

Contemplating the Next Generation of Sharing Economy Regulation

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7.1 INTRODUCTION

As with any new and disruptive market force, the sharing economy has posed a significant regulatory challenge. Indeed, it is fair to say that the first generation of regulations of the sharing economy exhibits confoundment over basic definitional questions. What are the best legal analogies for sharing economy platforms? What are the goals and interests at stake? And how do the participants in the sharing economy view the need for, or value of, regulation? These definitional struggles have obscured equally important questions that remain unanswered. Significantly, it remains unclear how different sharing industries will develop, and this unknown continues to make regulation extraordinarily challenging.

Yet, as we consider the next generation of regulations of and for the sharing economy, we do have at least some of the benefit of hindsight. We have now seen the values held by platform proprietors, consumers, and workers in the sharing economy as such values are expressed through market practices. For example, we have seen the extent to which Uber and Lyft have replaced busses and subways as an essential form of transportation, and we have seen the increased access they create to areas that are inaccessible by public transportation. These developments redefine values such as convenience and accessibility in ways that the first generation of sharing economy regulations did not anticipate. We have even experienced the extremes in need, usage, and access dictated by a global pandemic. We know, for example, that while platform proprietors tend to portray platforms as attractive online alternatives to consumer marketplaces for accessing products and services, an increasing number of consumers view some forms of sharing economy businesses as basic necessities.

This chapter reviews the first generation of sharing economy regulations and proposes an approach for developing the second generation of regulations. In Section 7.2, I argue that first-generation sharing economy regulations rely on legal categories and assumptions that have been used to address business operations that have developed

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over decades (sometimes centuries), but that such legal approaches are at times ill-suited to regulation of the sharing economy.¹ In Section 7.3, I argue for a new regulatory approach that directly addresses core principles or values in the sharing economy. I focus in particular on four core principles that ought to serve as foundations for the next generation of sharing economy regulations.

7.2 FIRST GENERATION REGULATIONS

7.2.1 *Safety and Consumer Protection*

Some of the earliest and most important regulations of the sharing economy were those responding to safety and other consumer protection concerns raised by users of sharing platforms, especially those who used home- and car-sharing services such as Uber and Airbnb. Such concerns included reports of sexual assault, harassment, and other forms of unsafe behavior by drivers.² While renters also raised similar concerns with respect to home-renting services, some of Airbnb's most prominent troubles were raised by hosts whose homes were burglarized or misused by renters.³

The first generation of regulatory responses to such safety concerns was either to ban sharing businesses from operating, to sanction them, or to require them to obtain the same permits required of their competitors in the non-sharing economy for rooms, rides, and other services. Thus, for example, London recently banned Uber citing safety concerns, and California fined the company \$59 million for failing to turn over information on sexual assaults.⁴ These and other car-sharing services also faced repeated efforts by states to require some level of permitting.⁵ Similarly,

¹ Portions of this section were originally published in 90 *Tulane Law Review*, 241 (2015).

² US Safety Report 2017–2018, 50, 57, 58 (Uber Technologies, Inc., 2019); Jennifer Schaller, Lyft Sexual Assault Claims Consolidated for Pre-Trial Proceedings, *National Law Review*, Feb. 10, 2020, www.natlawreview.com/article/lyft-sexual-assault-claims-consolidated-pre-trial-proceedings; Sara Ashley O'Brien et al., CNN investigation: 103 Uber Drivers Accused of Sexual Assault or Abuse, *CNN Wire*, April 30, 2018, <https://money.cnn.com/2018/04/30/technology/uber-driver-sexual-assault/index.html>.

³ Biz Carson, Airbnb is Fixing its Safety Problems After California Shooting Leaves 5 Dead, *Forbes.com*, Nov. 6, 2019, www.forbes.com/sites/bizcarson/2019/11/06/airbnb-to-verify-all-listings-after-orinda-shooting/?sh=7156096ee49a; Olivia Carville, Airbnb Is Spending Millions of Dollars to Make Nightmares Go Away, *Bloomberg Business Week*, June 15, 2021, www.bloomberg.com/news/features/2021-06-15/airbnb-spends-millions-making-nightmares-at-live-anywhere-rentals-go-away.

⁴ Knowledge at Wharton, Can Uber Overcome its Regulatory Obstacles?, *Fair Observer*, Dec. 3, 2019, <https://knowledge.wharton.upenn.edu/article/can-uber-overcome-regulatory-obstacles/>; Suhauna Husain, Uber Faces \$59-Million Fine, License Threat, *Los Angeles Times*, Dec. 16, 2020, https://enewspaper.latimes.com/infinity/article_share.aspx?guid=750229ad-fbc6-41a0-b9ca-22837db84ca8.

⁵ Meera Joshi et al., E-Hail Regulation in Global Cities (NYU Rudin Center for Transportation, 2019); Paul Nussbaum, PUC Approves UberX for State, Not Philadelphia, *Philadelphia Inquirer* (Business), Nov. 14, 2014, at A15; Andy Vuong, Likely Ride-Sharing Nod would be a First, *Denver Post*, Apr. 30, 2014, at A10; Public Service Commission of South Carolina Commission Directive, No. 2014-372-T, <http://dms.psc.sc.gov/pdf/orders/5A23B2F8-155D-141F-23C07EAA18BA1E64.pdf>. (ordering Uber to cease and desist operations in South Carolina until a regulatory determination has been made); Katherine Driessen, Ride-Share Operators Gain Access to Houston Airports; City Becomes Third in U.S. to Adopt Rules for App-Based Services, *Houston Chronicle*, Nov. 13, 2014, at A1.

Airbnb became entangled in disputes about the legality of its business operations in New York City, Paris, and other cities.⁶

Sharing economy businesses typically fought these regulatory measures by arguing that they were not hotels, rental agencies, or taxicab companies.⁷ Rather, they claimed they were only the providers of software that facilitates online markets.⁸ They also developed their own internal measures for assuring customers about safety and product efficacy, many of which increased the transparency of their measures as a means of transferring the burden of safety assurance to their customers.⁹ For example, Uber claimed to screen criminal and driving records and to provide a transparent system for reviewing driver profiles and the anonymous ratings of other users.¹⁰ In 2019, in partnership with the National Sexual Violence Resource Center, the company released its own safety report detailing the number of accidents and assaults that occurred during Uber rides.¹¹ Airbnb went considerably further by providing hosts with a “host guarantee.”¹² In 2019, after five people were killed at an Airbnb property, the company pledged to verify all its listings and provide a hotline for neighborhood complaints.¹³

More recently, regulators at especially the municipal level in some cities have begun to think about safety and consumer protection from a broader perspective,

⁶ Tim Logan, Boston’s Tough Rules Governing Airbnb Rentals are Finally in Full Effect, *Boston Globe*, Nov. 28, 2019, www.bostonglobe.com/business/2019/11/28/boston-tough-rules-governing-airbnb-rentals-are-finally-full-effect/qGyipfGarsWFPfcMmnrvyM/story.html; Sam Schechner and Matthias Verbergt, Paris Confronts Airbnb’s Rapid Growth, *Wall Street Journal*, June 25, 2015, www.wsj.com/articles/airbnb-still-has-stoops-to-conquer-paris-takes-to-airbnb-like-a-croissant-1434999730?tesla=y; David Streitfeld, Airbnb Listings Mostly Illegal, New York State Contends, *New York Times*, Oct. 16, 2014, at A1; John Lichfield, Beware Airbnb If You’re A Tenant Looking For A Quick Euro, *Independent (World)*, May 23, 2014, at p. 32.

⁷ These arguments have regularly arisen in the context of disputes with workers over employment status. See, for example, Noam Scheiber, Uber and Lyft Drivers Win Ruling on Unemployment Benefits, *New York Times*, July 28, 2020, www.nytimes.com/2020/07/28/business/economy/lyft-uber-drivers-unemployment.html; Tyler Sonnemaker, Court Rules Uber and Lyft Must Face Worker-Misclassification Lawsuit from Massachusetts’ Attorney General, *Business Insider*, Mar. 25, 2021, www.businessinsider.com/uber-lyft-massachusetts-attorney-general-misclassification-lawsuit-proceed-court-2021-3.

⁸ Lori Aratani, A ‘Balancing Act’ for Ride-Sharing Service, *Washington Post*, May 12, 2014 at B01 (Uber and Lyft argue “that they are not transportation companies but rather go-betweeners that link drivers who have vehicles with customers who need a ride.”); Brief for Defendants-Appellees, *Anoush Cab, Inc. v. Uber Technologies, Inc.*, No. 19-2001 (1st Cir. Aug. 25, 2020).

⁹ See, for example, Michael Liedtke, “Sharing Safety Program”: Uber, Lyft Team Up on Database to Expose Abusive Drivers, *USA Today*, Mar. 11, 2021, www.usatoday.com/story/travel/news/2021/03/11/uber-lyft-team-up-database-expose-abusive-drivers/4654902001/.

¹⁰ Uber Background Checks, Uber, <http://blog.uber.com/driverscreening> (visited Aug. 11, 2014).

¹¹ Liedtke, “Sharing Safety Program”; US Safety Report 2017–2018, 50, 57, 58 (Uber Technologies, Inc., 2019).

¹² Ron Lieber, A Liability Risk for Airbnb Hosts, *New York Times*, Dec. 5, 2014, www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html.

¹³ Carson, Airbnb is Fixing its Safety Problems; David Yaffe-Bellany, Airbnb to Verify All Listings, C.E.O. Chesky Says, *New York Times*, Nov. 6, 2019.

including traffic safety and congestion, neighborhood safety and preservation, and environmental protection.¹⁴ Some cities have even begun responding to concerns about loss of permanent housing and neighborhood gentrification.¹⁵ While most, and arguably all, consumer protection regulation is justified on the grounds that it forces the internalization of negative externalities,¹⁶ these more recent regulatory moves seem to recognize the breadth of the negative externalities that have proliferated in some sharing economy sectors. Though reactive, such regulation implicitly acknowledges the enormous extent to which network effects drive the development of the sharing economy. However, the piecemeal manifestation of these regulatory acknowledgements does not really comprehend the systemic relevance of both positive and negative externalities in the sharing economy.

7.2.2 Discrimination

A significant interdisciplinary literature has captured the proliferation of racial and other forms of discrimination across sharing economy industries. One well-known analysis, by Nancy Leong and Aaron Belzer, described the differing experiences of White and Black Uber customers, wherein the former were able to obtain Uber rides quickly and easily, while the latter had more difficulty obtaining Uber rides. Leong and Belzer traced the differing experiences partly to discrimination by Uber drivers, and particularly the rating system pursuant to which the drivers gave lower ratings to Black passengers.¹⁷ But multiple studies have also traced discrimination to the very algorithms used by Uber.¹⁸ In the United States, these algorithms incorporate geographical and other data that reflect residential racial segregation resulting from redlining and other hallmarks of structural racism.

The proprietors of platform technologies argue that the product features that have contributed most straightforwardly to discrimination on their platforms have other claimed benefits. For example, Uber's ratings system is intended to increase transparency for both drivers and passengers, which Uber claims makes its ride-sharing service safer for all involved and "includes steps to mitigate racial bias."¹⁹

¹⁴ See Chapter 8 (Behroozi) and Chapter 9 (Katsoupolos et al.).

¹⁵ See Chapter 10 (O'Brien et al.). See also Josh Bivens, *The Economic Costs and Benefits of Airbnb*, The Economic Policy Institute, 2019.

¹⁶ Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War With Each Other*, 121 *Yale Law Journal*, 2216 (2012).

¹⁷ Nancy Leong and Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 *Georgetown Law Journal*, 1271 (2017).

¹⁸ Donna Lu, *Uber and Lyft Pricing Algorithms Charge More in Non-White Areas*, *New Scientist*, June 18, 2020.

¹⁹ *Details on Safety*, *Uber News*, <http://newsroom.uber.com/2015/07/details-on-safety> (accessed April 22, 2021); Josh Eidelson, *Uber Sued for Using 'Biased' Rider Ratings to Fire Drivers*, *Bloomberg*, Oct. 26, 2020, www.bloomberg.com/news/articles/2020-10-26/uber-sued-for-using-biased-customer-ratings-to-fire-drivers.

Airbnb and other home-sharing services make similar claims about their ratings system.²⁰

With some important recent exceptions, the first generation of regulations has barely addressed these forms of discrimination. While algorithmic bias is the subject of intense scholarly attention by legal experts, it has not translated into many lawsuits or much law reform.²¹ Moreover, to the extent they have resulted in legal redress, successful claims have relied largely on existing laws that are not well-tailored to addressing algorithmic bias or other forms of discrimination that result from the industry norms of platform operation. Thus, for example, current regulation has failed to address the lack of transparency in the development of algorithms or the extraordinary extent to which intellectual property rights shield discriminatory behavior.²²

7.2.3 Workers Rights

Some sharing economy firms, especially Uber, have also come under attack for their treatment of the workers who provide services through their platforms. Several lawsuits have claimed that these individuals are not really independent contractors or businesses that contract with companies such as Uber; rather, they are employees.²³ This distinction has significant consequences, because some states (such as the Commonwealth of Massachusetts) provide extensive protections to employees, including requiring employers to provide unemployment and health benefits.²⁴ Lawsuits in Massachusetts and California also defeated Uber's restrictions on the

²⁰ Airbnb (n.d.), How Do Reviews Work?, www.airbnb.com/help/article/13 (accessed April 17, 2021); Emily Badger, Racial Bias in Everything: Airbnb Edition, *Washington Post*, Dec. 12, 2015.

²¹ See Leong and Belzer, The New Public Accommodations; Anne-Marie Hakstian et. al., The More Things Change, the More They Stay the Same: Online Platforms and Consumer Equality, 48 *Pepperdine Law Review*, 59 (2021); Allyson E. Gold, Redliking: When Redlining Goes Online, 62 *William & Mary Law Review*, 1841 (2021); Sonia K. Katyal, Private Accountability in the Age of Artificial Intelligence, 66 *UCLA Law Review*, 54, 56 (2019); Anupam Chander, The Racist Algorithm?, 115 *Michigan Law Review*, 1023 (2017); Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*, Harvard University Press, 2015.

²² Leong & Belzer, The New Public Accommodations; Rashmi Dyal-Chand, Autocorrecting For Whiteness, 101 *Boston University Law Review*, 191 (2021).

²³ *Healey v. Uber Techs., Inc.*, 2021 Mass. Super. LEXIS 28, 2021 WL 1222199; Kate Conger and Noam Scheiber, California's Contractor Law Stirs Confusion Beyond the Gig Economy, *New York Times*, Sept. 11, 2019, www.nytimes.com/2019/09/11/business/economy/uber-california-bill.html?utm_source=Triggermail&utm_medium=email&utm_campaign=Post%20Blas%20bii-transportation-and-logistics:%20Uber%20faces%20more%20regulatory%20woes%20%7C%20Trucking%20telematics%20looks%20poised%20for%20takeoff%20%7C%20Amazon%20brings%20offline%20Alexa%20functionalities%20to%20the%20car&utm_term=BII%20List%20T%26L%20ALL; Michael B. Farrell, Suit Claims Uber Exploits Drivers, *Boston Globe*, June 27, 2014, at B7; *Uber Technologies, Inc. v. Berwick*, Case No. 11-46739 (CA Labor Commissioner, June 3, 2015); *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 U.S. Dist. LEXIS 171813 (N.D. Cal. Dec. 5, 2013).

²⁴ In Massachusetts, these protections are buttressed by a very strict statute enacted to classify many of the people working as "independent contractors" instead as employees. See M.G.L. c. 149, s. 148B.

ability of drivers to request and retain tips.²⁵ These regulatory moves are another example of the growing recognition that negative externalities are also proliferating on the supply side of the sharing economy.

Of course, these companies dispute such claims, arguing instead that they have a much more limited role in these networks. However, the tide has begun to turn against them, opening a path for at least some sharing economy workers to have the benefits of true employment, including perhaps even unionization. The first generation of sharing economy regulations has left a significant open question, though, about the appropriate legal perspective on workers in platforms that are more genuinely peer-to-peer in their operation.²⁶

Recent scholarship has also begun to capture the racial inequalities among workers that are perpetuated by such platforms. In her analysis of a recent survey of platform workers, Daria Roithmayr noted: “Because workers of color have fewer options than their white counterparts, they are less free to refuse precarious work, and are more likely to form the core component of motivated workers on which the on-demand economy relies.”²⁷ Thus far, this form of discrimination on platforms has not resulted in much regulatory intervention.

7.2.4 Anticompetitive Behavior

A prominent form of first-generation regulatory interventions was aimed at preventing perceived anticompetitive behavior by businesses involved in the sharing economy. These claims were generally raised by traditional businesses, such as hotel or taxicab companies, that competed with sharing networks. Such businesses argued that by avoiding the costs associated with obtaining permits and complying with other regulations, sharing businesses were able to operate at lower costs.²⁸ Taxicab companies in Maryland even claimed antitrust violations on the grounds that Uber engages in price-fixing.²⁹

²⁵ Uber Drivers: Don’t Sign Away Your Rights, <http://uberlawsuit.com/> (visited Jan. 23, 2015); Lauren Weber and Rachel Emma Silverman, “We Are Not Robots” – Is Technology Liberating or Squeezing The New Class of Freelance Labor?, *Wall Street Journal*, Jan. 28, 2015, at B1 (describing a number of lawsuits filed by workers in the sharing economy to claim more benefits).

²⁶ See Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 *Tulane Law Review*, 241 (2015).

²⁷ Daria Roithmayr, *Racism is at the Heart of the Platform Economy*, *Law & Political Economy Project*, <https://lpeproject.org/blog/racial-capitalism-redux-how-race-segments-the-new-labor-markets/> (accessed April 17, 2021).

²⁸ *Ill. Transp. Trade Assn v. City of Chi.*, 839 F.3d 594, 2016 U.S. App. LEXIS 18285; Zeninjor Enwemeka, *Boston Taxi Group Files Federal Lawsuit Over State’s New Ride-Hailing Law*, *WBUR*, Sept. 23, 2016, www.wbur.org/bostonmix/2016/09/23/boston-taxi-group-sues-massachusetts; Lori Aratani, *Taxis Paralyze Downtown Traffic to Protest Ride Sharing Services*, *Washington Post* (Metro), June 26, 2014, at B5; *Boom and Backlash: The Sharing Economy*, *Economist*, Apr. 26, 2014, at 61.

²⁹ Parveer S. Ghuman, *Analysis of Competition Cases Against Uber Across the Globe*, CUTS International, 2017; Aratani, *Taxis Paralyze Downtown Traffic*.

The regulatory responses to these claims of anticompetitive behavior generally involved revising state or local anticompetition and permitting laws to apply to sharing networks. For example, Chicago considered an ordinance imposing permitting requirements on car-sharing services.³⁰ Similarly, New York City radically limited the extent to which people could work as hosts through Airbnb. Both in their narrower focus on anticompetitive behavior and in their implicit recognition of the effects on neighbors of Airbnb hosts and other third parties, such regulations are yet another example of first-generation regulatory efforts to address negative externalities.

7.2.5 Taxation

Finally, and not surprisingly, regulatory authorities have puzzled over the question of how to tax the first generation of sharing economy businesses. One pair of prominent scholars described Congress and the Internal Revenue Service as cycling between a “Proactive Approach,” whereby they “change existing regulations to encourage the growth of new industries,” and a “Neutrality Approach” in which they “cut back on regulatory benefits all around.”³¹ Meanwhile another pair of prominent scholars concluded that current tax law largely is capable of “tax[ing] sharing” and that the application of tax doctrine to sharing businesses is “not particularly novel.”³² They did, however, caution that some sharing businesses have behaved opportunistically in exploiting regulatory ambiguities in the tax arena.³³ Indeed, this observation seems to be shared by many tax law experts. More generally, these and other commentators have noted that, as is the case with other first-generation regulations, much of the regulation in this arena is reactive, piecemeal, and less than ideal.

7.3 GOVERNING PRINCIPLES FOR THE NEXT GENERATION OF REGULATION

The next generation of regulations must transition from reactive regulations that seek a rudimentary level of stability in the face of the upheaval of industry norms to proactive regulations that recognize the longer-term goals, expectations, and strategies of all relevant constituencies in sharing economy industries.

³⁰ Jon Hilkevitch, *Uberx Caught Illegally Sharing; Company Directed Drivers to Airports, Violating Ordinance*, *Chicago Tribune*, May 7, 2014, at C1; Kip Hill, *Lyft, Uber Drivers Will Have to Pay New Fees, Follow New Rules under Spokane City Council Proposal*, *Spokesman-Review*, Dec. 10, 2018, www.spokesman.com/stories/2018/dec/10/lyft-uber-drivers-will-have-to-pay-new-fees-follow/; H.R. 1093 Relating To Transportation Network Companies, 30th Leg., 2019 (Hi. 2019).

³¹ Jordan M. Barry and Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 *University of Chicago Law Review*, *Dialogue* 69, 82–83 (2015).

³² Shu-Yi Oei and Diane M. Ring, *Can Sharing be Taxed?*, 93 *Washington University Law Review*, 989, 994 (2016).

³³ *Ibid.*

Perhaps the first and most basic regulatory transition that is required is a transition from substantive regulatory silos to regulation that directly addresses core principles or values in the sharing economy. This is not to say that the trend toward more robust treatment of platform workers as employees, for example, is wrong or ineffective. But it is to argue that current regulatory systems, and the assumptions on which they have been built, are not the best basis for approaching the next generation of regulation. In making this argument, I take issue with some prominent legal commentators who claim that the sharing economy is not really that new or different as a market phenomenon,³⁴ at least to the extent that such claims lead to the conclusion that the same regulatory approaches we have used with other seemingly disruptive technologies will suffice for regulating the sharing economy. Instead, I am more convinced by Pollman's and Barry's observation that platform proprietors are very effectively taking advantage of regulatory gaps and conflicts to innovate their business models in new directions to avoid regulations that they disfavor.³⁵ This sophisticated (and Legal Realist) understanding of the regulatory landscape has allowed some sharing economy businesses to attenuate traditional legal categories to the near breaking point, as the increasingly frequent queries about the future of work in the "gig economy" reveal.³⁶

Thus, policymakers would be better served by regulating on the basis of the core principles that they seek to promote in the next generation of sharing economy businesses. Returning to the example of platform workers, rather than trying to analyze whether Uber drivers or Airbnb hosts are employees or independent contractors according to the laws of any given jurisdiction, it will be more efficacious for policymakers to regulate in recognition of the actual roles such platforms play as a source of work and income. This in turn requires recognition of who exactly participates as workers in various sharing industries.

In this section, I review four core principles that have emerged essentially as consensus principles that ought to govern sharing economy practices. These are

³⁴ Orly Lobel, *The Gig Economy and the Future of Employment and Labor Law*, 51 *University of San Francisco Law Review*, 51, 56 (2017) (asserting that the sharing economy is an expansion on previously existing contingent workforces); Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* 37 *Comparative Labor Law & Policy Journal*, 471, 480–481 (2016) (relating modern gig-workers to a broader trend of casualization and demutualization in the workforce that predated the modern platform-based sharing economy); Derek Miller, *The Sharing Economy and How it is Changing Industries*, *The Balance Small Business* (Jun. 25, 2019), www.thebalancesmb.com/the-sharing-economy-and-how-it-changes-industries-4172234#:~:text=The%20sharing%20economy%20is%20an%20economic%20principle%20that,share%20value%20from%20an%20under-utilized%20skill%20or%20asset.

³⁵ Elizabeth Pollman and Jordan M. Barry, *Regulatory Entrepreneurship*, 90 *Southern California Law Review*, 383, 392, 398–399 (2017).

³⁶ Robert Reich, *Why the Sharing Economy is Harming Workers – And What Must be Done*, RobertReich.Org, <https://robertreich.org/search/sharing+economy>, Nov. 27, 2015; Juliet Schor, *Debating the Sharing Economy*, *Great Transition Initiative*, Oct. 2014; Charlotte S. Alexander and Elizabeth Tippet, *The Hacking of Employment Law*, 82 *Missouri Law Review*, 973, 1000–1001 (2017).

principles that scholars across disciplines have argued should govern continued development in the industry. Such scholars have argued, for example, that sharing economy businesses must optimize for more than profit.³⁷ They must optimize for values such as equity.³⁸ I argue here that these principles also should anchor the next generation of sharing economy *regulation*. The four principles on which I focus here are by no means a closed list. To the contrary, this list ought to be developed, expanded, and edited as the sharing economy continues to mature.

However, this list does serve several crucial functions for policymaking moving forward. First, it provides a model for policymaking that is a compelling alternative to the piecemeal, reactive, and often ill-fitting regulatory approaches that have thus far dominated the landscape. Second, it serves as a powerful basis for regulation of the sharing economy *at this point* in time, capturing a phenomenon that has established itself as a ubiquitous market force that significantly disrupted prior market practices and has yet to assume its ultimate (and perhaps more stable) form. Third, it forcefully reminds us that regulation that “leaves to the market” the opportunity to optimize just for profit *is in fact regulation*. Said another way, the perceived absence of regulation is a form of regulation that tips the balance of legal power and privilege precipitously in favor of platform proprietors. By providing regulatory support for optimizing for values other than profit, policymakers can and must acknowledge the reality that they have already been regulating the sharing economy. Moreover, and crucially, lawmakers can be more proactive in regulating the profit-making and economic behavior of sharing economy businesses in such a way as to enable greater innovation and ultimately competition among businesses in any given sector. In short, lawmakers must take active responsibility for regulating forward.

7.3.1 *Principle 1: The Sharing Economy as Infrastructure*

Our experience with the pandemic has starkly revealed the extent to which some platforms, including some sharing economy businesses, have begun to serve as essential infrastructure for many individuals, especially those in urban locations. For example, many of us have been utterly dependent in our work lives on platforms such as Zoom and Microsoft Teams, with all the attendant dependencies

³⁷ Alexiomar D. Rodríguez-López, Trust Me, I Share Your Values, 10 *University of Puerto Rico Business Law Journal*, 44, 50–51 (2019) (arguing that the sharing economy could address economic problems in Puerto Rico, but only if implemented with a pool of shared values between the business and the clients in mind). Nestor M. Davidson and John J. Infranca, The Sharing Economy as an Urban Phenomenon, 34 *Yale Law & Policy Review*, 215, 268–269 (2016).

³⁸ Orly Lobel, The Law of the Platform, 101 *Minnesota Law Review*, 87, 163 (2016) (stating that equity issues should be addressed as platform companies continue to expand). See also Vanessa Katz, Regulating the Sharing Economy, 30 *Berkeley Technology Law Journal*, 1067–1112 (2015); Abbey Stemler, The Myth of the Sharing Economy and Its Implications for Regulating Innovation, 67 *Emory Law Journal*, 197, 223n (2017).

such as handing over our private lives for data collection by these platforms during the many hours in which we use these platforms for meetings.³⁹ Such dependencies extend to other core sharing economy sectors. Many of us have come to rely even more extensively on cloud technology to store both business and personal materials. Many of us have relied on ridesharing services both to get ourselves to workplaces, medical appointments, and grocery stores (during times when subways and busses have operated on much more limited capacity) and to provide additional income. Many of us have used sharing economy platforms to order products and services that are essential to our daily living, thereby also relying on last-mile delivery systems and other attendant services. And the list goes on.

These examples reveal that sharing economy businesses have directly replaced those things that we explicitly label as infrastructure, including modes of communication, transportation, storage, and essential equipment. Equally basically, such businesses have replaced – and displaced – those things that our federal, state, and local governments have built as public works. This basic reality dictates qualitatively different regulation. It is a given that policymakers develop fundamentally different rules for overseeing the operation, management, and maintenance of infrastructure.⁴⁰ Even when such infrastructure is privately owned, policymakers do not – and cannot afford to – leave the owners and managers of such infrastructure to their own devices for maximizing profit and efficiency. The stakeholders of such businesses include more constituencies than just their shareholders. The role of regulation is to

³⁹ See, for example., Jane Wakefield, Zoom Boss Apologises for Security Issues and Promises Fixes, *BBC News*, April 2, 2020, www.bbc.com/news/technology-52133349 (reporting on Zoom's response to widely criticized security breaches at the beginning of the coronavirus pandemic); Kate O'Flaherty, Zoom's Security Nightmare Just Got Worse: But Here's the Reality, *Forbes*, June 5, 2020, www.forbes.com/sites/kateoflahertyuk/2020/06/05/zooms-security-nightmare-just-got-worse-but-heres-the-reality/?sh=34b456592131 (reporting on the anger users expressed upon learning that end-to-end encryption was for paid users only). See also Celine Castronuovo, EU Privacy Regulator Proposes \$425M Fine Against Amazon, *The Hill*, June 10, 2021 <https://thehill.com/policy/technology/557863-eu-privacy-regulator-proposes-425m-fine-against-amazon> (reporting on charges against Amazon for alleged privacy data invasions that violate EU law); Barbara Ortutay, Record Facebook Fine Won't End Scrutiny of the Company, *AP News*, June 24, 2019, <https://apnews.com/article/technology-business-facebook-privacy-scandal--ap-top-news-ca-state-wire-47f5f7fd9e0941a880b929af081a37a0>; Jordan Valinsky, 4 Companies Affected by Security Breaches in June, *CNN Business*, June 26, 2021, www.cnn.com/2021/06/26/tech/cyberattacks-security-breaches-june/index.html (reporting on data privacy breaches from platforms including Electronic Arts and Peloton).

⁴⁰ Ganesh Sitaraman, Morgan Ricks, and Christopher Serkin, Regulation and the Geography of Inequality, 70 *Duke Law Journal*, 1763, 1830–1832 (2021) (noting that transportation and communications resources are foundational to economic growth and development, and analogizing high speed internet to the modern postal service as necessary to bring infrastructural equity to marginalized communities); Sofia Ranchordás, Innovation Experimentalism in the Age of the Sharing Economy, 19 *Lewis & Clark Law Review*, 871, 889 (2015) (relating the regulation of the modern gig-economy to earlier efforts to regulate infrastructure-based activities such as telecommunications and energy). See also, Lobel, *The Law of the Platform*, at 163 (raising questions of equity in whether platform companies serve poor and marginalized communities and arguing that platform companies should include such considerations as they expand); Stemler, *The Myth of the Sharing Economy*, at 239 (“For performance standards to be effective, they must be monitored”).

ensure that the public has the right to access and use such infrastructure, regardless of whether it is publicly or privately owned.⁴¹

Perhaps more than anything, this qualitative difference boils down to a recognition that the line between “public” and “private” in these sharing economy sectors is illusory in meaningful respects. Across a range of legal fields, the illusoriness of the public/private distinction has been the subject of more than a decade of robust legal scholarship, and much of this critique is directly applicable to the sharing economy.⁴² Thus, for example, the argument by a platform proprietor that it is a private entity with the right to treat its workers as independent contractors, ought to be of little consequence in this arena. It may be an apt argument that Uber should be forced to internalize the negative externalities it produces by not treating its drivers as employees. But it is an equally realistic argument that Uber’s operations should be regulated in ways that other forms of infrastructure are regulated because it is now providing an essential service. Thus, just as regulations protect subway drivers and electrical service technicians by prioritizing their ability to work safely and for fair wages,⁴³ so too must regulations protect sharing economy workers so that they

⁴¹ For an insightful treatment of this subject, see Nik Guggenberger, *The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myths*, *Yale Journal of Law & Technology*, 2021. See also, Frank Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, in *The Next Digital Decade*, 401–418 (Berin Szoka and Adam Markus, eds., 2010, Washington, DC: Tech Freedom).

⁴² See, for example, Brian Jason Fleming, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 *Vanderbilt Law Review*, 571, 573–574 (2006) (noting that homeowner associations take up an ambiguous legal space as private governing bodies whose jurisdiction overlaps with federal and state governing bodies); Gillian E. Metzger, *Privatization as Delegation*, 103 *Columbia Law Review*, 1367, 1371–1373 (2003) (discussing the blurred line between the public and private sectors in constitutional law); Michael P. Vandenberg, *Private Environmental Governance*, 99 *Cornell Law Review*, 129, 171–172 (2013) (discussing the emergence of private–public environmental governance); Matthew A. Shapiro, *Delegating Procedure*, 118 *Columbia Law Review*, 983, 998 (2018) (arguing that three significant aspects of civil litigation have been delegated by the federal government to private parties); Benjamin Zhu, *A Traditional Tort for a Modern Threat: Applying Intrusion Upon Seclusion to Dataveillance Observations*, 89 *New York University Law Review*, 2381, 2389 (2014) (claiming the digitization of public documents has given access and intrusive power to private data collection agencies); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minnesota Law Review*, 342, 345 (2004) (discussing the emerging governance model of transferring governing responsibilities to states, localities, private businesses and nonprofit organizations); Robert C. Hockett and Saule T. Omarova, *Public Actors in Private Markets: Toward a Developmental Finance State*, 93 *Washington University Law Review*, 103, 122 (2015) (arguing public and private sectors are “inseparable and deeply interconnected parts of the nation’s economic organism”). See also, Tabrez Y. Ebrahim, *National Cybersecurity Innovation*, 123 *West Virginia Law Review*, 483, 494–495 (2020) (noting that the private and public sectors are interconnected and co-mingled, thus requiring similar treatment in cybersecurity regulation).

⁴³ Ross Barkan, *New York’s Transit Workers Keep Getting Sick*, *The Nation*, April 9, 2020, www.thenation.com/article/politics/mta-transit-driver-covid/ (discussing the high rate of COVID-19 infection among public transit workers in New York and efforts to protect essential workers in public transit); Rachel Bugaris, *Why Electrical Safety Should be a Priority in Post-COVID Planning*, *Occupational Health & Safety*, June 1, 2020, <https://ohsonline.com/articles/2020/06/01/>

can continue to provide essential services without work interruption. The value of recognizing such platforms as infrastructure is that it forcefully creates more space for a broader range of regulatory interventions.

What regulatory possibilities might flow, then, from the recognition of at least some (perhaps many) sharing economy sectors as infrastructure? Consider the possibilities that such a perspective could have created during the coronavirus crisis. There should have been little question that Uber drivers should have received the same treatment as other essential workers in receiving personal protective equipment and early vaccinations. On the consumer side of the equation, the safety of consumers of such services should also have received more sweeping consideration. Meanwhile, just as we have enhanced rights of privacy from governmental surveillance,⁴⁴ so too should companies like Zoom and Microsoft have been regulated more strictly to protect the privacy of their many users.

Indeed, the pandemic has clarified the real role and value of such businesses, and it has also provided a basis for gaining much-needed regulatory perspective. Out of the many regulatory possibilities, three seem particularly efficacious. First, and most basically, public monitoring of such sharing businesses is imperative. Just as the Consumer Financial Protection Bureau, the Consumer Product Safety Commission, and a robust list of other federal and state agencies monitor and oversee a very broad range of consumer products and services, so too must sharing economy businesses receive the same careful scrutiny for safety, accessibility, value, and basic fairness.⁴⁵ Indeed, while monitoring is appropriate across all sharing economy sectors, it should be more extensive for those that serve as infrastructure.

why-electrical-safety-should-be-a-priority-in-postcovid-planning.aspx (discussing the safety concerns and protections unique to electrical safety practices, including COVID-19 precautions); Heidi Groover, Masks, Driver Shields, Artificial Intelligence: How Do We Make Public Transit in the Puget Sound Area Safe Amid COVID-19, *Seattle Times*, Aug. 23, 2020, www.seattletimes.com/seattle-news/transportation/masks-driver-shields-artificial-intelligence-how-do-we-make-public-transit-in-the-puget-sound-amid-covid-19/ (reporting on high death rates of transit workers and on the rules in place to protect them from COVID-19); *What Have Platforms Done to Protect Workers During the Coronavirus (COVID 19) Crisis?*, Organisation for Economic Co-operation and Development, Sept. 21, 2020, www.oecd.org/coronavirus/policy-responses/what-have-platforms-done-to-protect-workers-during-the-coronavirus-covid-19-crisis-9dc7aa2/ (reporting on the unique risks to platform workers during the pandemic and protections governments have taken to protect workers from the financial and health risks of the virus).

⁴⁴ Deborah Pearlstein, Before Privacy, Power: The Structural Constitution and the Challenge of Mass Surveillance, 9 *Journal of National Security Law & Policy*, 159, 166–168 (2017) (outlining the history of bulk surveillance and the regulations that limited the ability of the National Security Agency to monitor certain data from US citizens); leuan Jolly, Data Protection in the United States: Overview, *Practical Law*, (law stated as of June 8, 2020), <https://1.next.westlaw.com/Document/I02064fbd1cb61e38578f7ccc38dcbee/View/FullText.html?contextData=%28sc.Default%29&transitionType=Default> (a question and answer guide to privacy regulation in the United States).

⁴⁵ See Dodd-Frank Act 12 U.S.C.A. § 5491 (2010) (establishing Consumer Financial Protection Bureau); Consumer Product Safety Act 15 U.S.C.A. § 1261 (1972) (current version at 15 U.S.C.A. § 1261 [2008]) (establishing the Consumer Product Safety Commission).

Second, those sharing businesses that provide services that directly replace public infrastructure could be regulated as public utilities. Such regulation could take the form of treating some platforms as “essential facilities,” a possibility that Nikolas Guggenberger discusses as efficacious as a means of limiting monopoly power. As Guggenberger notes, “[t]o define the suitable remedies and to open the digital economy for competition, we can learn from the past. In the early twentieth century, the railroads controlled critical infrastructure and excluded competitors from crucial markets.”⁴⁶

Finally, it ought to be a routine option for public agencies at the federal or state level to consider investing in both research and development as well as the operation of government services that compete with and service as a public alternative to private sharing economy businesses that provide critical infrastructure. We have seen exactly this form of investment proposed by local governments such as New York City and the Biden Administration with respect to broadband access.⁴⁷ This form of regulatory investment has also been proposed in the ridesharing context, as is discussed by Behroozi in Chapter 8. It provides an intriguing opportunity for rebalancing and democratizing technological access that could contribute enormously to closing the digital divide and preempting some of the injustices that have proliferated as a result of the extreme emphasis on profit that we have seen in first-generation sharing economy businesses.

7.3.2 Principle 2: Protect Resilience

The pandemic has also helped to clarify the importance of a second principle – resilience – that I argue should define the next generation of regulatory approaches to the sharing economy. Indeed, the value of resilience is closely related to the recognition that some sharing economy sectors have become part of the infrastructure of modern society. However, I have separated resilience out as an independent core principle that must be promoted through regulation across *all* sharing economy sectors, even those that do not provide goods or services that can be deemed as essential facilities or infrastructure. Such a regulatory prioritization acknowledges that even

⁴⁶ Nik Guggenberger, Essential Platform Monopolies: Open Up, Then Undo, *Promarket*, Dec. 7, 2020, <https://promarket.org/2020/12/07/essential-facilities-regulation-platform-monopolies-google-apple-facebook/>.

⁴⁷ Andrew Duhren, Kristina Peterson, and Sabrina Siddiqui, Biden, Senators Agree to Roughly \$1 Trillion Infrastructure Plan, *Wall Street Journal*, June 24, 2021, www.wsj.com/articles/biden-senators-agree-to-roughly-1-trillion-infrastructure-plan-11624553972?mod=searchresults_pos3&page=1 (noting that increased broadband access is a priority of legislators under the Biden administration); Stacie Sherman, Cuomo Signs New York Bill Requiring Low-Cost Broadband Access, *Bloomberg*, April 16, 2021, www.bloomberg.com/news/articles/2021-04-16/n-y-to-require-all-internet-providers-offer-low-cost-broadband (discussing new legislation in New York that mandates that Internet providers ensure access to high-speed internet services at an affordable rate for all New York families).

niche markets, contexts, and consumer clusters can rely heavily on platforms, and concomitantly, that these consumers deserve protection also.

Returning again to the nature of work during the pandemic, Zoom glitches literally could mean hours of missed work, which had to be somehow made up, excused, or explained. When workers that our society labeled “essential” started catching COVID-19 in clusters, policymakers were forced to quickly discern the protections that were required in order to keep them at work. They also had to develop regulations that forced employers to provide such protections on an ongoing basis. Because the essential nature of some sharing economy sectors was invisible to policymakers, however, they did not have the information, nor often the motivation, to protect workers in those sectors who often were just as essential. Meanwhile, on the consumer side of the picture, prices of essential consumer goods fluctuated wildly, at times triggering price gouging laws,⁴⁸ as a result of problems with supply chains and delivery systems.⁴⁹

These lived experiences of crisis-generated disruption have taught new lessons about the importance of regulation that motivates and supports the development of resilient systems. Part of the function of regulation is to ensure that such lessons are not short-lived. The pandemic, and the range of economic and social crises that have surrounded and preceded it, have revealed a great deal about the fragility of many of the systems on which we rely. Our job now is to plan forward in building resilience for the crises we currently face and that we inevitably will face, including climate-related, health, financial, racial, and other disruptions and crises. Resilience can serve as a touchstone that clarifies both the need for regulation and the regulatory choices that ought to be made. In the realm of sharing economy businesses, one commonality across many sectors may be that sharing businesses have the capacity to rapidly and efficiently allocate resources for a very broad range of consumer needs. This makes them enormously attractive and useful in times of crisis.⁵⁰ Without regulation,

⁴⁸ See COVID-19 Price Gouging Prevention Act, H.R. 6472, 116th Cong. (2d Sess. 2020) (a bill proposed in response to price gouging in the COVID-19 pandemic); see also KY. REV. STAT. ANN. § 367.374 (West 2021); 73 PA. STAT. ANN. § 232.2 (West 2007); N.Y. GEN. BUS. LAW § 396-r (McKinney 2020) (examples of statutes designed to protect against price gouging; Kentucky’s and New York’s laws appeared after the COVID-19 pandemic).

⁴⁹ Michael Levenson, Price Gouging Complaints Surge Amid Coronavirus Pandemic, *New York Times*, Mar. 27, 2020, www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html; Danielle Wiener-Bronner, Everything at the Grocery Store is Getting More Expensive, *CNN Business*, Aug. 5, 2020, www.cnn.com/2020/08/05/business/grocery-prices-rising/index.html (reporting on the disrupted supply chains due to the pandemic); Lisa Baertlein, COVID-19 Delivery Surge Strains FedEx Service, Opening Doors for UPS, *Reuters*, June 30, 2020.

⁵⁰ Kentaro Toyama, The Sharing Economy Will Survive the Pandemic. Is That a Good Thing?, *World Politics Review*, July 7, 2020, www.worldpoliticsreview.com/articles/28893/what-the-coronavirus-pandemic-means-for-the-sharing-economy-business-model; Josh Whitney, Rebuild ‘Sharing Economy’ Post-Virus to Prepare for Climate Change, *Bloomberg Law*, May 1, 2020, <https://news.bloombergtax.com/coronavirus/insight-rebuild-sharing-economy-post-virus-to-prepare-for-climate-change> (arguing that companies such as Uber’s and Airbnb’s services to healthcare workers in the early stages of the pandemic are examples of how the sharing economy can nimbly respond to future crises such as climate change).

however, such businesses may have little incentive to ensure that their allocation choices are equitable, accessible for all, and built to last.

Again, a rich array of regulatory options is available to optimize for resilience in the sharing economy. One important consideration is to ensure consistent consumer access by actively monitoring, and at times capping, prices. Uber's and Lyft's surge-pricing schemes taught important lessons about the predation that can easily occur when a business both monopolizes a market and is free to set its own prices.⁵¹ While price caps seem particularly relevant during times of crisis, as evidenced by price gouging laws which typically only apply during states of emergency,⁵² such caps should be in consideration more broadly as a means to ensure accessibility to all. Thus, for example, just as utility companies are constrained from "turning off" a service if individuals are unable to pay,⁵³ so too should at least some sharing sectors be subject to broader regulations on pricing. This is not to say that all forms of dynamic pricing are problematic. To the contrary, the reasonable use of such pricing can help to ensure temporally efficient supply during times when demand suddenly spikes. However, regulation has a role to play in establishing the parameters of what is reasonable in this context.

As I have discussed, a second area for regulation is in the realm of worker protections. While all workers deserve fair treatment and wages, the need to develop resilient systems within a range of sharing economy sectors should serve as an independent basis for considering regulations relating to workers and workplace conditions.

⁵¹ Fran Spielman, Alderman Accuses Uber, Lyft of 'Predatory Fares,' Wants Price Cap Imposed, *Chicago Sun-Times*, May 24, 2021, <https://chicago.suntimes.com/city-hall/2021/5/24/22451667/uber-lyft-ride-share-hailing-surge-pricing-cap-city-council-ordinance-alderman-reilly-taxi-cabs#:~:text=They%20would%20be%20free%20to%20use%20%E2%80%9Csurge%20pricing%E2%80%9D,and%20other%20ride-hailing%20companies%20would%20limit%20surge%20pricing>; Michael Sainato, Uber and Lyft Fares Surge as Pandemic Recedes – but Drivers Don't Get 'Piece of Pie,' *The Guardian*, June 21, 2021, www.theguardian.com/technology/2021/jun/21/uber-lyft-fares-surge-drivers-dont-get-piece-of-pie (reporting on the reemergence of surge pricing following the pandemic, but noting that drivers are not receiving the financial benefit of surge pricing and neither customers nor drivers have transparency about how surge prices are allocated).

⁵² See, for example, Price Gouging Prohibited, 73 PA. Stat. Ann. § 232.4 (prohibiting price gouging in Pennsylvania during states of emergencies); Price Protections During the COVID-19 Recovery Period, DEL. CODE ANN. tit. 6, § 2528 (2020) (prohibiting price gouging during the state of emergency precipitated by COVID-19). See also, 8NewsNow Staff, Surge Pricing Cap on Uber Stems from 2015 Nevada Law, 8News Now, Apr. 14, 2021, www.8newsnow.com/news/local-news/surge-pricing-cap-on-uber-stems-from-2015-nevada-law/ (reporting that Uber blamed Nevada's declaration of emergency for preventing the company from charging surge prices).

⁵³ See, for example, Prohibition on Discontinuance or Disconnection of Utility Service During the Winter Heating Season; Minimum Payments; Payment Plans; Exceptions, N.M. Stat. Ann. § 27-6-18.1 (protecting low-income New Mexican citizens from having essential utilities turned off during inclement weather and ensuring access to government energy assistance programs); Limitations on Termination of Utility Service, Wash. Rev. Code § 54.16.285 (prohibiting Washington utility companies from terminating heating services during the winter months).

Finally, and more broadly, it will be important for policymakers to consider regulating in favor of redundancy in sharing sectors. This broad objective still leaves open many regulatory possibilities. For example, regulators could choose to develop their own publicly operating platform, as described above, or they could choose to regulate in such a manner as to promote competition within a sharing economy sector. Though radically different, both possibilities could avoid the fragility that results from over-dependence on a single provider of an essential platform service.

7.3.3 Principle 3: Create Equity

While the coronavirus pandemic has highlighted the importance of regulating to optimize for resilience, another ongoing crisis has shone a harsh light on the need for regulations across sharing economy sectors to address the imperative of equity. The murder of George Floyd has activated a long-overdue and more sustained reckoning with systemic racism and violence than has occurred in some time. While the almost weekly police killings of Black individuals demonstrate the urgency of such a reckoning in the area of criminal justice practice and regulation, no sector is immune from scrutiny. Indeed, that is one of the most important lessons from the recent dialogue about the nature of structural racism in US society.

Moreover, compelling research has revealed the extent and depth of racism in the sharing economy. The combination of individual decision making, such as the choice of Airbnb hosts not to rent to Black guests, and machine learning, namely the rampant nature of algorithmic bias, has resulted in tremendous inequities. Uber drivers have consistently given lower ratings to Black passengers. Gig workers who rely predominantly on gig work are also predominantly people of color. Platform technologies are configured in such a way as to exhibit algorithmic bias by race and other traits.⁵⁴ Here again, the list is almost endless.

Such inequities are not just racial, but include bias about gender, sexuality, disability, and many other identities and traits.⁵⁵ They also include economic inequalities, which have resulted in predation by platform proprietors – of lower-income consumers and workers.⁵⁶ The need for lower-income workers to access ridesharing

⁵⁴ See, for example, Benjamin G. Edelman, Michael Luca, and Daniel Svirsky, Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment, 9 *American Economic Journal: Applied Economics* 1 (2017), https://dash.harvard.edu/bitstream/handle/1/33045458/edelman,luca,svirsky_racial-discrimination-in-the-sharing-economy.pdf?sequence=1. See also Stemler, *The Myth of the Sharing Economy*, 222–223.

⁵⁵ See, for example, Naomi Cahn, June Carbone, and Nancy Levit, Discrimination by Design?, 51 *Arizona State Law Journal*, 1 (2019) (discussing how the platform economy reflects and exacerbates gender disparities in the workforce by relegating women to low-paying gig jobs such as clutter organization rather than high-paying jobs such as moving furniture).

⁵⁶ Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile Police and Punish the Poor*, Macmillan, 2017, 111–115 (defining modern algorithms that monitor poor and minority

services to reach their workplaces during the pandemic serves as a compelling example here. When such services were priced too expensively to be accessible to essential workers, the resulting inequities cried out for regulatory intervention.⁵⁷ Indeed, both the speed and extent of the proliferation of bias across sharing industries has been breathtaking. Especially given the failures of first-generation sharing economy providers to self-regulate to eliminate discrimination, it is imperative for policymakers to intervene.⁵⁸

While the creation and preservation of equity in the sharing economy will require a range of regulatory interventions, the threshold intervention that seems inescapable in this arena is the involvement of government agencies in monitoring the development and operation of sharing platforms. Simply put, it can no longer be a right of sharing economy businesses to hide behind claims of trade secrecy or other intellectual property rights as a way of avoiding scrutiny by public agencies to determine the existence or extent of differential impact by platforms on their consumers and workers.⁵⁹

Relatedly, it will be imperative for policymakers to develop a range of interventions when bias is discovered. These can and should occur at the federal and state level and should be driven by both legislatures and courts. They should include expanded rights of action for consumers to claim racial and other forms of discrimination. But especially when promulgated by legislatures, such regulations should also adopt a broad view of the imperative of equity, moving beyond the definitions of and tests for discrimination and the categories of protected classes traditionally determined by civil rights laws. Instead, lawmakers should consult the extensive literature on the benefits of equitable access to technology to define broad rights of equitable access to sharing economy systems and platforms.⁶⁰

communities as the “digital poorhouse” and describing how as a result of these facially neutral algorithms, marginalized groups are subjected to practices such as predatory lending and reverse redlining).

⁵⁷ See Community Rides: UTA Essential Workers, *Utah Transit Authority News*, Aug. 18, 2020, <https://rideuta.com/news/2020/08/Community-Rides-UTA-Essential-Workers> (discussing how essential workers continued to use Utah’s public transportation services throughout the pandemic); Matt McFarland, Traffic Deaths Jump for Black Americans Who Couldn’t Afford to Stay Home During Covid, *CNN*, June 21, 2021, <https://edition.cnn.com/2021/06/20/economy/2020-traffic-deaths-black-americans/index.html> (discussing how nonwhite pedestrians have much higher fatality rates than white counterparts, and reporting on the sharp rise of pedestrian deaths during the pandemic, especially in minority and low-income communities); Christine Roher and Randy Mac, Rideshare Prices Soar: Here’s What’s Going On, *NBC Los Angeles*, May 19, 2021, www.nbclosangeles.com/investigations/rideshare-prices-increase-uber-lyft-pricing/2598627/.

⁵⁸ See Rashmi Dyal-Chand, Autocorrecting for Whiteness, 101 *Boston University Law Review*, 191, 250–251 (2021).

⁵⁹ *Ibid.*, 253–254. See also Pauline T. Kim, Data-Driven Discrimination at Work, 58 *William & Mary Law Review*, 857, 921 (2017) (explaining how algorithm creators often escape liability for bias by claiming their algorithms are proprietary information).

⁶⁰ Ifeoma Ajunwa, The Paradox of Automation as Anti-Bias Intervention, 41 *Cardozo Law Review*, 1671, 1733–1735 (2020); Stephanie Bornstein, Antidiscriminatory Algorithms, 70 *Alabama Law Review*, 519,

Finally, the troubling extent to which Black, Indigenous, and People of Color (BIPOC) and other historically marginalized individuals are represented among the ranks of sharing economy workers mandates far greater regulatory attention to ensure equity in the sharing economy workplace. Such attention will require regulators to break through some of the traditional legal structures, including labels such as “independent contractor,” and rhetorical slogans such as freedom of contract, that have been used (and attenuated) by platform proprietors to avoid regulation. Just as the pandemic-induced rules allowing for gig workers to file for unemployment recognized the true nature of sharing economy work from the perspective of those workers, so too will more permanent regulations have to recognize the precarity that has resulted from the current imbalance of power between platform proprietors and their workers.

7.3.4 *Principle 4: Develop Democracy*

The fourth core principle that I wish to discuss here builds on the prior three principles, abstracting a crucial basis for governance of the sharing economy going forward. While the prior three principles provide foundations for regulations that shape rights and remedies for categories of participants in the sharing economy as a means of correcting the imbalance of power and providing stability, this fourth principle addresses the instability and imbalance of power by providing a foundation for *governance* as a form of regulatory intervention. The imperative to develop democratic institutions for governance within the sharing economy recognizes that platforms today are a powerful means of organizing and controlling social interactions and behaviors. This powerful role dictates ongoing access by the public not only to the goods and services provided but also to the right to determine *how* such platforms operate.

Currently, the governance of sharing economy platforms is controlled almost exclusively by their proprietors, who set the rules for participation in such platforms. The resulting governance failures are numerous. Rather than enumerating examples, the best demonstration of such failures may be simply to contrast Wikipedia, which is arguably a governance success,⁶¹ with Uber, which has repeatedly disregarded the voices and participation of consumers, workers, and really anyone (other than its owners) who has a stake in the company’s operations.

534 (2018); Kim, Data-Driven Discrimination at Work, 919–921. See also Matthew Adam Bruckner, The Promise and Perils of Algorithmic Lenders’ Use of Big Data, 93 *Chicago-Kent Law Review*, 3, 18–19, 23, 26 (2018); Ifeoma Ajunwa, Algorithms at Work: Productivity Monitoring Applications and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law, 63 *St. Louis University Law Journal*, 21, 44–45, 50–51 (2018).

⁶¹ Yochai Benkler, Coase’s Penguin, or, Linux and the Nature of the Firm, 112 *Yale Law Journal*, 369 (2002).

Extreme examples such as this have generated a developing consensus that, like home-owners associations⁶² and bowling societies⁶³ a generation earlier, some platforms are developing into institutions that substitute for public institutions. It is not an exaggeration to describe such platforms as forums in which private forms of government have developed. As with predecessor institutions that have developed in this manner, one of the roles of regulation is to provide scaffolding that promotes their democratic growth and development.

Thus, policymakers should investigate the regulation of home-owners associations and other similar institutions as models for developing democracy in the sharing economy. They should also draw strategies from Wikipedia and other truly “open access” platforms. Indeed, one basic assumption that may well be both an appropriate starting point for such work, as well as a basis for further investigation, is that genuinely peer-to-peer sharing platforms are a home-grown, internally generated form of governance within the sharing economy.⁶⁴ Assuming such investigations bear out the validity of this assumption, then policymakers can and should investigate ways in which to incorporate some of the operational strategies of peer-to-peer platforms more broadly into sharing economy sectors, particularly those that serve as crucial infrastructure today.

7.4 CONCLUSION

While regulation of the sharing economy has thus far been a reactive process, exhibiting very little attention to priorities such as consistency and the development of

⁶² Paula A. Franzese and Steven Siegal, The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights, and Privatized Mini-Governments, 5 *Rutgers Journal of Law & Public Policy*, 729, 752–753, 767 (2008) (discussing the rise of home-owners associations as governing bodies).

⁶³ Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community*, Simon & Schuster, 2000 (discusses the rise and fall of social capital in the United States, explaining that once-common civic participation in clubs and other social activities complemented state and federal governance).

⁶⁴ Daniel H. Kahn, Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms, 11 *Columbia Science & Technology Law Review*, 176, 199–200 (2010) (discussing Wikipedia’s success in creating a code-of-conduct-based governance system); Molly Cohen and Arun Sundararajan, Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy, 82 *University of Chicago Law Review: Dialogue*, 116, 129 (2015) (arguing peer-to-peer platforms have tremendous grassroots potential, and that the platforms themselves should be included in developing needed regulatory solutions to governance issues in the sharing economy); Kasey C. Tuttle, Embracing the Sharing Economy: The Mutual Benefits of Working Together to Regulate Short-Term Rentals, 79 *University of Pittsburgh Law Review*, 803 (2018) (arguing local governments should work together with peer-to-peer property sharing platforms, such as Airbnb, and home owners themselves to develop regulations to govern property sharing); Bryant Cannon and Hanna Chung, A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies, 31 *Santa Clara High Technology Law Journal*, 23, 55, 91 (2015) (using the example of California’s Occupational Health and Safety Administration’s collaboration with management and existing labor unions to develop a co-regulation strategy that could be applied to sharing economy regulation models).

core regulatory principles, it need not be going forward. We now have a much greater level of knowledge about the sharing economy as well as interdisciplinary tools for regulating it. Moving forward, it is incumbent upon policymakers to use the regulatory tools available to them in support of the optimization of a more just sharing economy.