehicles issued cease-and-desist letters to both Uber and Lyft, ordering them to stop operating their services in that state. These and other car-sharing services have also been the target of repeated efforts in various states to require some level of permitting. Meanwhile, Airbnb is embroiled in a series of disputes about the legality of its business operations in cities such as New York City and Paris, again because of concerns about the safety and needs of both participants and neighbors. It may be reasonable to enhance consumer safety by imposing some form of permit requirements on sharing businesses and their intermediaries. However, many of the current regulatory interventions do so in a heavy-handed manner that is so inattentive to sharing models that it effectively shuts them down.

Intermediary institutions that organize participation by individual hosts or drivers typically fight these regulatory measures by arguing that they are not hotels, rental agencies, or taxicab companies. Rather, some argue that they are only the providers of software that

89. Specifically, there is no reason why such products should not be subject to all the consumer safety regulations that would apply to sales in other fora.
90. Weiner, supra note 8.
93. Aratani, supra note 32; Harris, supra note 49; Streitfeld, supra note 92.
facilitates markets for these services, to help them develop and thrive.\textsuperscript{94} They pair these responses to regulation with their own internal regulations to assure market participants about the safety and viability of the services.\textsuperscript{95} For example, Uber claims to screen criminal and driving records and to provide a transparent system for reviewing driver profiles and the anonymous ratings of other drivers.\textsuperscript{96} Uber also collects a $1 “Safe Rides Fee” in the “UberX” category of its vehicles to finance the company’s ability to ensure safety for Uber passengers in cars not owned by Uber.\textsuperscript{97} Airbnb went considerably further by providing hosts with a “host guarantee.”\textsuperscript{98} The company also purports to protect both hosts and renters by allowing them to complete much more detailed profiles that enable each to take their own steps to verify the trustworthiness of the other.”

2. Regulating Anticompetitive Behavior

A second well-known set of regulatory interventions has attempted to prevent perceived anticompetitive behavior by businesses involved in the sharing economy. These claims are generally raised by traditional businesses, such as hotel or taxicab companies, that compete with sharing networks. They argue that by avoiding the costs associated with obtaining permits and complying with other regulations that bind their more traditional competitors, these sharing businesses are able to operate at lower costs.\textsuperscript{100} This, they argue, is nothing short of cheating.\textsuperscript{101} Taxicab companies in Maryland have claimed that Uber committed antitrust violations by engaging in price-
This seems like a claim ripe for further exploitation to the extent that regulators come to view the sharing economy in a way that more closely matches the perspectives of many participants, namely that each of the providers of products and services is an individual business. Viewed as such, the individual businesses within sharing networks engage in price-fixing through their use of intermediaries such as Uber.

The regulatory responses to these claims of anticompetitive behavior have generally involved revising state or local anticompetition and permitting laws to apply to sharing networks. For example, Chicago and Houston have considered ordinances banning or imposing permitting requirements on car-sharing services. Similarly, New York City has radically limited the extent to which people can rent their homes through Airbnb. The major intermediaries in the sharing economy have poured resources into disputing the claim that they are engaging in anticompetitive behavior, and it appears that their arguments have had some traction. In a recent letter to a Chicago alderman, Federal Trade Commission (FTC) staff members opined that car-sharing services such as Uber and Lyft are contributing to healthy competition, rather than inhibiting it, and that any permitting and other regulations imposed on them ought to protect their ability to contribute to a competitive market. Despite this and other votes of confidence in the sharing economy, claims of anticompetition are proliferating.

103. Gansky and others, including the intermediaries themselves, present sharing economy hosts, drivers, and service providers as independent operators, rather than employees of companies like Airbnb and Uber. See GANSKY, supra note 67; Farrell, supra note 24.
105. Harris, supra note 49; Streitfeld, supra note 92.
107. Gavil & Grengs, supra note 104.
108. See, e.g., Michael B. Farrell, Uber Car Service Gets Support from New Mayor, BOS. GLOBE, Mar. 1, 2014, at B5 (discussing Mayor Walsh’s support for Uber as an “effective” method of transportation); Andy Vuong, Governor Challenges Uber Ruling, DENV.
3. Protecting Workers

Critics of sharing giants such as Uber have also started to take aim at their treatment of the individuals who provide products or services using their technology platforms. Several lawsuits have raised the argument that these individuals are not really independent contractors or businesses that contract with companies such as Uber; rather, they are employees. This distinction has significant consequences because some states (such as the Commonwealth of Massachusetts) provide extensive protections to employees, including the requirement that employers provide unemployment and health benefits to employees. Uber drivers have filed lawsuits in Massachusetts and California attempting to recover withheld tips. They argue that Uber’s restrictions on drivers’ abilities to request and retain tips contributes to the company’s de facto status as an employer of hundreds of drivers, rather than merely an intermediary providing a technological platform to a network of small businesses.

Of course, these companies dispute the claims, arguing instead that they have a much more limited role in these networks. However, this category of proposed regulation is a useful indicator that no one, including sharing giants such as Uber and Airbnb, seems to have a clear idea of how to define the role and contributions of these companies in the sharing economy. While there is strong evidence that these companies currently contribute to greater labor flexibility (but perhaps also exploitation), there is a significant theoretical gap in understanding how to regulate them.

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112. See Farrell, supra note 24.

113. See sources cited supra note 16.
4. Monitoring Financing

Regulatory dilemmas have also arisen concerning crowdfunding, in which small businesses have used web-based portals to seek collaborative funding from large numbers of private individuals.\(^{114}\) This sharing approach to financing has caught the attention of the United States Securities and Exchange Commission (SEC) because the financing is sought from ordinary investors, as distinguished from so-called “accredited investors,” who are typically wealthy and savvy enough not to need the extensive disclosures required by the SEC when “public” companies seek funding from ordinary investors.\(^{115}\) The SEC has developed specific rules tailored to allowing some forms of crowdfunding, but only with certain conditions and for limited amounts of funding.\(^{116}\) In a refrain consistent with their responses to other regulations, both the intermediaries and many small businesses are looking for ways to avoid and limit these regulations, citing overburdening costs associated with compliance.\(^{117}\) As concerns the intermediaries, these arguments again raise the question of what exactly businesses such as Kickstarter are—technology providers, conveners, intermediaries, or brokers?

5. Regulatory Redux: Regulating Against Collaboration

As this brief review demonstrates, policy makers work hard to fit sharing networks into an ill-fitting regulatory framework. Their definitional discomfort brings out regulatory suspicions that the participants are avoiding some of the costs and constraints associated with the traditional categories.\(^{118}\) The regulatory reasoning appears to be that Uber would have no reason not to accept the label of employer if it was willing to accept the costs of providing benefits for its


\(^{115}\) See Crowdfunding, 78 Fed. Reg. 66,428, 66,428 (Nov. 5, 2013); Ackerman, supra note 114.


\(^{118}\) See, e.g., Dungca, supra note 100 (discussing a lawsuit against ride-sharing services in Boston and passenger safety concerns); Farrell, supra note 24 (discussing lawsuits against Uber over licensing and safety concerns); Streitfeld, supra note 92 (discussing a report by the New York State Attorney General that described Airbnb rentals as “illegal hostels”).
drivers\textsuperscript{119} or that Uber is a taxicab company that is trying to avoid the costs of registration.\textsuperscript{120} Because these companies are performing some of the functions traditionally performed by “employers,” “taxicab companies,” or “investment advisors” in our capitalist system, regulators conclude that these companies should take over all the functions and associated responsibilities.\textsuperscript{121}

Meanwhile, policy makers have failed to examine what these companies are really doing. In many networks, these companies are indeed only taking on some of the tasks associated with the liberal market categories of employer, hotel business, or investment advisor. Companies such as Uber and Airbnb create a network of tiny businesses that act as suppliers and that retain some of these tasks. For example, in the case of car-sharing services such as UberX and Lyft, the drivers provide their own assets—the cars—for the purpose of selling rides.\textsuperscript{122} So too in the case of homes for rent through Airbnb.\textsuperscript{123} These are not minor details: the ownership of key assets by the individuals, rather than by the company that might otherwise be their employer, sharply distinguishes these models from our traditional assumptions about the way firms operate.\textsuperscript{124} By no means should this lead to the conclusion that companies such as Airbnb and Uber have no responsibility to consumers of these services or to the service providers, as some of these companies have argued.\textsuperscript{125} But it is also reasonable to conclude that these companies should not have all the responsibilities associated with our traditional understanding.

Thus, the ultimate justification for current regulation of at least some important sectors of the sharing economy seems to boil down to concerns about unfair competition. Even though policy makers might be motivated to regulate in order to protect the safety interests of consumers or the rights of those they perceive to be employees, time and again they appear to conclude that the ultimate losers are the businesses in the nonsharing economy.\textsuperscript{126} Often, this conclusion seems odd indeed: as the FTC and others have recognized, much of the time,}

\textsuperscript{119.} Farrell, supra note 24.
\textsuperscript{120.} Dungca, supra note 100; Lazo, supra note 100.
\textsuperscript{121.} See Crowdfunding, 78 Fed. Reg. at 66,486-87; Lazo, supra note 100.
\textsuperscript{122.} Sign Up To Drive with Uber, supra note 1.
\textsuperscript{123.} How To Host, supra note 46.
\textsuperscript{124.} Cf. R.H. Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937) (arguing that firms replace bilateral trade through contracts in order to reduce transaction costs); Benkler, supra note 36, at 372-73 (describing the emergence of the networked information economy and its potential to increase individual autonomy).
\textsuperscript{125.} See infra Part IVC.2.
\textsuperscript{126.} See supra text accompanying note 28.
consumers are the beneficiaries of increased competition as a result of sharing networks. The traditional justifications for anticompetition regulations simply do not appear to apply in many cases. This regulatory default thus results in a political failure as well.

C. Current Theoretical Gaps

While the concept of nonmarketized sharing of information technology has been the subject of robust and sophisticated research, the even more recent phenomenon of sharing as a market strategy has received fleeting attention. As a consequence, it is fair to say that neither policy makers nor legal scholars have much considered how to regulate the special features of the sharing markets described above. This Subpart discusses two scholarly strands that have provided a theoretical backdrop for regulating the sharing economy. The brevity of this Subpart is due in part to the pioneering work of Yochai Benkler, whose previous discussions of nonmarketized sharing have already knitted these two strands together into a theoretical perspective on sharing. As Benkler has discussed, the current theoretical perspective is grounded in neoclassical economic theory.

The central claim of this Subpart is that this perspective does not alone suffice as a basis for developing a regulatory model for the sharing economy. It may well be the case that many of the insights from neoclassical economics are descriptively accurate. For example, it may be that a sharing network such as Airbnb is a new, integrated model of a Coasian firm or, following Benkler, a “third way” of commons-based economic production. However, as a prescriptive matter, viewing such networks as a variation on a Coasian theme elides two important regulatory questions. First, does the Coasian perspective adequately capture the range of institutions involved in governing the relationships within these sharing networks? And second, does such a perspective adequately address the distributional concerns that emerge within such networks? This Article answers both questions in the negative.

127. See Gavil & Grengs, supra note 104.
130. Benkler, supra note 36, at 401.
131. Id. at 375, 401-02.
As Benkler has noted, the starting point for defining the current legal theory of sharing is the “mainstream of economic theory,” represented by Ronald Coase and Harold Demsetz. Benkler contributed to the current theoretical picture by presenting Coase’s theory of the firm and Demsetz’s theory of individualized ownership as a package. Together, these theories form the foundation for an argument that the institutions of private firms and private ownership arose and exist as a result of, and to the extent that, they achieve desired outcomes at lower transaction costs than by resorting to the pricing system of the “market.” In other words, individuals organize themselves into firms (and take orders from managers higher up in the hierarchical structure within firms), and they also invest in private ownership of property because and when these are the most efficient means of achieving economic gain. They join firms when the costs of doing business in this manner are lower than either the costs of going it alone in the marketplace by relying on pricing signals or the costs of participating in a commons form of ownership.

Sharing markets, and the sharing economy more broadly, seem to violate the claims of Coase and Demsetz. These are situations in which individuals share resources outside a firm structure. Indeed, they could be described as horizontal rather than hierarchical networks of resource management. In their sharing, individuals organize access to and use of some of their assets in a manner more descriptive of a commons arrangement, rather than appropriating and guarding information and other assets for each firm’s or individual’s private use. Benkler describes such arrangements as a “puzzle.” If Coase and Demsetz are correct, why do these individuals neither join firms nor go it alone, using private ownership and access to information and other assets for their own individual gain?

Benkler answers this question on neoclassical economic terms, arguing that sharing is an alternative to the two institutions—either firms and private ownership or market-based pricing—described by

132. Id. at 401.
133. See id. at 401-02.
134. Id.; see Coase, supra note 124; Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967).
135. See Coase, supra note 124.
136. See Benkler, supra note 36, at 372-73.
137. See id. at 423-43; see also BENKLER, THE WEALTH OF NETWORKS, supra note 64 (examining the ways in which information technology permits extensive forms of collaboration that have potentially transformative consequences for the economy).
Coase and Demsetz. In two separate articles, Benkler traces the development of commons-based peer production in a range of settings as a legitimate alternative form of economic production. In all of his examples, however, Benkler focuses on sharing that does not involve pricing or profit. He draws a sharp distinction between “social sharing” and “markets,” even secondary markets such as eBay. As a consequence, Benkler’s main inquiries focus first on how such a form of not-for-profit sharing could function as a stable mode of economic production and second on how to change laws to support such a mode of production. Benkler answers the first question by arguing that social sharing avoids information loss, which is highly valued in these contexts. He also argues that the sharing of resources can produce allocation gains throughout a sharing network. Benkler’s regulatory proposals continue this focus by examining ways to support commons-based production.

Benkler’s discussion of sharing is part of a rich conversation, in which Lawrence Lessig and James Boyle are also prominent participants. In his book, Remix, for example, Lessig directly discusses the sharing economy as well as what he terms the “hybrid economy.” Like Benkler, however, both Lessig and Boyle focus largely on Internet-based technologies that facilitate sharing outside of market contexts. Lessig makes this point emphatically by drawing a distinction between sharing (read: nonmarket) economies and hybrid (read: closer to market) economies. His prominent examples of the latter include free software producers such as Red Hat, Incorporated.

139. Id. at 375.
140. See Benkler, supra note 36; Benkler, supra note 129. Benkler also addresses these questions in his books. See BENKLER, THE WEALTH OF NETWORKS, supra note 64.
141. See Benkler, supra note 129, at 306-21.
142. Id. at 320-21.
143. Benkler, supra note 36, at 415-23. Benkler also focuses extensively on the social and psychological factors that motivate individuals to participate in social sharing as an economic activity. See id. at 423-26; Benkler, supra note 129.
144. Benkler, supra note 129, at 344-56.
146. See LESSIG, supra note 145, at 143-224.
147. See id.; BOYLE, supra note 145.
148. Lessig defines a “hybrid economy” as follows: “The hybrid is either a commercial entity that aims to leverage value from a sharing economy, or it is a sharing economy that builds a commercial entity to better support its sharing aims.” LESSIG, supra note 145, at 177.
and community spaces such as Craigslist.\footnote{Id. at 179-91.} Thus, while the terminology is similar, these are not examples in which profit-making intermediaries form a network with profit-making microentrepreneurs to share business resources.

The sharing markets described in this Article align more with eBay and other examples of the “secondary markets” that Benkler excludes from his descriptive analysis of sharing. By excluding markets in which individuals share private assets for \textit{profit}, Benkler, Boyle, and Lessig leave open a theoretical question about how such sharing \textit{markets} are able to operate stably and, further, about what regulations they require. Thus, when their analyses are superimposed on sharing markets rather than on volunteer networks, the descriptive fit is more awkward. In sharing markets, information products serve as a platform that enables the sharing of key business operations so that individuals within a network can profit from the rental of physical assets or the sale of services. Stated more simply, information is not the output of sharing in the same way as in many of these scholars’ examples. Airbnb hosts, Uber drivers, and TaskRabbit service providers are producing something else, and they are doing so for profit.\footnote{See Geron, supra note 5.} Meanwhile, the developers and managers of the software and apps that help these networks function are producing information products, but they are doing so for their own proprietary ownership and not in a peering effort with others.\footnote{See discussion supra Part II.A.} The sharing of these two sets of resources outside of a firm structure makes them unique.

One way to interpret the for-profit sector of the sharing economy is that it is indeed Coasian in all but name and attention to formalities. Such an analysis would conclude that Airbnb and Uber are traditional firms that refuse to accept the costs of formally treating their hosts and drivers as employees. Indeed, many regulators and some critics share this perspective and argue that this form of sharing is simply a different way of organizing and coordinating production networks.\footnote{I am grateful to Robin Paul Malloy and James Smith for their insights on this point.} An alternative interpretation is that these are complex networks of formal contracts that occupy a relatively well-defined middle ground between firms and markets.\footnote{See OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985); Benjamin Klein et al., \textit{Vertical Integration, Appropriable Rents, and the Competitive Contracting Process}, 21 J.L. & ECON. 297 (1978).} Thus, it might be possible to describe these as
franchises. But such interpretations would have to ignore the details of some of these networks. The things shared in these examples are the use of software, apps, back seats of cars, and extra bedrooms that in a traditional Coasian world would be owned and privately used by each of the hosts, drivers, and service providers or would be used by these individuals as employees of the owners of those assets or would be the subject of extensive licensing arrangements or simply would have no independent value. Again, the descriptive fit within a Coasian framework is awkward, though not impossible.

But more important than the descriptive fit is the question of whether the foundation laid by Coase, Demsetz, and information theorists such as Benkler provides enough information for adequate regulation. The remainder of this Article provides a more elaborate answer to this question. But the introduction to this answer is that the current theoretical framework has not yet addressed the internal functioning of sharing markets. Viewing these networks as integrated firms assumes facts about property ownership, financing, business organization, and hierarchical control that are often nonexistent. Something else acts as the glue keeping these networks together. To be more precise, some other set of institutions than those recognized by our current framework acts as the glue. Regulation of these networks requires a more specific understanding of exactly those institutions. Meanwhile, one of the prominent messages from Benkler, Lessig, and Boyle is that the state, in Benkler’s words, should play a more “muted” role. This makes complete sense in the context discussed by these theorists and when the target regulations are intellectual property laws. But intellectual property laws aside, the state has a crucial role to play in supporting a very different kind of capitalist structure.

In addition to leaving insufficient space to explore the institutions of the sharing economy, the current framework inadequately inspires questions about the distribution within sharing markets. This is the second respect in which current theory has left a gap. As may well be happening in the case of ride-sharing networks such as Uber’s, regulation from within a Coasian frame may assume (and therefore promote) more power for the developer of the Uber app than (at least

155. See Boyle, supra note 145; Benkler, supra note 129, at 344-56.
156. Obviously, intellectual property laws are an important part of our legal framework in support of a particular set of capitalist practices. But my point here is that regulation of sharing markets requires a broader regulatory approach than just one aimed at reforming intellectual property laws.
some of) the participants in Uber’s network originally intended. The regulatory tendency toward hierarchy and formality may well be operating to suppress organic efforts to develop alternative distribu-
tional structures. Here again, revisions to intellectual property laws may not suffice.Understanding the particular value of sharing to sharing markets thus requires us to employ an additional theoretical tool.

III. THE INSTITUTIONS OF CAPITALIST SHARING

This Part builds the case for regulating the sharing economy as a different system of capitalism. While sharing may well be a hidden necessity within our liberal market economy, it is also clear that our liberal economy constrains collaboration beyond a certain point. By considering economies in which collaboration is given more space and institutional support, it may well be possible to remove the constraints that currently limit sharing in the name of (our liberal form of) capitalism. Moreover, these economies can provide us with successful examples for designing and regulating institutions that support collaboration across a range of regulatory needs and issues.

Consistent with the broader study of institutions in different economies, this Article uses the term “institutions” to mean “a set of rules, formal or informal, that actors generally follow, whether for normative, cognitive, or material reasons” and often includes within the term those organizations “whose rules . . . contribute to the institutions” of a particular economy. The study of comparative economies has developed a subfield, known as the varieties of capitalism approach, to investigate the phenomenon of different capitalist forms and the corresponding institutions. If the

microcosmic sharing economy was a national economy, a compelling case could be made that it was a coordinated market economy.\(^{159}\) Of course, it is not a national economy, and there are flaws that develop if we try to superimpose the varieties of capitalism mode of analysis wholesale onto the study of the sharing economy. This is especially true because of the enormous historical and other differences between coordinated market economies such as Germany’s and liberal market economies such as the United States’. But the analysis in this Part applies the varieties of capitalism literature in more limited fashion to achieve a critical benefit. By understanding the development of the sharing economy as part of a much broader spectrum of capitalist behavior, we can think about analogs for better supporting this different form of capitalism. Doing so, as a matter of policy making, may well be much more productive than curtailing market practices in the sharing economy or requiring them to conform to the institutional practices that prevail in the broader economy that surrounds microcosms. In short, this Part argues that by adopting a broader understanding of capitalist practices, regulators can better answer questions such as whether Airbnb is a hotel chain, an employer, or merely a software provider.

A. A Brief Introduction to Varieties of Capitalism

Unless we came of age before 1950, most Americans assume that capitalism is capitalism, just as a rose is a rose, and that our experience of markets defines capitalism writ large. This is especially so since the fall of the Soviet Union, which many Americans take to be an absolute vindication both that capitalism is the only viable form of a national economy and that the highest or most developed form of capitalism is that which is practiced in the United States.\(^ {160}\) While the rise of the

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\(^{159}\) See Hall & Soskice, supra note 26, at 1, 8.

\(^{160}\) In legal scholarship and practice, one powerful example of this commitment to American-style capitalism is the effort of the so-called “law and development” movement to export this capitalist system in the 1960s and 1970s, an effort later taken up by the World Bank and other major international institutions. See, e.g., Klaus Deininger, Land Policies (for explaining institutional change in advanced industrial economies); Robert J. Franzese Jr. et al., Modeling History Dependence in Network-Behavior Coevolution, 20 Pol. Analysis 175 (2012) (discussing economic actors’ self-selection into coordinated networks and how this can produce “history-dependent political dynamics”); Torben Iversen & David Soskice, Real Exchange Rates and Competitiveness: The Political Economy of Skill Formation, Wage Compression, and Electoral Systems, 104 Am. Pol. Sci. Rev. 601 (2010) (exploring why some countries in the “open economy” have persistently higher real exchange rates than others). This Article will only discuss a few of the hundreds of works in the varieties of capitalism oeuvre.
European Union, the economic dominance of countries such as Germany, and the many analyses of these phenomena in the 1990s all demonstrated that capitalism can be practiced quite successfully in many different ways, it was not perhaps until the early part of this millennium that these intuitions and analyses gelled into a highly influential claim, first definitively made by Peter Hall and David Soskice, that there is no one ideal kind of capitalism. Rather, as the archetypally different cases of Germany and the United States show, capitalism can be practiced successfully in markedly different forms.

In short, what Hall and Soskice have shown is that American capitalism is only one form of capitalism. Hall and Soskice label this form a "liberal market economy." The practices of businesses engaged in this form of capitalism are marked by competitive and arm's-length market transactions that make use of information that is privately acquired and used by individual businesses, only a small subset of which is publicly accessible. This liberal form of capitalism is in sharp contrast to its archetypal polar opposite, a coordinated system that makes much more extensive use of nonmarket, or at least noncompetitive, relationships and institutions, such as trade associations, unions, and other organizations, which

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162. See Hall & Soskice, supra note 26, at 21.
163. Id.
164. Id. at 8.
165. Id.
serve to network individual businesses. Contracting in such a capitalist system is often more informal, and there are different systems for monitoring within the network. Businesses in such a system coordinate their activities much more extensively and explicitly than in a liberal market system.

This insight from the literature on varieties of capitalism is crucial to law reform and institutional design. For example, the problem of market failure is a response to the specific form of capitalism that prevails in the United States. But what if the sharing economy represents a different form of capitalism? In that case, it may simply be wrong to describe it as cheating or market failure and, worse, to regulate it by imposing on it an institutional and legal infrastructure designed for the liberal market form of capitalism that prevails outside of the sharing economy.

That is exactly the diagnosis presented in this Article. The behavior of market participants in the sharing economy is so qualitatively different that it does not comfortably fit the rules of American capitalism. To overgeneralize, the most critical difference is the collective behavior of businesses in achieving success. The behavior of these businesses is collective to such an extent that it breaks some of the legal rules of market participation (such as unfair competition laws) and cannot make use of many other rules. Meanwhile, examples from other places in the world reveal that this qualitatively different kind of capitalist behavior can lead to tremendous success and wealth if the market participants have the right legal and institutional infrastructure to support and regulate them.

To make the case that the sharing economy represents a coordinated form of capitalism, it is necessary to describe the essential features of a coordinated market economy (CME), as distinguished from a liberal market economy (LME). It is also necessary to consider the legal infrastructure that has been built to support CMEs and how that infrastructure differs from that which supports LMEs. Here it may be helpful to have in mind the prototypes of these two forms of capitalist economy: the national economy of Germany is a relatively

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166. *Id.*
167. *Id.*
168. *Id.*
169. See discussion *supra* Part II.
170. See discussion *infra* Part IV.
prototypical CME;\textsuperscript{172} the national economy of the United States is a relatively prototypical LME.\textsuperscript{173}

1. Liberal Market Economy: The United States

Given its greater familiarity to most readers in the United States, it may be conceptually easier to begin by mapping some of the salient features of the LME that flourishes in the United States. Most prominently for purposes of this Article, the market relationships in an LME can be generalized to conform to Coase’s claims about when and why firms develop.\textsuperscript{174} In turn, the liberal market institutions of arm’s length contracting, hierarchical firms, and high competition among firms produce a structure in which individual businesses internalize much of the information that supports their market participation.\textsuperscript{175} Stated simply, businesses in LMEs internalize virtually all the functions critical to their success in the marketplace, and indeed their success in the market is often linked to their ability to outcompete other businesses in their efficient use of information and other internalized resources and functions.\textsuperscript{176}

These relatively more formal relationships of the LME permeate the different spheres of relationships that businesses must maintain in order to succeed in the market. Hall and Soskice divide such relationships into five categories, namely industrial relations, vocational training, corporate governance, interfirm relationships, and employee relations.\textsuperscript{177}

2. Coordinated Market Economy: Germany

By contrast, and again in stylized form, businesses in a CME such as Germany’s operate on the basis of what Hall and Soskice
describe as “strategic interaction,” a mode of interaction in which businesses engage in relatively more informal contracting and the sharing of what might be described in the United States as private or “insider” information, often about sources of financing, dissemination of technology, and business governance. The result is a markedly different mode of market participation that can be defined using several key characteristics.

Coordination among businesses. The hallmark characteristic of CMEs such as Germany’s is the much more extensive level of coordination among businesses within a market—a coordination that relies on institutions and organizations other than hierarchies, formal contracts, or what Hall and Soskice term “market” relations. One robust way to describe this kind of “nonmarket” coordination is that, rather than being outside the market, this form of collaboration is in fact a sharing of information and resources within a market. In any given market or industry in a CME, it is quite typical to observe businesses sharing such resources as research and technology competencies, vocational education, market data, and financing sources—information and functions that would be privately managed and leveraged in an LME.

Institutional intermediaries that serve coordinating function. In order to accomplish this extraordinary level of coordination, businesses in CMEs rely on a variety of well-developed institutions. These institutions not only achieve the sharing of resources and business functions, but they also monitor and sanction the behavior of businesses in the collaborative networks, often without reliance on formal contracts to govern their rights. Prototypical examples of such institutions are trade associations and unions. This type of coordination could be more aptly described as maintaining a horizontal set of relationships, rather than a hierarchical structure such as that evident in a prototypical LME.

178. Id. at 10.
179. Id. at 8.
180. Id.
181. See id. at 21-27.
182. See id. at 27-33.
183. Id. at 16.
Relations across a range of market interactions. As in LMEs, CMEs exhibit these more informal forms of strategic interaction through intermediary organizations across a range of different kinds of market relationships. Thus, to promote longer-term stability of business collaboration, businesses in Germany tend to provide incentives for long-term employment of their managers and employees.185 These employees participate in robust business associations that are typically responsible for the development and dissemination of technology critical to success within the industry.186 And the employment relationships in turn are managed externally by unions and internally by works councils.187 Adding to this infrastructure, the employment structure in CMEs supports a vocational education and training system that promotes the development of business- and industry-specific skills.188

3. Critiques of Varieties of Capitalism Theory

As powerful as the varieties of capitalism analysis has been in increasing the scholarly understanding of capitalist development and prosperity, it is also the subject of meaningful critique and revision.189 For the purposes of this Article, two critiques are particularly relevant. Both have been made by Colin Crouch, who has considered the varieties of capitalism approach in the context of a variety of local economic development contexts.190 The first critique is of the idea that varieties of capitalism theory is most viable if applied to national economies.191 Although Hall and Soskice originally emphasized the

185. Hall & Soskice, supra note 26, at 24-25.
186. Id. at 26-27.
187. Id. at 24-25.
188. Id. at 25-26. The history, culture, and values in CME countries such as Germany can be seen as supporting and reinforcing these different institutions of coordinated market interaction.
189. See, e.g., Crouch, supra note 158 (criticizing the varieties of capitalism analysis as overly simplistic and challenging the assumption that varieties of capitalism theory is only viable in the context of national economies); Ian Bruff, What About the Elephant in the Room? Varieties of Capitalism, Varieties in Capitalism, 16 New Pol. Econ. 481 (2011) (arguing that the varieties of capitalism framework is premised upon an “institutional reductionism” and that a broader approach which acknowledges the varieties in capitalism is warranted); Peter A. Hall & Kathleen Thelen, Institutional Change in Varieties of Capitalism, 7 Socio-Econ. Rev. 7 (2009) (criticizing the varieties of capitalism theory for neglecting issues of institutional change); Michele Mastroeni, Engaging the Evolution of Varieties of Capitalism: A Two-Tier Approach to Examining Institutional Change, 14 Bus. & Pol., no. 4, 2012, at 1 (advocating for a two-tiered approach to analyzing institutional change which moves away from the categories described in varieties of capitalism).
190. See Crouch, supra note 158.
191. Hall & Soskice, supra note 26, at 16; Crouch, supra note 158, at 23.
The importance of nation-specific complementarities, histories, and legal frameworks in maintaining the forms of capitalist success, Crouch has argued that distinct forms of capitalism can be maintained successfully at more local levels.

The second critique is related to the first. While it is not surprising that the progenitors of varieties of capitalism theory emphasized the differences between CMEs and LMEs in their eagerness to prove that different forms of capitalism can coexist, Crouch and others have provided ample examples demonstrating that capitalist forms fall along a spectrum of difference rather than at two opposite poles. Together, these two critiques suggest that businesses and institutions within one form of a national economy can adopt features of the other and indeed develop toward that form at a more local or regional level. Thus, while the original varieties of capitalism approach may appear to be extraneous to understanding the puzzle of the sharing economy, the modifications of that theory by Crouch and others make it much more relevant for this Article’s purpose.

B. The Sharing Economy as a Coordinated Market

Even this limited background ought to reveal the possible comparisons between the sharing economy and a prototypical coordinated economy such as Germany’s. While Germany has a very specific history, cultural milieu, and an economic system that epitomize coordinated market systems, the main characteristics of this approach are startlingly descriptive of the sharing economy in the United States.

1. Coordination Among Businesses

As described above, the overarching feature of CMEs concerns the interaction of individual businesses within the system. Rather than competing with each other in a race for employees, market information, and product development, these businesses collaborate to acquire some or all of these resources and achieve development goals. In the sharing economy, this coordination is regularly accomplished by technology. For example, what we know as Airbnb is
the website that provides a platform on which individuals wanting to rent rooms in their homes can advertise their services and enter into leasing relationships with customers interested in renting rooms. 197 Similarly, ride-sharing services like Lyft and Sidecar make extensive use of smart phones for the purpose of sharing data about available customers. 198 The collaboration that occurs here is in sharing a common source of customers and the technology to access those customers efficiently and cheaply. In both these examples, it is noteworthy and, for those steeped in liberal market capitalism, shocking how general the contractual arrangements appear to be between the individuals renting their property and the hosts of the websites or other technological platforms. The level of contracting seems far more akin to the “contracts of adhesion” that predominate in the consumer world than the more expansive and specific contracts that typically govern business relations. 199

Moreover, the level of coordination far exceeds what we might see among competitors in a market outside of these enclaves. In contrast to the standard operating procedure for obtaining customer information in the sharing economy, for example, a firm operating in the LME would internalize these costs by conducting market studies individualized to its needs and by then using those studies as a private asset for planning, marketing, and improving its services. 200 In the sharing economy (and the typical CME), the costs of these functions are shared among the network of businesses rather than being borne by each individual business.

Finally, as is evident from this description of the functions served by intermediaries, one important feature of the coordination in these markets is that it occurs with respect to business needs and functions that are critical to the success of the individual member-businesses. In the examples described in Part II, the business activities that are externalized to the network as a whole are often necessary to the very

197. See About Us, supra note 1.
198. See Become a Driver, supra note 1. Note that this is sharing only up to a point, of course, because individual drivers still compete for customers within the network.
199. Contrast the process for becoming an Airbnb host, see How To Host, supra note 46, or an Uber driver, see Sign Up To Drive with Uber, supra note 1, with the contracts required for listing a property through a traditional real estate broker, see Exclusive Right To Sell Listing Contract, CRIS MLS, http://www.crismls.com/shared/fs/0383/company/forms/exclurighttosell.pdf (last visited Nov. 19, 2015).
survival of those businesses.\textsuperscript{201} Services such as Expedia blur the lines between Airbnb and traditional hotels and rental agencies because such services also allow potential renters to search among a variety of rental options on the basis of price and other requirements.\textsuperscript{202} However, it is important that Airbnb’s website is a predominant means by which the individuals renting rooms engage in rental transactions,\textsuperscript{203} whereas most of the hotels renting rooms through Expedia have their own websites and toll-free numbers.

Indeed, the indispensable nature of these shared business functions is essential to the comparison between the sharing economy and Germany. Despite the vast difference in scale, the sharing among businesses in the sharing economy networks is fundamentally similar to the sharing among businesses in various sectors of the German economy. Both achieve critical business functions that are either accomplished internally within firm structures or by means of formal contracting in a LME.

2. Institutional Intermediaries that Serve Coordinating Function

The other paramount feature of the sharing economy as a CME is the importance of institutional intermediaries that accomplish the coordination among individual businesses.\textsuperscript{204} In Germany, these institutions take multiple and robust forms, for example, trade associations, labor unions, chambers of commerce, banks, and trade schools.\textsuperscript{205} In the sharing economy, these intermediaries are typically the providers of the technological platforms through which businesses in the networks sell or rent their products and services. The intermediary for the Airbnb network runs the website.\textsuperscript{206} The intermediaries for car services such as Uber, Lyft, and Sidecar create and manage mobile phone applications to connect drivers to passengers.\textsuperscript{207} The intermediaries for online shopping services such as eBay maintain those websites.\textsuperscript{208} And the intermediaries for crowd-
funding services operate the websites through which such funding is achieved.209

To understand how a technological platform could be compared to a German trade association, it may help to contemplate in more detail exactly how each institution contributes to the network in which it serves as an intermediary. These contributions can be broadly categorized as accomplishing three functions: the sharing of critical business resources, the monitoring of network participants, and the sanctioning of such participants.210 In the case of sharing of critical resources, the varieties of capitalism literature is replete with examples of business associations that either coordinate or perform the function of technology development and diffusion within a given sector.211 These are not like the typical U.S. trade associations, which provide important services, but often services that increase the success or efficiency of individual members at the margins. Rather, these intermediary organizations perform key functions, which outside of these systems are performed within individual businesses. For example, they collaborate on the development of technologies and products critical to the advancement of the industry as a whole.212 They develop standard forms of contracts and share market information.213 The development of such sector-specific technology, contracts, and codes is aided by the private information that flows within the network, allowing the intermediary to customize technology and research for the particular purposes of the sector.214 In complementary fashion,

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209. See How It Works, supra note 55; Start Your Project, supra note 56.
211. See, e.g., Margarita Estevez-Abe, Torben Iversen & David Soskice, Social Protection and the Formation of Skills: A Reinterpretation of the Welfare State, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE, supra note 25, at 145 (arguing that social protection aids the market by preventing market failures and helping economic actors overcome failures in skill formation); J. NICHOLAS ZIEGLER, GOVERNING IDEAS: STRATEGIES FOR INNOVATION IN FRANCE AND GERMANY (1997) (arguing that despite an increasing move toward international production methods, national governments continue to display distinctive policies for promoting innovation); David Soskice, German Technology Policy, Innovation, and National Institutional Frameworks, 4 INDUSTRY & INNOVATION 75 (1997) (discussing Germany's pattern of economic innovation and the ways in which it substantially differs from that of the United States and the United Kingdom).
212. ZIEGLER, supra note 211; Soskice, supra note 211.
some networks that share technological research and development also promote the development of niche products and specialties within a sector as a means of reducing competition among businesses in that sector.\textsuperscript{215}

It is critical that in coordinating economies, institutions such as unions, works councils, supervisory boards, and business associations appear to ensure a broader spectrum of democratic participation than the corporate structure of the typical U.S. firm allows. Because shareholders are at the top of the U.S. firm’s vertical structure, their interests are paramount. In coordinated economies, many important resources are shared horizontally within the network. Consequently, these networks require participation in the coordinating institutions by key members of each business. This broader level of democratic participation prioritizes the issue of equitable distribution among the managers, workers, and financing sources.

Compare this model to that evident in networks such as Airbnb, TaskRabbit, or Uber. One critical difference is that the technological platforms in the sharing economy result not from an initial collaboration among product or service-providers, but rather from the work of high-tech start-ups.\textsuperscript{216} Part IV will argue that this important distinction impedes the more equitable development of the sharing economy. Putting this difference aside for now, however, the similarities between the two types of intermediaries come to the fore. As in the case of German business associations, the private flow of information within these sectors contributes to the development of specialized technological platforms that streamline the participants’ ability to acquire, contract with, and serve customers. Moreover, in a number of these networks, the technological platform is supplemented by additional, informal associations in which Uber drivers, Airbnb hosts, and TaskRabbit taskers can exchange information using Facebook pages and alternative websites.\textsuperscript{217} It is even possible in

\begin{footnotes}
\item[215] Id.
\item[216] See discussion supra Part II.A.
\end{footnotes}
networks such as Airbnb and Uber to see the development of niche products, such as the types of rental properties or the quality of cars.\textsuperscript{218}

Trade associations in coordinated economies also serve important monitoring and sanctioning functions. For example, they may develop standards of conduct and dispute resolution mechanisms internal to the network.\textsuperscript{219} Analogously, in a broad range of sharing-economy networks, the transparency of those networks allows for the ultimate customers to share information about their experiences with particular product or service providers.\textsuperscript{220} The technological platform thereby facilitates monitoring in a way that previously could only be accomplished by specific contractual provisions allowing for inspection or requiring certain levels of permitting, for example.\textsuperscript{221} Although the monitoring and sanctioning mechanisms may at first view seem one-sidedly directed at the product or service providers, recent developments suggest otherwise. For example, TaskRabbit taskers recently joined a Facebook page to organize around certain changes made by the intermediary that the taskers protested would increase competition among them.\textsuperscript{222} The innovation of intermediary institutions as technology providers is thus a fascinating and specific case study of how intermediary institutions in coordinated economies accomplish the functions of sharing, monitoring, and sanctioning without resorting to formal contracts and hierarchies. Again, it is important to note in these examples how vital the services provided by these intermediaries are to the success and even survival of the individual businesses in the network.

3. Relations Across a Range of Market Interactions

One of the things that establishes Germany as such a forceful example of a CME is that sharing institutions are observable throughout the economy in a broad range of market relations.\textsuperscript{223} As Hall and Soskice have described in detail, Germany has institutions that accomplish collaboration in the spheres of labor relations,

\begin{itemize}
  \item \textsuperscript{218} See, e.g., \textit{Airbnb Picks}, supra note 75 (curating unique rental properties); \textit{UBER}, supra note 52 (offering cars of various sizes and luxury levels).
  \item \textsuperscript{219} Hall & Soskice, supra note 26, at 10-11.
  \item \textsuperscript{220} See, e.g., O’Connell, supra note 81 (describing ratings as “de facto regulations”).
  \item \textsuperscript{222} Jaffe, supra note 217.
  \item \textsuperscript{223} Hall & Soskice, supra note 26, at 21-27.
\end{itemize}
vocational training, corporate governance, interfirm relations, and employee relations.\(^\text{224}\) Simply by virtue of being a more localized example of market coordination, the sharing economy cannot possibly claim to touch so many segments of market relations. Nevertheless, it is striking to see how deeply sharing affects relations in two of the spheres identified by Hall and Soskice, namely the spheres of interfirm relations and corporate governance.

Hall and Soskice define \textit{interfirm relations} as “the relationships a company forms with other enterprises and notably its suppliers or clients, with a view to securing a stable demand for its products, appropriate supplies of inputs, and access to technology.”\(^\text{225}\) This brief description alone should highlight the extraordinary level to which sharing permeates interfirm relations in the sharing economy. Businesses share access to technology to find clients and also to establish an ongoing supply of products or services. The stability of demand and supply is maintained for the entire network through the technological platform. Moreover, access to the platform regularly equates with access to a national or international market of customers.\(^\text{226}\) Businesses do not have to conduct their own research about specific markets because the website or mobile application does that work for them.\(^\text{227}\)

Hall and Soskice define the second relevant sphere of market relations, that of corporate governance, as the set of relations in which businesses access financing.\(^\text{228}\) Here, too, the institutions of collaboration have a unique impact. First, a subcategory of venture capital financiers has developed with an apparent specialty and interest in investing in sharing intermediaries despite the legal and other known and unknown risks associated with doing so.\(^\text{229}\) It is not clear what factors give these investors comfort in investing in sharing intermediaries, but one real possibility is that the technology-based structures developed by these intermediaries for monitoring, sanctioning, and alleviating legal risks and costs also alleviate the \textit{investment}-related concerns of these financing sources.\(^\text{230}\) Second, and more dramatically, crowdfunding is itself turning into a source of what

\(^{224}\) Id.\(^{225}\) Id. at 7.\(^{226}\) See, e.g., \textit{Why Should I Host on Airbnb?}, supra note 66 (offering free translation of listings available worldwide via the Airbnb website).\(^{227}\) See \textit{Host Your Space and Make Money with Airbnb}, supra note 79.\(^{228}\) Hall & Soskice, supra note 26, at 7.\(^{229}\) See O’Connell, supra note 81.\(^{230}\) See id.
Hall and Soskice describe as “patient capital,” one in which investors are willing to take risks that traditional investors would not, thereby allowing new businesses to develop despite economic downturns and other market and nonmarket risks.

C. Hints from Europe: Coordinated Market Approaches to Regulating the Sharing Economy

The sharing economy is also taking root in European countries with CMEs. If it is true that coordinated economies have regulatory structures tailored to sharing institutions, then we ought to see a different regulatory approach to the sharing economy in such countries. At first blush, then, the most visible reaction to the sharing economy in Europe is disconcerting because it appears to be similar to that in the United States. Most prominently, last year local authorities banned Uber from operating in several German cities. Shortly thereafter, a German regional court imposed a nationwide ban on Uber’s app on the grounds that Uber violated Germany’s Passenger Transportation Act. The lawsuit in that case was filed by the Taxi Deutschland Servicegesellschaft (TDS), which offers an app that competes directly with Uber’s app. TDS’s app allows consumers to obtain rides from registered taxi drivers.

However, a closer look reveals that, while U.S. and German regulations appear facially similar, they may well be trying to protect a very different set of capitalist practices. Germany’s reaction to Uber appears aimed not at its collaborative aspects, but rather at what one TDS spokesperson described as Uber’s “neoliberal” features. The early reactions of policy makers seem concerned with protecting the institutions, such as taxi drivers’ unions, business associations, and partnerships with chambers of commerce that are part of the fabric of coordinated economies such as Germany’s. Taxi drivers in the United States have sued on the grounds that Uber has failed to obtain

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231. Hall & Soskice, supra note 26, at 22.
233. Knight, supra note 232.
234. Id.
235. Id.
236. Id.
taxi licenses, thereby destroying the value of the medallions that those taxi drivers own. By contrast, taxi drivers in Germany are suing for licensing violations in order to protect the unions and trade associations that collaborate to modulate prices, regulate safety, and set industry standards. In short, Germany’s reaction to Uber likely is not predictive of its reaction to the broader sharing economy.

A recent report to the European Commission (EC Report) supports my hypothesis that Germany and other coordinated economies would approach the task of regulating the sharing economy very differently from the U.S. approach. Although it is merely a white paper that has not yet been adopted by the EC or any coordinated economy, it is the most direct evidence of how a coordinated economy would regulate the sharing economy writ large, rather than how it might react to one particularly neoliberal representative. The EC Report focuses on six sharing economy companies operating in Europe. Two, TaskRabbit and Sorted, are online marketplaces for sale of services. Peerby is a system for short-term rentals of personal property. Fixura is a peer-to-peer lending platform. Shareyourmeal offers the sale of home-cooked meals. Finally, the EC Report also discusses Airbnb.

Most notably, the EC Report embodies an attempt to translate the institutions that undergird mature coordinated economies into functional counterparts for these sharing economy businesses. In this respect, the EC Report serves two critical needs for this Article. First, it tells us what institutions in the sharing economy could serve as the counterparts to such institutions as trade unions, workers’ councils, and


241. Id. at 4-5.

242. Id.

243. Id.

244. Id.

245. Id.
employers’ associations. Second, the EC Report proposes ways to regulate those particular institutions. Current regulatory approaches in the United States fail to perform either of these functions.

The EC Report’s answer to the first question is implicit, extractable from its particular regulatory proposals. These proposals conceptualize the relationship between the technology-providing intermediary and the individual product and service providers in ways that substitute for traditional CME trade unions and employers’ associations. For example, many technology providers are start-ups that cannot provide the traditional employment protections of long-term employment contracts and that may not have ties to trade unions. In recognition of this, the EC Report proposes employee stock ownership in the start-ups as a form of democratic participation as well as job security. The EC Report also assumes that some traditional types of CME institutions can be tailored to the needs of the sharing economy. Industry-specific business associations that would work alongside the website and app providers are a key example. In general, a CME approach to the sharing economy would begin by assuming that it ought to develop institutions that substitute for sharing institutions in mature coordinated economies.

This expectation is borne out by the proposed means of regulation. Three from the EC Report are worth mentioning because they are transferable to the U.S. sharing economy. First, the EC Report proposes “industry-led certificate[s] of trust” as a means of developing acceptable minimum safety and quality standards to protect consumers in such markets. The EC Report proposes this form of partial self-regulation as an alternative to established permitting and licensing requirements. The purpose of the industry-led process would be partly to allow businesses within the sharing network to collaborate on standards that would be specifically tailored to their operational needs and structures. But the EC Report also explicitly considers a role for government either to substitute for an industry-led process or to facilitate it, thereby ensuring that standards would be sufficiently

246. See Hall & Soskice, supra note 26, at 22-25.
248. Id. at 17.
249. Id.
250. Id.
251. Id.
252. Id. at 16-17.
253. Id.
protective of consumers.\textsuperscript{254} Second, the EC Report proposes tax and other incentives for workers to receive equity shares in start-up companies participating in the sharing economy.\textsuperscript{255} A third, more abstract policy aspiration is to develop educational opportunities, including internships, that are more tailored to participation in the sharing economy.\textsuperscript{256} Ironically, these regulations probably appear neoliberal to some European policy makers. But the EC Report serves a critical purpose for U.S. policy makers by offering concrete ideas for regulating the coordinating institutions within the sharing economy.

IV. REGULATING THE INSTITUTIONS OF CAPITALIST SHARING

As this Article has demonstrated, current U.S. regulations make it difficult to engage in any form of capitalism other than the liberal market form that this infrastructure supports.\textsuperscript{257} What sharing networks need is a suite of laws regulating their unique institutions. Such laws must balance the needs and rights of all the participants in these new markets. The purpose of this Part is to provide such a regulatory model, which I call the Sharing Institutions Model, and then to apply that model to two of the regulatory issues currently plaguing some sectors of the sharing economy.

A. A Model for Regulating Sharing Institutions

Imagine the regulatory implications of viewing Airbnb as a coordinating intermediary rather than a Coasian firm. That is the foundational move that this model prescribes. One implication could be to view Airbnb’s hosts as microentrepreneurs rather than, for example, as employees of Airbnb. This in turn might enable regulators to think differently about how to fill regulatory gaps. First, regulators might view the distribution of rights, duties, and powers very differently if they conceptualize Airbnb hosts as independent businesses. They might, for example, find it useful to support the creation of additional sharing institutions that could better distribute power and resources within the network. Second, regulators might reach different conclusions about how to fill gaps in consumer protections. Finally, if they recognized sharing networks as different capitalist animals than their traditional Coasian counterparts, they

\textsuperscript{254} Id.
\textsuperscript{255} Id. at 17.
\textsuperscript{256} Id. at 16-17.
\textsuperscript{257} See discussion supra Part III.A.
might fashion rules that would allow the two to coexist. This summarizes the basic model proposed in this Article.

1. Identify Coordinating Institutions
   a. From Firms to Intermediaries

   By moving from a Coasian frame to one more open to a range of capitalist forms, regulators can reconceptualize the roles of different sharing market participants. From coordinated markets in Europe, we can see that businesses in a sharing network need intermediaries for the purposes of sharing key resources and also monitoring and sanctioning the behavior of businesses within the network.258 The first regulatory question for U.S. policy makers should be to ask which players in the U.S. sharing economy fulfill these functions. Part of the answer is obvious. Clearly, the technological platforms, and the providers of those platforms, play a role in reducing the transaction costs associated with performing such critical business functions as conducting market analyses, advertising products and services, ensuring stable supplies of customers, and streamlining contracts for sales or rentals of goods and services.259 But are the website and app providers in the U.S. sharing economy the only entities that reduce transaction costs? If we look to the EC Report as a guide, the answer may well be no. As the EC Report suggests, there may be networks in which transaction costs are reduced by means of informal, or even formal, associations of drivers, lessors, investors, and others who make use of alternative fora for accomplishing at least some of these functions.260 The use by TaskRabbit “taskers” of a Facebook page for the purpose of discussing the terms of service provision is an example.261 It is used alongside TaskRabbit’s website to accomplish some of the sharing that occurs within the network.262

   Regulators should ask these same questions about the capacity of current sharing intermediaries to monitor and sanction the behaviors of businesses within sharing networks. Presently, intermediaries such as Airbnb and Uber do have some mechanisms for monitoring and sanctioning hosts and drivers within their networks, largely by means of transparent fora for providing ratings of the products and services

258. Hall & Soskice, supra note 26, at 9-10.
259. See supra Part II.A.
260. See Dervojeda et al., supra note 240, at 16-17.
261. See Jaffe, supra note 217.
262. Id.
These innovative uses of technology for purposes of monitoring and sanctioning are powerful, but again, regulators often have sidestepped the responsibility of ensuring that they suffice. Instead, they have tried to force the intermediaries into the traditionally defined forms of monitoring and sanctioning such as obtaining the same licenses to operate that their counterparts in the nonsharing economy must obtain. These inquiries ought to lead regulators to the question of whether it is possible or desirable for additional institutions to develop for the purpose of monitoring and sanctioning. Here again, the EC Report can serve as a guide. It may well be the case that some sharing is better accomplished by coordinating institutions other than the technology providers. Simply put, regulators and consumers may not trust an entity such as Uber to establish safety standards for drivers. That task may better be allocated to an industry association of drivers, just as the EC Report suggests. In general, a broad guideline for regulators is that they should be alert to the political economy in a given market as a means of understanding the relative power relationships of the parties.

b. From Formal Contracting to Relational

The move from a Coasian point of view to one that is more sensitive to varieties of capitalism also embraces a broader range of contractual forms. This then is the second overarching principle that ought to guide regulators involved in the task of reenvisioning sharing institutions. Hall and Soskice describe this as a difference between formal and relational contracting: Because of the many contingencies that can arise in close interfirm relationships involving joint research or product development, tightly written, formal contracts are often inadequate to sustain such relationships. However, the German courts permit unusually open-ended clauses in interfirm contracts on the explicit condition that these be grounded in the prevailing standards of

265. See Dervojeda et al., supra note 240, at 16-17.
266. See id.
the relevant industry association. Germany uses the institution of relational contracting to complement the work of business associations. It provides space for such associations to accomplish a certain level of what U.S. regulators might describe as self-regulation. Such a description might be misleading, however, because the standards governing service provision or product development may be industry-led, but they are carried out under the watchful eye, and often with the collaboration, of regulators.

Interestingly, article 2 of the Uniform Commercial Code provides one of the best examples of relational contracting in the United States. Article 2 provides a basis for court enforcement of what amounts to industry practices among large businesses who regularly transact with each other. By advocating the use and enforcement of relational contracting in the sharing economy, I am essentially arguing that courts and other policy makers should not shy away from supporting and enforcing more informal contracting within business networks in the sharing economy, as long as those relationships are mediated through one or more intermediary institutions in which there is robust democratic representation of all the members of the network.

How might the norm of relational contracting advantage the U.S. sharing economy? First, as regulators engage in the process of identifying sharing institutions within the sharing economy, they should look for patterns of informal or quasi-contractual behavior as a means of finding and developing new sharing institutions. Second, and more importantly, reliance on and monitoring of relational contracting within sharing networks could be a powerful new form of regulating such networks. It could, for example, serve as a means to take advantage of the self-regulation within a network, which in turn could be the basis for setting an industry standard that is acceptable to regulators and consumers. The move I am advocating is not from a system that is more contract-based to one that is less so. Rather, it is to recognize a broader range of contractual relationships. This ought to provide more choices. Rather than imposing on small businesses the transaction costs of hiring lawyers to write lengthy, accurate contracts or avoiding those costs by signing contracts of adhesion, such a move ought to allow sharing businesses to contract more accurately and informally.

268. Id.
269. Id.; Dervoje et al., supra note 240, at 16-17.
2. Promote Equitable Participation

Once regulators identify the sharing institutions within a given sharing market, they must move to the critical task of filling the regulatory gaps they identify. With the noteworthy exception of crowdfunding markets, this is something that U.S. regulators have largely refrained from doing. The evolving literature on the sharing economy in the United States and Europe has already identified two domains in which regulatory gaps seem to recur. These are likely not the only gaps, but they are early examples of regulatory need within a different capitalist structure. Mature coordinated economies can provide useful answers about how to fill both types of gaps.

The first gap concerns the lack of equitable participation within business networks. There is a growing refrain among commentators that the sharing economy is just a new chapter of a continuing story in which workers lose job protections, benefits, and stability by engaging in piecemeal and temporary forms of underpaid labor. This refrain sheds light on Germany’s antipathy towards Uber, which undercuts the labor unions and industry associations that have traditionally protected taxi drivers in that country.

The sharing economy is at a crossroads in its development. It can be a vehicle for a technology-based attenuation of the firm to the point where employees are essentially eliminated from the firm’s structure. Or it can be the basis for redistributing resources, market participation, and ultimately wealth to a broader range of individuals.

In the United States, the power imbalance between the technology-providing intermediaries and the businesses within sharing networks is partially driven by our Coasian framing. While it is true that policy makers have failed effectively to regulate intermediaries largely because of their own limited view of capitalism, the intermediaries likely share that limited view. As a result, companies such as Airbnb and Uber have been able to develop a new model for

270. The SEC’s proposed rules, for example, limit the extent to which an intermediary such as Kickstarter or Indiegogo can advertise a particular company seeking funding while still avoiding complying with rules concerning investment advising. See Crowdfunding, 78 Fed. Reg. 66,428, 66,559-63 (Nov. 5, 2013). Another potential exception is a new Chicago ordinance that would require ride-sharing networks to submit anonymized data about customers and rides. See Emily Badger, Is This Investment Worth $150,000? No One Knows., WASH. POST, June 22, 2014, at G1 (discussing the value of taxi medallions in Chicago and the city’s response to car-sharing services such as Uber and Lyft).
271. See, e.g., Reich, supra note 16; Schor, supra note 16.
272. See Rooney, supra note 239.
273. See discussion supra Part II.C.
doing business that takes advantage of collaboration without accepting all the associated costs.\textsuperscript{274} One such cost is that these companies have to share more power and responsibility with the businesses involved in their networks.\textsuperscript{275} In Coasian terms, their failure to do so produces negative externalities (especially for the workers) that regulators have thus far failed to recognize.

In mature CMEs, Hall and Soskice describe the hallmark of an effective balance of power as a network conducive to joint deliberation among its members.\textsuperscript{276} Hall and Soskice define deliberation as a capacity to “engage in collective discussion and to reach agreements with each other.”\textsuperscript{277} Networks such as Uber’s display this capacity only to a limited extent, instead relying on the intermediaries to play more of a directive role.\textsuperscript{278} As the EC Report reveals, this power imbalance between intermediary and workers is ultimately unacceptable in a coordinated market context.\textsuperscript{279} And so the EC Report assumes that additional sharing institutions will develop to supplement the dominant role of the technology provider.\textsuperscript{280}

This Article proposes a similar presumption for the U.S. sharing economy, namely that the current power imbalance between technology provider and worker must be adjusted. At this early stage of promoting equitable participation within a sharing network, it may be most useful for U.S. policy makers to ask the following basic question: Does the technology-providing intermediary control so many of the resources and so much of the value of the network that it effectively manages the workers as employees, or do the workers retain control of critical resources and wealth? In answering this question, conventional tests defining the line between employees and independent contractors ought to serve as useful guides.\textsuperscript{281}

\begin{itemize}
\item \textsuperscript{274} See Schor, supra note 16.
\item \textsuperscript{275} See id.
\item \textsuperscript{276} Hall & Soskice, supra note 26, at 9-12.
\item \textsuperscript{277} Id. at 11.
\item \textsuperscript{278} This seems to be a primary cause of lawsuits such as those filed in Massachusetts and elsewhere claiming that these companies are directing their drivers to such an extent that they should be required to follow all the rules applicable to employers. See Farrell, supra note 24.
\item \textsuperscript{279} Dervojeda et al., supra note 240, at 16-17.
\item \textsuperscript{280} Id. at 14-17.
\item \textsuperscript{281} Such tests often focus on the “hiring” party’s “right to control” the work conditions of the “hired” party. See, e.g., C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995) (distinguishing supervision, which usually indicates an employee relationship, from efforts to improve, which do not).
\end{itemize}
The answer to this question should then determine the regulatory response. If Uber is indeed acting as a traditional firm, then it should be forced to internalize the costs of employing hundreds of drivers. If, however, a ride-sharing intermediary relies on drivers to use their own cars, and especially if it leaves important terms of the service provision (such as pricing and quality control) to be determined by the drivers, then it may be reasonable to think of the intermediary as just that. In such a case, the further response of regulators should be to develop the extra protections necessary to allow the individual drivers to operate as independent microbusinesses. Here, the last decade or two of regulatory developments to support small businesses should be useful to regulators. Examples include tax incentives and other financial support for small business development, special forms of business entities, special rules regarding disclosures to investors, and streamlined applications for government contracts. The United States may be behind coordinated economies in regulating sharing institutions, but it has excelled at supporting small firms. This is one respect in which our liberal market leanings can be used to support equitable development of the sharing economy.

3. Ensure Consumer Safety

The second regulatory gap that has surfaced in sharing markets across the globe is in the domain of consumer protection. This is also a domain in which the sharing economy is at a crossroads, with particular implications for a legal structure with a Coasian orientation.

282. As I have suggested, this may be an alternative that protects drivers more than regulation of traditional taxicab companies can accomplish, as the unfair conditions for taxi drivers in some cities seem to demonstrate. See, e.g., Gary Blasi & Jacqueline Leavitt, Driving Poor: Taxi Drivers and the Regulation of the Taxi Industry in Los Angeles, TAXI LIBR. (2006), http://www.taxi-library.org/driving-poor.pdf (discussing the myriad problems and disadvantages that plague taxi drivers in Los Angeles).


unlicensed Uber drivers,\footnote{286} to swindling of unsophisticated Kickstarter investors,\footnote{287} regulators are flummoxed by the myriad apparent evasions of consumer protection laws by sharing economy businesses. In the United States, this problem also could be described as a regulatory failure to force sharing firms to internalize the negative externalities associated with their sale of unsafe products and services.\footnote{288}

Of course, a perspective more open to different forms of capitalism might conclude that the better answer for a given network is not to require the sharing intermediary to internalize the costs of producing safe products, but rather to require the network as a whole to do so. Thus in this domain as well, it may be most useful for U.S. policy makers to ask two basic questions. First, in any given sharing industry, what deficiencies prevent the sale of a complete, safe, and viable product or service? Second, who in that industry is in the best position to address those deficiencies? The critical function of new regulations should be to ensure, or at least to provide incentives for ensuring, that the sharing network will address those deficiencies.

Here again, the answers to these two questions should guide policy makers in developing an alternative set of rules tailored to the business models within the sharing economy. Any such rules ought also be sensitive to the power balance within the network. Thus, as I discuss below, it may be appropriate to require Uber to comply with traditional taxi licensing requirements if those rules are designed to ensure consumer safety.\footnote{289} For other ride-sharing networks, it may be more sensible to provide regulatory support for business associations among drivers to develop a certificate of trust or analogous safety and quality standards.\footnote{290} Business associations could choose to work in concert with the intermediaries in these networks, or not. In either case, they could serve as a useful counterforce to the power wielded by the intermediaries. As they have long done for other types of micro-businesses, regulators could also create incentives for educational support for new entrepreneurs within sharing networks.\footnote{291}

\footnote{286. See Sadovi & Swartz, supra note 87; Nuzzi, supra note 87.}
\footnote{287. See Ackerman, supra note 114; Solomon, supra note 114.}
\footnote{288. See Joshua D. Wright, The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other, 121 YALE L.J. 2216, 2226-33 (2012) (outlining the market considerations that lead to consumer protections).}
\footnote{289. See discussion infra Part IVC.}
\footnote{290. See Dervojeda et al., supra note 240, at 17.}
\footnote{291. See id.; see also Lisa J. Servon, Fulfilling the Potential of the U.S. Microenterprise Strategy, in Replicating Microfinance in the United States 169, 177 (James H. Carr & Zhong Yi Tong eds., 2002) (describing U.S. microfinance policies, especially the federal Model Cities program).}
4. Regulate in Favor of Coexistence

For U.S. policy makers, one challenge in regulating the sharing economy will be to promote its peaceful coexistence with the LME that predominates in the United States. The current regulatory approach to this challenge is to quash or at least constrain sharing networks. 292 This Article has instead proposed a model that would support such networks by developing an alternative set of regulations designed specifically for them. If policy makers rise to this challenge, however, they will also have to develop rules for maintaining a level playing field between the two regulatory regimes. Much of their work in this regard will be accomplished by attention to two concerns.

First, sharing intermediaries should be able to take advantage of sharing-specific regulations for only as long as they serve the critical functions of an intermediary. This requirement may well require careful regulatory attention to just such a company as Uber, which has been the target of lawsuits claiming that it is an employer of hundreds of drivers and that it should be regulated as such. 293 When Uber internalizes enough of the functions of its counterparts in the nonsharing economy (such as ownership of key assets, control over the assignments of the drivers, and specific direction of key operations), then it should be regulated as a taxicab company employing hundreds of drivers. Concomitantly, when Uber stops playing a coordinating role among a network of relatively more independent operators—when it no longer accomplishes for them the sharing of critical resources—then it should no longer receive the benefit of sharing regulations. 294 In developing an alternative set of rules for sharing intermediaries, regulators should aspire to embed in such rules incentives for the intermediaries to choose to switch to the rules governing their traditional counterparts if and when the costs of compliance with the traditional rules make it worthwhile to do so.

Second, alternative regulations for sharing networks should not leave the kinds of gaps that we currently see. 295 It should not be an option for such networks to opt out of important consumer protection and other regimes. In developing regulations for intermediaries, regulators should seek to ensure a seamless web of regulation between these sharing-specific regulations and the broader regime of

292. See supra Part II.B.
293. Farrell, supra note 24.
294. See Hall & Soskice, supra note 26, at 10.
295. See discussion supra Part II.B.1.
regulations that govern small businesses, consumer rights, and other relevant issues. Even where small businesses within sharing networks share some critical resources through intermediaries, these businesses will retain other important resources and functions. These latter internalized functions ought to be governed by the traditional rules that govern all businesses in a given industry.296

B. Applying the Model: Equitable Participation

My main purpose in applying the Sharing Institutions Model described above is to demonstrate the range of superior regulatory possibilities that flow from recognizing a broader range of capitalist forms. This Subpart focuses on the entrenched problem of equitable participation. The next Subpart focuses on the pervasive problem of consumer safety.

1. Is Airbnb a Hotel Conglomerate or a Website Provider?

Identify coordinating institutions. Is Airbnb a hotel conglomerate employing hundreds of hosts around the world or is it an intermediary providing a website and related services that enable individual homeowners to rent rooms in their homes? The first step in answering that question is to consider what exactly Airbnb does for its “hosts.” Most notably, Airbnb provides a website through which owners can list their properties for rent.297 It provides a system whereby guests can book rooms and pay for their rentals through Airbnb.298 It provides a “host guarantee” of up to $1,000,000 for damage to a host’s property.299 And it provides a “Resolution Center” for addressing disputes between hosts and guests.300 These are substantial contributions, amounting to the provision of advertising and listing services, a streamlined service for leases and payments, an insurance fund, and a dispute resolution system. Airbnb also makes extensive use of social media to provide mechanisms for hosts and guests to monitor each other and to share information with the broader community of guests and hosts.301

296. Part IVB infra provides an analysis of how such a regulatory spectrum could provide seamless coverage.
297. See About Us, supra note 1.
298. See How To Travel, supra note 41.
299. Lieber, supra note 98.
301. Trust at Airbnb, supra note 70.
However, Airbnb is not the only institution that enables Airbnb hosts (and guests) to share information and resources. There are a number of additional fora in which Airbnb hosts can share information that is useful to lessors of Airbnb rooms.³⁰² Topics on one such forum recently included information about a scam, email templates for hosts to use, and a discussion about how to meet San Francisco’s permitting requirements.³⁰³ While this kind of information sharing has not generally risen to the level of informal contracting among hosts for additional services or resources, it is certainly a nascent system for establishing basic standards of hosting conduct, as well as a forum for developing expectations about safety, quality, and other critical features of property rental. Thus far, it appears that fora such as these are invisible to regulators. This Article urges that regulators pursue the possibility of developing advisory boards or other mechanisms that develop the potential of such fora to provide a richer range of sharing opportunities. Could such fora propose alternative permitting standards for cities like San Francisco? Could they develop mechanisms for monitoring and sanctioning bad hosts? These are questions that regulators ought to be exploring alongside the question of whether Airbnb ought to comply with hotel licensing requirements.

Promote equitable participation. The existence of alternative institutions for sharing resources in the Airbnb network is relevant to the basic question of whether Airbnb, the technology provider, controls so many of the resources of the network that it effectively controls the hosts. The richness of these alternative websites suggests that the answer is no. And there are a number of other criteria that point to the same answer.

I have proposed that conventional tests for determining whether a worker is an employee or an independent contractor can guide regulators in answering the question about extent of control by the intermediary in a sharing network.³⁰⁴ The hallmark test defining the line between employees and independent contractors is the right-to-

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³⁰⁴ See supra text accompanying note 281.
control test, which evaluates the circumstances surrounding the relationship between the contracting parties to determine whether the hiring entity controls not only the result achieved by the worker, but also the “means and manner” by which it was achieved. Applying this test to the Airbnb network, it becomes more evident what each party controls. The Airbnb intermediary leaves to the hosts decisions about how to list and advertise their properties, how much to charge for rental, and whom to choose as renters. If the result of the contracting relationship between the intermediary and the hosts is to rent properties for short terms, this particular sharing network plainly treats hosts as independent contractors who control the means and manner of the work. The broader “agency” test used by some courts to define the line between employees and independent contractors leads to similar conclusions. Of the twelve or more factors for consideration, such factors as the location of the work, whether the hiring party has the right to assign additional projects (in this case rentals), the extent of the hired party’s discretion about when and how long to work, the method of payment, and the provision of employment benefits, all point to an independent contractor relationship.

As is evident, the traditional tests for determining whether a business should be subject to employment and labor laws can be quite useful up to a point. They are useful as a guide for line drawing between traditional Coasian firms in an LME framework and businesses built on a different capitalist model. Additionally, they provide a useful vocabulary for understanding what exactly is different about the sharing economy. But once regulators conclude that a given network is not following a Coasian structure, they need additional frameworks for supporting and regulating these new business forms. It is not equitable to leave those who fall on the independent contractor side of the line to go it alone in undefined and underregulated territory. As the last decades of supporting microentrepreneurs have taught us, these individuals need an alternative regulatory framework that stands in for the labor and employment protections they would have received as employees. Facebook pages and other informal institutions for sharing would be invisible in a Coasian world. Yet they are utterly relevant to sharing market participants, and they can be used to support the development of new kinds of regulatory support in place of

305. C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995).
306. See How To Host, supra note 46.
308. See Servon, supra note 291.
employment laws. This, then, is one justification for the Sharing Institutions Model, which brings a new theoretical framework to bear for the purpose of generating a range of regulatory options that recognizes the value of sharing institutions such as these.

Assuming that regulators agree with the conclusion that the Airbnb network is not a traditional firm, then the critical questions are how to support the hosts in such ways as to enable their development into self-sufficient businesses and, further, how to promote a healthy power balance between these tiny businesses and the Airbnb intermediary. As I have described, the alternative sharing institutions that Airbnb hosts have started to develop have excellent potential to serve both these regulatory purposes. Consider the effect of a regulatory intervention in which participants in a hosts’ Facebook page or blog were invited by a local authority to join an advisory council. Such a council could address the question of how to ensure an appropriate level of property protection, which is one of the most frequent concerns raised by hosts. It could negotiate with local authorities to develop a streamlined permitting process. It could pool resources for obtaining insurance protection and health benefits. Over the longer term, it could even pool resources to obtain financing for hosts independent of Airbnb’s financing endeavors. Finally, such a council could wield more power in negotiations with the intermediary. This, in turn, could be the basis for developing a meaningful mechanism for deliberation within the network, a benefit that Hall and Soskice repeatedly emphasize as epitomizing the strengths of a coordinated economy.

By no means are such councils the only options for promoting more equitable participation within networks such as Airbnb’s. While more research and thought will be required to give substance to the following suggestions, their enumeration ought to make clear their potential for providing a rich structure of support for microbusinesses within sharing networks. First, state regulations could create new categories of business entities and supplement those that are newly developing, such as worker-owned cooperatives and beneficial corporations. It is astonishing to see the resurgence of the worker

310. See Dervoje da et al., supra note 240, at 17.
311. See Hall & Soskice, supra note 26, at 9-12.
312. For a discussion of worker-owned cooperatives, see Scott L. Cummings, Developing Cooperatives as a Job Creation Strategy for Low-Income Workers, 25 N.Y.U.
co-op in both urban and rural contexts, and this is another domain in which the sharing economy seamlessly fits into a new pattern of development. Second, regulations at all levels of government could include tax incentives and various forms of technical assistance to the microentrepreneurs in sharing networks. Third, sharing networks could partner with local community colleges and other educational institutions to provide specialized education in managing small hosting businesses. Finally, such networks could partner with their traditional hotel counterparts to create pathways for workers and guests to be employed by, and be consumers of, both kinds of businesses.

2. Is Uber a Taxicab Company or an App Provider?

At least on the question of whether Uber’s drivers are employees or independent contractors, Uber is much closer than Airbnb to the dividing line and quite possibly on the other side of it. Through use of its app for mobile phones, Uber provides essentially all the services provided by Airbnb. But in contrast to Airbnb, Uber also decides how much to charge for a ride, including by means of its controversial surge-pricing system. It controls the terms and form of payment, including by restraining drivers from accepting tips. It has a system by which passengers can rate drivers—with a consequence of “deactivation” for drivers whose ratings fall below a certain level. In short, Uber manages many more aspects of the means and manner of...
the work performed by the drivers.\textsuperscript{319} Not surprisingly, many of the factors comprising the more fact-sensitive agency test also point in the direction of treating Uber’s drivers as employees rather than independent contractors.\textsuperscript{320} The Sharing Institutions Model would thus argue in favor of treating Uber, at least in its current instantiation, as a traditional firm with hundreds of employee-drivers.

Doing so for the purpose of subjecting Uber to labor and employment laws, however, would not necessitate treating Uber as a traditional firm for other regulatory purposes. Instead, this model would approach each regulatory question individually. For example, like Airbnb and TaskRabbit, Uber has alternative fora for drivers, in which they discuss a broad range of subjects, including pay, tips, and the Uber rating system.\textsuperscript{321} Recently, in one such forum, several posts raised questions or complaints about various Uber policies.\textsuperscript{322} This is in marked contrast to the more policy-making function of fora for Airbnb hosts. But it certainly seems possible that these alternative Uber fora could evolve into institutions in which Uber drivers deliberate and decide about policies, rather than react to those established by the app provider. Thus, if regulators notice a discussion underway about whether Uber drivers could develop an alternative permitting system, they ought to consider inviting representatives of such fora to join policy makers in discussing the subject.

\textbf{C. Applying the Model: Consumer Safety}

In applying the Model to the issue of consumer safety, this analysis will focus in on the example of Uber’s ride-sharing measures. Although consumer protection issues will vary for other types of sharing networks, analyzing Uber as an example ought to provide a flavor of the regulatory possibilities available through application of an institutional approach. In particular, this Subpart will discuss Uber’s measures to ensure the personal safety of its customers, with some discussion of broader considerations of consumer protection and business protection from liability. As will be evident from this analysis, many regulatory options are available that regulators have not yet tried.

\textsuperscript{319} See C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995).
\textsuperscript{321} See, e.g., Warned or Deactivated for Low Rating, supra note 318.
\textsuperscript{322} Id.
1. Identify Coordinating Institutions

As discussed above, Uber’s network relies heavily on the technology provider to accomplish the three functions of a sharing intermediary, namely the sharing of key business resources, monitoring of the participants within the network, and sanctioning of those participants. But the network also has alternative institutions in which drivers have begun to share experiences and knowledge. The sharing is at a more rudimentary stage than in the Airbnb network, but it is a start. For now, however, it appears to be the app provider that addresses the question of how to ensure customer safety.

It largely does so using a system of self-regulation that mimics many of the requirements imposed on taxicab companies. At the same time, Uber argues that it should not be subject to the costs of the licensing and permitting requirements actually imposed on such companies. According to Uber, such self-regulation includes a three-step criminal background screening and ongoing reviews of drivers’ motor vehicle records. The company layers this screening process on a system in which drivers respond to specific requests for rides through Uber’s mobile application. Uber also shares some of the screening responsibility with consumers by giving them information about driver “profiles” as well as the opportunity to anonymously rate their experience with the driver. Lyft’s safety protocols are much the same. These companies also claim to do initial checks of the driver-owned vehicles that are used for their ride-sharing services, although there is no apparent requirement or monitoring to ensure the ongoing good maintenance of the vehicles.

323. See Features, supra note 207; Huet, supra note 318.
324. See, e.g., Uber Drivers Forum, supra note 217.
325. See, e.g., Lazo, Maryland Panel, supra note 264 (detailing Uber’s fight against efforts by state regulators to subject the company to the same licensing requirements as taxicab companies).
326. Sullivan, supra note 96.
327. See Safety, Uber, https://www.uber.com/safety (last visited Nov. 19, 2015); see also Farrell, supra note 108 (explaining how Uber drivers use smartphones to respond to ride requests).
328. See Safety, supra note 327.
2. Ensure Consumer Safety

Focusing for the moment on the safety threats from drivers, despite such self-regulatory measures, these sharing networks continue to suffer from a barrage of negative publicity, lawsuits, cease-and-desist letters, and other attacks for failing to ensure rider safety.\footnote{331} Even if consumers of traditional taxicab services experience just as many risks as those of peer-to-peer services, these concerns about consumer safety are significant enough to demand further action. A regulatory gap still remains. One conclusion to draw from the current state of affairs is that self-regulation does not suffice. It may be true that traditional licensing requirements purportedly imposed to protect rider safety do not fit the new ride-sharing business models.\footnote{332} Nevertheless, these licensing requirements do serve an important function of ensuring that those who sell rides comply with a consistent (and hopefully rigorous) set of screening and other requirements designed to protect the safety of riders.\footnote{333} This is an appropriate point of government intervention, and—just as is the case with products ranging from toasters to swimming pools—privatizing it risks too much derogation of responsibility for something as critical as assuring safety.\footnote{334} It is an even more serious derogation of responsibility to transfer to the consumer the responsibility to screen drivers by reviewing their profiles. This, then, is one reasonable description of the regulatory gap: some meaningful evidence of screening must be provided to one or more governmental authorities.

\footnote{331}{See discussion supra Part II.B.1.}
\footnote{332}{See Aratani, supra note 32.}
\footnote{333}{This is a point made over and over by regulators seeking to impose the traditional licensing rules. See, e.g., Joe Shortsleeve, Boston Police Commissioner Questions Safety of Uber App, CBS Bos. (Feb. 25, 2014, 4:53 PM), http://boston.cbslocal.com/2014/02/25/boston-police-commissioner-questions-safety-of-uber-app (reporting on comments by the Boston Police Commissioner that Uber ought to be more regulated for the sake of passenger safety); see also Aratani, supra note 32 (reporting on regulatory efforts in Washington D.C., Maryland, and Virginia); Weiner, supra note 8 (reporting on regulatory efforts in Virginia, California, and Chicago); Kelly Goff & Kate Larsen, Taxicab Drivers Protest Uber, Other Ride-Share Apps, NBC L.A. (June 10, 2014, 10:28 AM), http://www.nbclosangeles.com/news/local/Taxicab-Divers-Protest-Uber-Other-Rideshare-Apps-262564181.html (reporting on a California state bill imposing insurance requirements on ride-share operators).}
The key question once the regulatory gap is defined is this: Who should fill that gap and how should it be filled? If the gap is defined as a failure to provide evidence of safety assurances to governmental authorities, then the actions of companies such as Uber and Lyft are somewhat puzzling. If these companies do all the things that would be required to obtain taxi licenses, why do they resist taking the additional step of providing this information to local governmental agencies in return for licenses to operate? Assuming the answer is not that the companies are lackadaisical in their self-regulation, then it might be logical to conclude that it costs meaningfully more to have to prove these things to a governmental agency, rather than just to collect and store the information for themselves.

Although the companies are not articulating it in these terms, one interpretation of their claims that they are merely software providers and should not have to bear the costs of traditional taxicab companies is that permitting requirements would undercut the cost savings these companies achieve by using a technological platform to perform some of the functions that taxicab companies must internalize. Assuming this is true, the answer of course is not to excuse these networks from the requirement of governmental oversight, but rather to tailor such oversight to the claimed capabilities of the technologies, thereby leveraging regulatory power to the claimed technological efficiency. For example, if these companies are indeed performing background checks and other forms of screening by electronic means, one cost-efficient means of regulation ought to be to give the relevant governmental authorities access to such electronic records, whether at the point of granting permits or for the purpose of performing spot checks.\(^\text{335}\) Another intriguing regulatory possibility is to develop a means for governmental oversight of aspects of the transparent system by which riders can rate experiences and view driver profiles. As discussed, many networks rely in part on these systems as additional safety measures, although this form of self-regulation is currently capable of manipulation.\(^\text{336}\) Governmental oversight of such systems could require that driver profiles include certain information, for example, or it could require that drivers with low ratings be sanctioned. It could also monitor the manipulation of such systems.

\(^{335}\) And indeed, the Chicago ordinance appears to be headed in this direction. See Badger, supra note 238.

\(^{336}\) See Brad Tuttle, 9 Reasons Why You Shouldn’t Trust Online Reviews, TIME (Feb. 3, 2012), http://business.time.com/2012/02/03/9-reasons-why-you-shouldnt-trust-online-reviews/ (discussing the prevalence of online review manipulation).
By means of tailored permitting regulations such as these, regulators can take advantage of the role of intermediaries and their technological capacities for the purpose of regulation, rather than ignoring these unique aspects of sharing networks. They can effectively bridge the gap between software providers and taxicab companies by regulating precisely that which allows software providers to operate a new kind of taxicab service. This regulatory choice recognizes the uniqueness of creating a market in which an intermediary institution does for an entire network of independent drivers some of the things that individual taxicab companies typically do.

Alternatively, there might be sharing networks about which regulators could conclude that the most appropriate point of regulatory intervention is to regulate the individual businesses within the network, rather than impose the costs of regulatory compliance on the intermediaries. In the Uber, Lyft, and Airbnb networks, for example, regulators could require the individual drivers and hosts to obtain licenses to operate, rather than imposing this requirement on the intermediaries. Assuming the benefit for consumers would be the same regardless of whether the permitting requirements were imposed on the intermediary or the individual operators, the question for regulators ought to be which choice would allow the network to flourish. This question should take into consideration the relationship between the intermediary and the individual operators in any given network, the power dynamics, the availability of mechanisms within the network for spreading the costs, and, again, the possibility of intervening at a low cost by taking advantage of already existing technology.

In the case of ride-sharing networks, such a regulatory decision could be made with a view toward enhancing the sharing network by encouraging the formation of business associations within these networks. Such associations could serve as a means of spreading the costs of permitting requirements, but also as a means of engaging with regulators about appropriate forms of regulation. The EC Report could serve as a useful example here, providing a model by which regulators could work with drivers to establish and regulate an industry standard to assure customer safety and to sanction drivers who fail to comply with such a standard. Such a development also could have

337. See Dervojeda et al., supra note 240, at 15-17; Hall & Soskice, supra note 26, at 24-25.
the effect of redistributing power between the intermediaries and the network of drivers, which may well be a welcome tradeoff for drivers facing the additional costs of obtaining permits. For example, in the case of Uber, such a business association could provide a voice for drivers negotiating with Uber on their right to gratuities. The U.S. regulatory framework currently constrains this kind of regulatory solution by means of antitrust and anticompetition laws. This is one area in which regulators will have to develop a new set of standards applicable to sharing businesses.

A regulatory middle ground between imposing permitting requirements either fully on the intermediaries or on the individual operators could be to require intermediaries to provide evidence that they had contracted with their individual operators to meet certain safety standards. While this may not be a substitute for proof of criminal background checks, it may well be a useful requirement for ensuring vehicle safety, driving safety, customer privacy, and the acquisition of insurance. Here, Germany’s example of relational contracting within a network could be a useful guide. If governmental standards could encourage the development of a more robust (if relatively less formal) set of contract terms establishing and maintaining an industry standard concerning some safety issues, then customers should eventually be able to participate in a market with fewer unknowns—and less variability—in the quality of driving, vehicles, and experiences. Such a solution in turn could drive the development of a broader regulatory framework supporting it. Thus, regulators ought to support the development of causes of actions such as a tort for negligent credentialing, which could be enforced by individual consumers or state attorneys general.

339. Again, these are areas in which intermediaries claim to self-regulate and governmental authorities seek oversight through licensing requirements. Compare Safety, supra note 327 (describing Uber’s safety efforts), with Aratani, supra note 32 (describing governmental efforts to regulate Uber), and Weiner, supra note 8 (reporting on Virginia’s regulation of ride-sharing services).
340. See Hall & Soskice, supra note 26, at 26-27.
Yet another regulatory alternative would be for regulators to examine the function of an intermediary in a given network and conclude that it in fact is too similar to a traditional taxicab company or hotel operator to escape the standard permitting requirements established for such companies. This ought to be an ongoing option for regulators, but it should be one exercised after a close examination of the form and functions of intermediaries in a given sharing market, rather than as a reflexive reaction to this different form of capitalism.

3. Promote Coexistence

The consumer safety example is also useful in demonstrating the possibilities for regulating in favor of coexistence between sharing networks and their liberal market competitors. If regulators successfully develop rules specifically tailored to sharing networks, then such rules simply will not fit traditional competitors, nor will they be economically more desirable for them. Consider the example of Uber. If Uber is required to share access to some features of its technological platform—either with regulators or with an association of drivers—it may well conclude that the imposition on its proprietary rights in the technology is not worth the cost savings and may instead accept the requirements of operating like a standard taxicab company. Alternatively Uber may decide that it is well worth the cost savings to be able to transfer the costs of permitting to the drivers in return for sharing more access to its technology. This would be a success story in regulating for coexistence. It is an example of a market-driven choice between two sets of regulations tailored for different forms of market practice.

V. Conclusion

Regulation of the sharing economy is, of course, inevitable. But it is unfortunate indeed that much of the present conversation about the form and function of that regulation falls all too easily into traditional patterns and assumptions about markets, firms, ownership, and competition. This Article has presented a regulatory approach that avoids the well-worn debates that often define regulatory responses to market innovations and new technologies. By recognizing the sharing economy as an alternative capitalist system that is taking hold

342 In connection with Chicago’s proposed requirements that it hand over customer information, Uber has raised the concern of protecting its customers’ privacy, rather than its own intellectual property. Badger, supra note 238.
alongside and within the U.S. liberal economy, this Article proposes a bold approach to a necessary regulatory task. By paying attention to the unique institutions of the sharing economy, regulators can maintain the critical balance between protecting all market participants and allowing this different form of capitalism to flourish. As this Article has demonstrated, the regulatory options are rich and varied.