

## *Commentary*

# A Better Account of Constitutional Contractarianism Implies a Cooperative Form of Governance of the Sharing Economy: Critical Assessment of Hielscher, Everding, and Pies' (2022) "Ordo-responsibility in the Sharing Economy: A Social Contracts Perspective"

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This commentary aims to discuss the article "Ordo-responsibility in the Sharing Economy: A Social Contracts Perspective" from a sympathetic viewpoint toward its implementation of a constitutional contractarian approach to business ethics and due consideration of digital platforms as institutions resulting from a social contract. Nevertheless, the commentary also wants to criticize the article's interpretation of constitutional contractarian theory and institutional reconstruction of the phenomenon, and thus even the governance structure it is proposed for sharing platforms. The commentary presents another understanding of constitutional contractarianism, referring to both the *ex ante* agreement and the *ex post* compliance problem. Moreover, it reframes the history of the evolutionary process of institutions' selection within the domain of the sharing economy consistently with the idea that the Internet should be framed as a common pool resource. In this way, the commentary suggests an alternative governance structure for sharing platforms, that is, platform cooperatives.

**Key Words:** sharing economy, constitutional contractarianism, compliance problem, common pool resources, platform cooperatives

**T**he article "Ordo-responsibility in the Sharing Economy: A Social Contracts Perspective" by Stefan Hielscher, Sebastian Everding, and Ingo Pies (*Business*

*Ethics Quarterly*, July 2022, hereafter: Hielscher et al., 2022 or simply “the article”) is a significant contribution to the debate on how to regulate and govern sharing markets. We largely appreciate the constitutional/post-constitutional contracts perspective that it applies to business ethics. At the same time, however, we want to raise some concerns in this commentary about both the way the article understands this theory and how the theory is applied to the sharing economy. In addition, we will try to advance the discussion on this topic a step further by showing how a proper understanding of the constitutional/post-constitutional contracts theory and its development would entail a completely different governance structure for sharing platforms.

The commentary is organized as follows. In the first section, we briefly summarize the main points of Hielscher et al. (2022). In the second one, we outline the plan of the reply. In the third section, we argue why the unilateral solution to the bargaining problem presented in the article is normatively unjustifiable according to constitutional contractarian developments. In the fourth one, we also demonstrate the intrinsic instability of this solution because of how improbable it is that the stakeholders will fully comply with it. In the fifth section, we criticize the underlying idea that, before the birth of the sharing economy giants, the Internet could be considered as a *res nullius* open to private appropriation. Accordingly, in the sixth and final section, we discuss how the organizational structure of platform cooperatives would be more coherent with a more advanced contractarian theory and reconstruction of the sharing economy itself. The conclusion follows.

#### BRIEF SUMMARY OF HIELSCHER ET AL. (2022)

Hielscher et al. (2022) is built around the question of legitimacy and conditions for the legitimacy of private rule-setting, as observed in the sharing economy (see 2022: 411). Thus, before critically commenting on this idea, let us show how the article argues that the private rule-setting of platforms such as Uber and Lyft is indeed legitimate.

From the very beginning, sharing platforms are mainly described as private actors that regulate and govern “a web of markets in which individuals use various forms of compensation to transact the redistribution of and access to resources” (Hielscher et al., 2022: 404; Mair & Reischauer, 2017: 12). On the contrary, it is just marginally mentioned how they often substantially act as traditional companies hiring their workforce and imposing strict rules on their clientele (Frenken & Fuenfschilling, 2021). Consequently, for this “quasi-public” (Hielscher et al., 2022: 404) function of market-matching systems and regulators of the consequent transactions emerging, the article considers it licit to apply James Buchanan’s (1975) constitutional contractarianism legitimacy test. That is, since these institutions allow stakeholders to gain some kinds of Pareto improvements by creating new markets, it is considered implicit that they could emerge from a hypothetical agreement among them and should be hence assessed as legitimate rule-setters.

Therefore, by applying a Buchanan-like contractarian framework (see also Hielscher, Beckmann, & Pies, 2014), the article compares the welfare level enjoyed

by sharing stakeholders in the previous status quo (not a hypothetical state of nature, but the institutional setting existing before the advent of commercial sharing platforms) and the level attained after certain rules established by sharing platforms are agreed upon. In this way, it suggests an equation between these rules and the constitutional and post-constitutional rules that in Buchanan's constitutional political economy characterize a legitimate state (see Hielscher et al., 2022: 409). This may be seen as a reckless innovation in applying the constitutional contract apparatus. To be sure, we have instead nothing to object to an extension of the method from state institutions to the domain of corporate law.<sup>1</sup>

However, the article almost takes for granted that sharing platforms' rule-setting legitimacy is satisfactorily achieved with any Pareto improvement that stakeholders may gain because of the new regulation. Hence, it can quickly move from the analysis of the conditions for legitimacy to programmatic injunctions about how to improve this feature (see 2022: 418). Namely, the article claims that, if sharing platforms respect some minimum conditions (see 2022: 414), that is, guaranteeing exit and voice options to sharing partners (Hirschman, 1970) while staying within the broader constitutional limits imposed by the basic structure of society (limits that can be then strengthened through additional "post-constitutional self-commitments"), they have the right to take upon themselves novel "ordo-responsibilities" (see also Pies, Hielscher, & Beckmann, 2009) and exercise coercive power over other users. Therefore, they can unilaterally change the "rules of the game" for sharing markets, establish a "platform constitution" and, by implementing "constitutional and post-constitutional commitment services" such as Uber's "deactivation policy" or Uber's leasing program, further improve the game payoffs for all the other stakeholders (Hielscher et al., 2022: 415–18).

The reason for this normative position is that the article does not interpret the institutional setting characterizing the beginnings of the sharing economy, before the birth of private platforms, as a system of emerging social norms in an equilibrium selection process and open to different possible equilibrium outcomes and juridical concretizations. On the contrary, it argues that that time was a sort of Hobbesian "state of nature" suffering from an "institutional deficit" (2022: 411), that is, a situation in which the lacking distribution of property rights over the Internet and the high transaction costs of finding reliable sharing partners, building reciprocal trust, and managing potential risks determined violent conflicts, unsecured sharing rights, and, hence, inefficient utilization of resources. Consequently, without the effort of private platforms to bridge that gap through constitutional and post-constitutional rules (see 2022: 412), it would have been impossible to guarantee mutual betterment to all affected stakeholders. All of them would have been losing

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<sup>1</sup> There is a discussion in the business ethics literature about the opportunity of applying social contract theories and, especially, Rawlsian-like theories to corporate governance. In particular, the discussion is about the legitimacy of including corporate institutions in the basic structure (see Arnold, 2013; Berkey, 2021; Blanc, 2016; Blanc & Al-Amoudi, 2013; Fia & Sacconi, 2019; Heath, Moriarty, & Norman, 2010; Mansell, 2013; Néron, 2015; Norman, 2015; Singer, 2015).

the opportunities offered by new technologies. Thus, whatever Pareto improvement for sharing stakeholders makes platforms' regulation legitimate.

Accordingly, Hielscher et al. (2022) also adds a final claim that the newly established sharing constitutions must respect, answering its third fundamental question (see 2022: 406). Namely, to be considered completely legitimate, sharing platforms necessitate conforming to an external "enabling institutional environment" in society established by public and civil actors to assist them in implementing their private regulatory framework (2022: 422). This enabling environment is described as a sort of "meta-constitution for platform constitutions." However, in the article's perspective, the meta-constitution is not intended as the higher level of the constitutional contract that establishes the system of rights and responsibilities that sharing platforms must respect and substantiate at the post-constitutional level. It is just presented as a "second-order" regulatory framework aimed to enhance sharing stakeholders' exit and voice options by indirectly incentivizing sharing platforms to freely assume some extra commitments (2022: 425).

#### PLAN OF THE REPLY

In our reply, we present the alternative thesis that, even though some suggestions for improving sharing platforms' rule-setting capacity may be sound, Hielscher et al.'s (2022) starting point—namely, that the sharing constitution established by these platforms is legitimate—is based on four widely questionable points. In particular, i) as a matter of fact, its empirical reconstruction of the sharing economy is partial because it does not properly stress how digital platforms are, in many cases, "employers" that should be held responsible for the conditions of their "workers" and may become monopolistic actors damaging consumers and third parties in society through invasive surveillance practices and anti-competitive behavior. ii) As a matter of interpretation, its normative reconstruction of constitutional contractarianism is flawed since it does not take into account post-Buchanan developments in the theory—even regarding the application of the constitutional/post-constitutional approach to business ethics—that provided an answer to the question about the fair and rational terms of the agreement that would be achieved in a bargaining game on the constitutional/post-constitutional contracts. A problem that Buchanan left unsolved. Similarly, iii) the article does not provide any positive analysis of the proposed social contract stability and thus does not explain how it can gain actual compliance—another aspect that was tackled by some relevant contributions developing Buchanan's theory. Finally, iv) the description of the *status quo ante* of sharing markets, on which the entire argument is based, is not consistent with the evolution of the system of social norms that characterized peer-to-peer digital infrastructures before the advent of the sharing economy giants shifted the equilibrium selection path towards "neo-feudal" private appropriation of the Internet. Consequently, we conclude that the answer to the legitimacy question surrounding the unilateral rule-setting function of private platforms must be negative. However, the commentary also argues that the path conducive to the current situation of sharing markets was not the only possible one. Quite on the contrary, it shows that

the cooperative form of platform governance would offer a solution to all the weaknesses of Hielscher et al. (2022).

### THE BARGAINING PROBLEM: A UNILATERALLY DECIDED PARETO IMPROVEMENT DOES NOT AMOUNT TO A SOCIAL CONTRACT

As anticipated, empirically, one of the main problems of the article is that it primarily focuses on the idea that sharing platforms are “rule-makers” (Hielscher et al., 2022: 404) of new markets, which they create through the matching of providers and users of goods and services thanks to digital means. In this way, however, the article seems to make two important omissions. On the one hand, it seems to conceal what has been called the “gig economy” (Woodcock & Graham, 2020), that is, a highly significant sector within the sharing economy where hierarchical forms of business organizations and extractive practices—such as precarious working conditions, employment misclassification, and risk outsourcing (Bieber & Moggia, 2021; De Stefano, 2016)—are widely documented. In our opinion, the gig economy, an organizational model that de facto hides authority relations behind occasional market relations performed by supposed independent contractors, cannot be forgotten in a fair analysis of the phenomenon. This is especially true since platforms such as Uber and Lyft, always mentioned among gig platforms, are explicitly cited as examples.<sup>2</sup> On the other hand, the article underestimates the increasing perplexities about users’ data extraction, algorithm surveillance, and behavioral manipulation practices of sharing platforms (Johnson & Acemoglu, 2023; Marciano, Nicita, & Ramello, 2020; Martin, 2015; West, 2019; Zuboff, 2015, 2022) and the threat to fair competition connected with their monopolistic tendencies and their increasing privatization of essential infrastructures (Davis, 2022; Khan, 2017; Lindman, Mäkinen, & Kasanen, 2023).

In a fully consistent way, but from a normative viewpoint, although a constitutional contractarian approach may be the right normative framework for addressing the tasks of regulating and governing sharing markets, we contend that the specific version of the social contract portrayed in the article risks to justify abuses of authority and thus cannot be accepted in a proper social contract perspective. In particular, we disagree with the thesis that whatever welfare improvement for sharing stakeholders reached through “Pareto-superior rules” (Hielscher et al., 2022: 410) can legitimize the institution of a regulatory discipline for the sharing economy largely to the advantage of the party in the position of setting the rules. That is at least what would follow from the argument that a tiny (sometimes nearly null) utility improvement for most stakeholders is a sufficient condition for hypothetical

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<sup>2</sup> In the sharing economy literature, there is a debate about the dependent/independent contractors’ status of gig workers. Citing in a note the 2020 ballot initiative held in California (the so-called “Proposition 22”) when citizens voted for considering Uber and Lyft’s drivers as independent contractors (see Hielscher et al., 2022: 413), the article claims that the revealed preferences of sharing stakeholders point to their acceptance of the rule-setting function of sharing platforms (according to which they are independent contractors). However, there is evidence that both companies used their apps to influence clients’ and drivers’ preferences and push them to vote for the independent status of gig workers in the weeks before the consultation—for example, by threatening longer waiting times, higher prices, and job losses (Hawkins, 2020).

agreement among them, even though the supposed agreement would result from a unilateral decision and lead to a sharply unfair outcome distribution.

Indeed, resting on the assumption that whatever Pareto improvement is equivalent to a mutual and rational agreement, Hielscher et al. (2022) transforms what would be supposed to be a bargaining game—wherein the parties converge on some bargaining equilibrium—into a noncooperative ultimatum game. This assumption clashes with the obvious economic modeling of the constitutional contract according to post-Buchanan developments in social contract theory (Binmore, 1997, 2005; Brock, 1979; Gauthier, 1986; Hampton, 1986) that see it as a bargaining game by which the parties reach a workable agreement within a fairly symmetrical set of feasible payoff distributions (on this point, see also Nash, 1950). Coherently with these developments, in our account of the contractarian argument, the Pareto improvement condition is just a necessary but insufficient condition to characterize alone the bargaining solution.

To keep things simple, notice that, if the constitutional contract is seen as the solution of a Nash bargaining game with a symmetrical payoff space, this solution would coincide with an equal splitting of the surplus. But, even if we introduce asymmetries in the payoff space, the solution would always fall on the Pareto frontier point where the product of utilities is maximized so that the utilities' marginal rate of substitution reflects the condition that the utility of one player cannot marginally decrease more than the marginal increase of the other player's utility. This means that, given the convex shape of the bargaining space, it is not possible to largely reduce the utility of a party only in order to induce a small increase in the other's utility, as would necessarily happen with a strongly unilateral bargaining solution. For these reasons, the article cannot provide any convincing normative argument for explaining why the most unbalanced possible concretization of the hypothetical agreement (like that emerging in an ultimatum game) could be *ex ante* preferred over the remaining points on the Pareto frontier of the bargaining space and be understood as a normative model corresponding to the idea of a constitutional contract.

On the contrary, given the possibility of selecting amongst many equally efficient points on the frontier, but entailing very different payoff distributions, a social contract seen as the rational solution of a bargaining game would rule out the option that a party is forced to accept just an infinitesimal part of the surplus. This is not only due to the normative constraints of impersonality and impartiality that are natural elements of the social contract way of reasoning but also follows from the typical condition implicit in any bargaining game—that is, that the result must be invariant with respect to the exchange of the players' positions. However, that is actually a widespread experience for many low-skilled precarious gig workers who, being extremely dependent on their work and lacking any other alternative in the conventional labor market, often end up accepting whatever conditions platforms set (Schor, Attwood-Charles, Cansoy, Ladegaard, & Wengronowitz, 2020).<sup>3</sup> At the

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<sup>3</sup>That has to do more with the problem of adaptive preferences, which cannot be, obviously, a normative basis for a legitimate social contract. Namely, it has been extensively demonstrated how inferring autonomous preferences from actual choices is not always possible and how this equation cannot act alone as a proxy

same time, more subtle extractive practices and negative externalities are unilaterally imposed even on consumers and third parties in society due to the same platforms' monetization on the accumulation of big data and monopolization of sharing markets by acting as gatekeepers and exploiting network effects.

In this sense, some scholars speak of “platform capitalism” (Srniczek, 2017) or “neoliberalism on steroids” (Murillo, Buckland, & Val, 2017). For example, consider Uber's so-called “deactivation policy.” The article, recalling the same arguments made by the platform, presents it as a way to prevent and sanction uncooperative drivers' strategies in order to protect users (see Hielscher et al., 2022: 419). However, deactivations may also be interpreted as traditional dismissals that the platform can implement without having to pay the costs of firing its employees. By accepting the unilateral role of rule-setters of sharing platforms, the article risks justifying, beyond the proposed reconstruction of the sharing economy, exactly these outcomes that are obviously unacceptable from a social contract perspective.

Apparently, this is a weakness that can be traced back to Buchanan's theory. Indeed, because of the mutually destructive equilibrium of its state of nature, Buchanan (1975) claimed there is a mutual advantage in building a private property rights regime. Nevertheless, i) he did not prescribe a univocal theory of distribution since he lacked a proper bargaining theory, leaving many possible alternatives open. Furthermore, ii) he also suggested “salience” (Schelling, 1960) as a reasonable criterion to conjecture what agreement would be achieved by the constitutional contract, in particular by taking as a focal point the pre-social allocation of possession existing before the mutually destructive anarchical interaction started. Namely, the latter being a suboptimal equilibrium because of the reciprocal costs of investments in aggression and defense that the players must face in the state of nature, avoiding such costs and securing each player the initial possession would open the room for mutual advantage and guide to the identification of an agreement.<sup>4</sup> Therefore, even though there is no basis for inferring equality in Buchanan's theory, there are also no reasons for deducing a seriously unbalanced social contract.

Accordingly, the aforementioned developments of contractarian theory in the following decades recognized how its completion would have required such a bargaining theory.<sup>5</sup> From this theory, it can be inferred, first, the (macro)

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for normative legitimacy when it comes to the task of institutional design. Indeed, according to Nussbaum, “habit, fear, low expectations, and unjust background conditions deform people's choices and even their wishes for their own lives” (2000: 114).

<sup>4</sup>Quoting Buchanan (1975: 79) on the pre-social allocation versus the state of nature: “If the direct-production position is Pareto-superior to E, by which we mean only that both parties secure higher utility levels in the former position than in the latter, there may well be a strong attraction toward settling the negotiations at this point.”

<sup>5</sup>The Nash bargaining theory identifies a unique solution where the product of the players' utility net of the *status quo* is maximized. This is one of the many possible Pareto allocations, but one not extremely biased in favor of any player—otherwise could not maximize the product—and that satisfies an egalitarian property under a symmetric payoff space (Nash, 1950). Brock (1979) modeled Buchanan's constitutional and post-constitutional contracts in terms of two subsequent bargaining and coalitional game solutions. More relevantly, Gauthier (1986), reformulating the Hobbesian tradition of the social contract (the same as Buchanan), modeled the *ex ante* agreement as a bargaining game. Thus, in the basic symmetric game, the solution would

constitutional agreement amongst all concerned individuals about the governance principles of economic transactions in general. Second, the following (micro) post-constitutional agreement about what ownership/organizational structure should be given to any economic institution (in this specific case a platform) to translate the agreed rights into practice (see Donaldson & Dunfee, 1994, 1995; Fia & Sacconi, 2019; Sacconi, 2006).

Moreover, to account for the self-sustainability that any social contract should satisfy for working as an effective normative foundation for a theory of economic institutions, the more sophisticated developments show that the constitutional contract should be modeled as an equilibrium selection device operating under a “veil of ignorance” (Binmore, 1997, 2005). In this way, the agreement boils down to a bargaining game over a symmetrical payoff space resulting from the intersection of the equilibrium space of the game played in the state of nature and its symmetrical translation operated by exchanging the players’ positions. That would identify the subset of equilibrium outcomes that satisfies the requisites of impersonality and impartiality. Then, by applying bargaining theory within this subset, it would be possible for the parties to select a unique and mutually acceptable agreement on the Pareto frontier. But notably, within such a subset—which is also symmetrical—the equilibrium solution needs to be the egalitarian Nash bargaining one (see Binmore, 2005: 175; see also Sacconi, 2011). Hence, as an implication, we may confirm that the parties in the contract would not be satisfied with whatever unilaterally selected Pareto improvement. They would instead require the respect of their equal rights obtained at the constitutional contract level to enter the post-constitutional agreement on the governance rules for sharing platforms.

#### THE COMPLIANCE PROBLEM: HOW NOT TO MAKE A NORMATIVE THEORY OF ECONOMIC INSTITUTIONS UTOPIAN

In this section, we focus on the problem of *ex post* compliance with regulations based on the social contract. Namely, the necessity of proving that the contract is self-sustainable not only against the test of *ex ante* acceptance based on impartial and impersonal reasons (justification) but also the *ex post* persistence test when stakeholders’ behavior reflects the complexity of their motivations (including self-interest

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be identical to the Nash bargaining one but, even accepting some degree of asymmetry in the payoff space, the result would be the point where the surplus is distributed according to the rule of giving each player the maximal equal gain relative to the same player maximum possible claim (see 1986: 143). Finally, no one more than Binmore (1997, 2005) was successful in reformulating the social contract in game-theoretical terms. More specifically, he made clear that, under the veil of ignorance, the problem of equilibrium selection (i.e., the selection of one of the possible equilibria in the “game of life”) reduces to a matter of agreement within a symmetric payoff space (the so-called “game of morals”) wherein any *ex-ante* agreement could only coincide with the egalitarian Nash bargaining solution (see 2005: 170–75). Summing up, all the authors resort to a bargaining theory able to single out a unique solution candidate for the social contract and characterized by a certain degree of symmetry of the payoff space. It is noticeable that, in the more sophisticated game-theoretical account of the social contract (i.e., Binmore, 1997, 2005), the Pareto efficiency criterion can be set aside, given the main role played by fairness in the equilibrium selection process.



and personal/collective attitudes). In this sense, we understand a normative theory as “non-utopian” or “realistically utopian” (Nagel, 1986; Rawls, 1999; see also the distinction between “internal” and “external” rationality in Gauthier, 1986).

Accordingly, we will show that Hielscher et al. (2022) also fails to secure the stability of the recommended private regulation of the sharing economy because it underestimates the compliance problem and ignores its possible solutions. Namely, due to the underlying *prisoner’s dilemma* structure of the state of nature, the absence of any true external sanctioning authority and the contemporaneous lack of any stakeholders’ joint commitment resulting from a proper deliberative process, the contractors would have an individual incentive to defect ex post from the article’s proposed sharing constitution. Hence, missing the equilibrium property of the constitutional agreement (a property that we have introduced at the end of the previous section), the entire construction of the article would turn out to be unstable. This weakness is again a legacy deriving from Buchanan’s theory, and the same authors partially recognize it in the text (see 2022: 429–30). Indeed, if the state of nature is a mutually destructive prisoner’s dilemma, as it is assumed, and even the compliance problem is a prisoner’s dilemma, the contractors’ psychology would be inherently self-interested and the only equilibrium solution (in dominant strategies) would be defection. This point was clearly seen by those who worked within the social contract tradition through the lens of game theory (Binmore, 1997, 2005; Gauthier, 1986; Hampton, 1986; Skyrms, 2003).

Therefore, lacking the equilibrium property, the platform constitution that Hielscher et al. (2022) propose would not have the strength required for becoming an equilibrium institution in Masahiko Aoki’s sense of the term—that is, “a self-sustaining system of shared beliefs about a salient way in which the game is repeatedly played” (Aoki, 2001:10)—and be capable of bridging the governance gap of sharing markets. Note that Aoki’s definition of institution is per se just a descriptive concept stressing that the stability of an institution requires a regularity of behavior in which the players’ actions are reciprocally optimal strategies and are sustained by a summary and shared mental representation of the equilibrium itself. However, such an equilibrium institution can only be achieved dynamically through an equilibrium selection process and normative mental models play an essential role in identifying the initial conditions of this process. In particular, the social contract reasoning can trigger the process by putting the players’ attempts of outguessing the reciprocal strategies on the path along which mutual predictions will converge on a mental representation of the game solution having the distributive property of a fair bargaining solution (see, on this point, Binmore, 2005; Sacconi, 2013). In this way, the social contract legitimizes the system of shared beliefs and supports the achievement of an equilibrium institution.

As we further argue in the next section, that is the reason why the instability of Hielscher et al.’s (2022) proposed sharing constitution is empirically proved by recent court decisions and growing supranational, national, and local rules enacted in many countries for regulating and constraining the activities of private platforms (from antitrust to privacy, tort, and labor law). Namely, these legal facts are exemplifications of normative mental models shared in society that affect the equilibrium

selection process by reminding the players of the terms of a fair social contract that do not confirm the unilateral outcome based on private rule-setting (see Basu, 2018 on the role of the law as the focal point of institutional equilibrium selection processes).

From what we know, within the theory of the social contract based on some version of economic modeling (so following the line started by Buchanan), the compliance problem could have been faced instead by Hielscher et al. (2022) in two different (but not incompatible) ways. The first one is the solution of Binmore presented at the end of the previous section, that is, formalizing the issue of self-sustainability of the social contract as an ex ante equilibrium selection problem with a multiplicity of possible equilibria played behind the veil (see 2005: 4). But in this case, as we have seen, admitting that the social contract can be an equilibrium, it can only be egalitarian. This result clashes with the institutional arrangement defended by the article once we realize that it includes a sector like the gig economy and justifies sharing platforms' algorithmic surveillance and monopolistic tendencies. In fact, these equilibria would never be included in the symmetrical subset of the ex ante acceptable solutions and selected as a fair social contract.<sup>6</sup>

The second way out of the compliance trap is to hypothesize that the fair agreement on an ethical norm of behavior may activate endogenously a variation in beliefs and preferences, so that, under the condition of reciprocal expectations of conformity, the participants in the ex ante agreement also prefer to comply ex post with the principles of the agreement itself, that is, develop conformity preferences. These preferences would make the social contract stable even if compliance would not have been the participants' preferred behavior without the agreement. The topic of social preferences based on mutual expectations is not new in behavioral game theory (Rabin, 1993), the theory of social norms (Bicchieri, 2005), public choice, and business ethics. Among the possible options, the one we consider here is based on the link between pro-social individual preferences and the impartial agreement on the constitution of economic organizations (Grimalda & Sacconi, 2005; Sacconi 2007; Sacconi & Grimalda, 2007), a connection that has already been tested even through laboratory experiments

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<sup>6</sup> An anonymous reviewer pointed out that identifying the constitutional contract with a more extended set of socio-economic rights beyond the simple requisite of Pareto optimality could be criticized as overly rigid and paternalistic and betray Mill's "harm principle." However, this criticism does not hold for our constitutional contractarian theory because, in this case, constitutional constraints not be derived from an external idea of justice or exogenously imposed but would endogenously result from an impartial and mutually advantageous agreement which also owns the equilibrium property. Moreover, Mill himself does not even recognize trade as a field of application of his harm principle since trade is an inherently social activity where externalities are always produced, out of the myth of perfect competition, at least because in deciding to exchange something with someone we implicitly refuse to exchange the same thing with someone else (see *On Liberty*, chap. 5, 1859/2014). Thus, the system of economic liberties cannot be based on the absence of externalities but on its functionality to the perfectionist view of utilitarianism, based on Mill's reading of von Humbolt's view of human flourishing (Grillo, 2023). Accordingly, Mill can be interpreted as a proponent of a partially positive conception of liberty (surely not libertarian) founded on the establishment of an institutional setting tailored to guarantee individual opportunities for free and autonomous realization.

(Degli Antoni, Faillo, Francés-Gómez, & Sacconi, 2022; Faillo, Ottone, & Sacconi, 2015; Sacconi & Faillo, 2010).<sup>7</sup>

Actually, “conformity preferences” is just another term (with the addition of a game theoretical model) for what Rawls calls the “sense of justice” (Rawls, 1971, 2001; Sacconi & Faillo, 2010). Indeed, for Rawls, the “sense of justice” is exactly an attitude of compliance with impartially agreed-upon principles based on the reciprocal expectation of conformity—these principles not being *prima facie* equilibria. Game theoretically, it corresponds to the activation of preferences that *ex post* modify the payoff structure of the compliance game so that the resulting “psychological game” (a game in which players are characterized not just by material payoffs but also by “psychological payoffs” depending on their mutual beliefs about conformity) offers equilibrium points to the players’ interaction that could not exist in the original game only based on material payoffs.<sup>8</sup> Therefore, activation of conformity preferences (or the sense of justice) would incentivize the parties endogenously to conform *ex post* with what they have jointly accepted *ex ante*, even if this, individually, would not be convenient.

Finally, note that this model, like most social preference theories, also attaches additional motivational weight to strategic choices that not only respect the *ex ante* agreement but deny other parties the possibility of deviating from it by intrinsically remunerating sanctioning. In our case, this would induce psychological payoffs for rejecting cooperation with a company that only minimally offers its stakeholders the benefits of their cooperation while appropriating much of the surplus. The recent forms of collective action that have characterized the sharing economy in the last few years, such as gig workers’ strikes and consumers’

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<sup>7</sup> The general idea behind all these experiments is quite similar. Namely, the participants are first asked to choose a rule of distribution of a common endowment without knowing their *ex post* positions in the experimental setting (some of them will be lucky active players, some others just unlucky passive recipients), mimicking in the lab the veil of ignorance. What can be observed here is that most participants reach an agreement on an egalitarian rule. Then, the veil is lifted, and the participants learn about their roles in the game so that they have the concrete opportunity to make *ex post* individual choices to implement the distributive rule or defect from it. Even if there is no monetary incentive in this *ex post* game to comply with the agreement, quite a large majority of them decide to comply. Moreover, a no-veil treatment, where the participants do not participate in a pre-play communication stage and hence directly select a division, is compared with the treatment in which they play, first, the pre-play communication game with agreement and, second, the *ex post* division game beyond the veil. Consistently with the theory of conformity preferences, the comparison of the two treatments shows that participants in the first group are moved only by egoistic rational preferences and take all the surplus for themselves. On the contrary, in the second group, participants tend to respect the previously agreed-upon rules and share the surplus even if they are not forced to do so. Furthermore, those who show this behavior—before apprehending their final payoffs—also report beliefs of mutual compliance. Given that this happens in a controlled experimental setting, the experimenters concluded that these results can only be explained by an endogenous activation of a disposition to conform with fair agreements conditional on the similar endogenous formation of conformity expectations.

<sup>8</sup> Quoting directly from Rawls (1999: 44), when an agreement reached through an *overlapping consensus* “is honored by peoples over a certain period of time, with the evident intention to comply, and these intentions are mutually recognized, these peoples tend to develop mutual trust and confidence in one another. Moreover, peoples see those norms as advantageous for themselves and for those they care for, and therefore as time goes on they tend to accept that law as an ideal of conduct. Without such a psychological process ... the idea of realistic Utopia ... lacks an essential element.”

boycotts, point exactly in this direction (Bunders, 2021; Lehdonvirta, 2022; Woodcock & Graham, 2020).

#### THE INSTITUTIONAL PROBLEM: THE INTERNET OF THE BEGINNINGS WAS NOT A *RES NULLIUS* BUT A SHARED INFRASTRUCTURE

Since Hielscher et al.'s (2022) version of the social contract is founded on a Hobbesian “state of nature” view of the Internet’s *status quo ante*, the article can argue that the unilateral rule-setting function of private platforms solved this inefficiency for the first time (see 2022: 412). Hence, admitting that the previous critical points were not stringent enough, this interpretation would still justify the emergence of corporate governance institutions as the outcome of an implicit social contract putting an end to that mutually destructive state of nature. Nevertheless, we also suggest that the proper framing of the status quo is different. Namely, the Internet of the beginnings has been more appropriately framed as a shared infrastructure characterized by nonexcludability and only partial rivalry (Benkler, 2006; Frischmann, 2005, 2012; Fuster Morell, 2014; Hess, 2008; Kostakis & Bauwens, 2014; Schultze & Whitt, 2016).

In particular, Frischmann (2012: 3) describes shared infrastructures as a set of resources “made by humans for public consumption” and defined in terms of how they create value for their users, that is, through free downstream productive activities that generate positive spillovers. Therefore, in accordance with these features and because of its nonexcludable and (partially) rival character—two points that rule out both the possibility of centrally controlling and partitioning it without a significant loss of value—the shared infrastructure of the Internet boils down to a subspecies of Ostrom’s (1990) common-pool resources that can be governed, at least to some extent, by an evolving apparatus of collectively decided and self-sustaining rules. More specifically, Frischmann (2012: 320) qualifies the Internet as a complex and multilayered conglomeration of different infrastructure resources intertwined with each other. Accordingly, at the macro level, there is a congestible physical infrastructure—characterized by an interconnection of telecommunication, cable, server, and satellite networks—and a nonexcludable logical infrastructure, that is, the standards and protocols that facilitate the transmission of data across networks. Then, there are different applications running on this layer, such as social media platforms, online marketplaces, sharing platforms, and so on. Finally, there are the information, communication, content, and services that the users exchange through platforms and the social relations they create in doing that.

Coherently with this way of framing the Internet, a self-sustaining and collaborative alternative system of social norms and property rights, represented by still-existing and successful experiences such as the FLOSS (Free/Libre/Open Source Software) and the Wikipedia encyclopedia, was effectively developing at the outset for governing this common pool resource as a *commons*. According to the first enthusiastic reactions that it produced related to the promise of disintermediating and democratizing economic exchanges of goods and services among peers—ideally in the form of idle assets, time, or skills (see Botsman & Rogers, 2010)—we can

think of the early sharing economy as part of this narration. However, at least for the sharing economy's sector, these emerging norms were not yet in a state of stable equilibrium reinforced by mutual expectations and shared mental models supporting them (Denzau & North, 1994) and were not concretized in any juridically recognized institution. On the contrary, they were just one of the different possible frames that were competing for saliency, among the traditional ones of private ownership—sometimes specified as club ownership—and state control. Thus, the early experiments of sharing platforms were still replaceable through an exogenous change of the initial conditions, determining a shift in the focal point of the equilibrium selection dynamic (recall Aoki's definition of institutions).

In our interpretation, such a shift was provided by the venture-capital-backed big techs such as Uber and Lyft that, profiting from the existing legal vacuum, “enclosed” the Internet (or a portion of it) through the creation of capitalistic and legalistic private monopolies over a previously shared and open-source asset (Lehdonvirta, 2022; Muldoon, 2022). Namely, the entry of several venture capitalists on the board of directors of the leading sharing start-ups determined the triumph of the for-profit mentality and shifted the equilibrium selection path towards the de facto reaffirmation of the hierarchical integration and economies of scale models typical of traditional capitalist companies (Frenken & Fuenfschilling, 2021; Srnicek, 2017). This is also the thesis developed by Pistor (2019) about the capacity of private lawyers—informed by neoliberal culture—in designing new contracts and new property rights regimes over resources still not completely regulated and formerly accessible as shared resources and then mobilizing strategic and cognitive assets to impose and defend their private/exclusive appropriation.

Accordingly, someone has sustained that, behind the whole rhetoric of the sharing economy, “business as usual” soon reemerged and the same term “sharing economy” is now used only as a marketing expedient to cover outcomes that have nothing to do with the concept of sharing (Ravenelle, 2017). The story, however, did not end there, and many legal facts show that not even the institutionalization process of the self-regulated capitalist governance of the sharing economy has reached a stable state of equilibrium. On the contrary, new regulations and court decisions seeking to constrain the activities of sharing platforms, such as the 2017 sentence of the European Court of Justice which first framed Uber as a transport company instead of a technological market-matching system (European Court of Justice, 2017), are the proof that their unilateral authority is not accepted by all the affected stakeholders (who, from a social contracts viewpoint, would prefer a more equitable point on the Pareto frontier). Ironically, the article considers these legal facts as dysfunctional regulatory acts that only reduce stakeholders' opportunities for mutual betterment (see Hielscher et al., 2022: 424) rather than evidence that the regulatory system that emerged through private appropriation is unstable because of its inherent unfairness and the availability of fairer institutional arrangements along the frontier.

Consequently, from the lens of a different framing of the status quo, the juridical structure characterizing the governance as a *commons* (Ostrom, 1990) could not be

the problem but rather the solution to an only apparent institutional void and capable of avoiding the current concentrations of power with dubious legitimacy that characterize sharing markets. Indeed, instead of creating an unbalanced and radically unstable outcome, governing platforms as commons (and not as a state, club, or private good) could effectively produce a self-sustainable and equitable Pareto improvement, determining positive spillovers for all the sharing stakeholders coherently with the idea of the “comedy of the commons” (Frischmann, 2005, 2012).<sup>9</sup>

Now, a peculiarity of sharing platforms is that they are organizations where the transaction of goods and services, even if enabled online by large tech companies, often takes place offline between people who can physically meet (think, for instance, to the ride-hailing sector) and who are in principle oriented by some kinds of pro-social motivations (Schor, 2014). For this reason, the most consistent experience with the proposed alternative way of looking at the Internet is arguably the organizational model known as “platform cooperativism” (Nicoli & Paltrinieri, 2019; Scholz & Schneider, 2017). In fact, the idea of platform cooperatives consists of an attempt of “cloning or creatively altering the technological heart of the sharing economy” (Scholz, 2017: 174) and implementing the traditional cooperative principles of democratic governance and shared ownership by involving the relevant stakeholders in the property and control structures of digital platforms (see also Foramitti, Varvarousis, & Kallis, 2020; Schneider, 2018).

Hence, on the one hand, platform cooperatives would respect the definition of infrastructure given above and avoid the private appropriation of the positive spillovers produced by their users, while the possibility of sharing the technology within a network of federated local cooperatives offers an alternative growth strategy to the building of big monopolistic giants (see Kostakis & Bauwens, 2014 on the “global commons” scenario; Mannan & Schneider, 2021; Scholz, 2023: 59). On the other hand, the potential criticism regarding their feasibility related to the difficulty of making possible continuous interaction between dispersed individuals (Bunders, Arets, Frenken, & De Moor, 2022) could be solved thanks to the peculiar features of sharing markets themselves—that is, usually, local scale of service provision and fairly homogenous stakeholders (at least locally). Indeed, following the governance theory, these features could guarantee the viability of the platform cooperative solution by fostering mutual trust (Spear, 2000), engendering motivations based on ideological commitments (Rose-Ackerman, 1996), and reducing transaction costs involved with bargaining (Hansmann, 1996). At the same time, the intermediation of digital technology potentially makes even easier their success as compared to traditional cooperatives by facilitating organizational efforts and the detection of free riders (Belloc, 2019).

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<sup>9</sup>The concept of the “comedy of the commons” was coined for the first time by Rose (1986) as a response to Hardin’s (1968) famous “tragedy of the commons.” What the former argues is that, in some cases, leaving resources open to public access, instead of generating waste and inefficient underutilization, may determine positive externalities for the affected communities and the emergence of spontaneous self-regulation.

## DISCUSSION: HOW PLATFORM COOPERATIVES CAN SOLVE THE IDENTIFIED WEAKNESSES AND ADDRESS CRITICISMS

Drawing the appropriate conclusion from the more nuanced constitutional contractarian theory presented in this commentary, the purpose of this section is to discuss how the institutional alternative of platform cooperatives can address all the problems of Hielscher et al. (2022). In short, platform cooperatives can be seen as i) the most legitimate organizational structure for substantiating the regulation of sharing markets hypothetically bargained at the constitutional level in line with the effective reality of the sharing economy, ii) providing incentives and motivations consistent with its endogenous self-sustainability, and iii) proving to be more coherent with the idea of a Pareto improvement from an *ex ante* status quo representing the nature of the Internet as shared infrastructure.

Let's start by hypothetically involving all the relevant stakeholders (see Freeman, Harrison, Wicks, Parmar, & De Colle, 2010) in the impersonal and impartial collective *ex ante* bargaining of the platform constitution and let's assume that their agreement concludes that platforms have to be treated as commons. Their constitutive social contract would require recognizing to all the ideally contracting stakeholders' freedom of access and participatory rights, the limited list of property rights compatible with the notion of collective ownership of a common pool resource (see Schlager & Ostrom, 1992), and would give them the entitlements enabling the establishment of the most effective governance structure to realize these rights.

Coherently with the idea of an emerging social norm legally actualizable in different possible ways by a local social contract, many options are open for detailing this governance structure. Among these options, multi-stakeholder platform cooperatives would be the most natural candidate.<sup>10</sup> Indeed, multi-stakeholder cooperative arrangements would symmetrically satisfy the quest for fairness created by the social contract procedure and hence generate mutual expectations for conformity with their democratic rules. Conformity preferences (or the sense of justice) would be thus elicited and stabilize these arrangements *ex post*. And finally, from an institutionalist point of view, they would also be coherent with the original representation of the Internet as a multilayered common pool resource, thanks to their inherent feature of giving a say in the governance at different levels to all their stakeholders (see again Mannan & Schneider, 2021).<sup>11</sup>

However, assuming Hielscher et al.'s (2022) perspective, companies such as The Drivers Cooperative,<sup>12</sup> a New York City-based ride-hailing platform cooperative with a multi-stakeholder inspiration, could be still criticized for their apparent incapacity to guarantee the same win-win-win(-win) opportunities to platform

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<sup>10</sup>To delve into the main differences between multi-stakeholder cooperatives and traditional single-stakeholder ones and look at examples of multi-stakeholder models in practice, we suggest looking at Birchall and Sacchetti (2017).

<sup>11</sup>Interestingly, some steps towards the juridical recognition of platform and data cooperatives have been recently made by the OECD (2023), the European Economic and Social Committee (2021), and the European Parliament together with the Council (2022).

<sup>12</sup><https://drivers.coop/>.

owners, directly involved stakeholders (both consumers and service providers), and indirectly involved third parties as compared to their commercial competitors. Indeed, after having stated the equal legitimacy of commercial platforms and platform cooperatives from a social contract perspective, Hielscher et al. (2022) claim that commercial platforms are in the end preferable. Namely, according to the article, commercial platforms offer stronger exit options to sharing partners and thus a superior possibility of mutual betterment because they are more ready to face market competition and capable of continuously innovating themselves to match the evolution of their users' expectations (see 2022: 428–29).

We believe that even this point is misleading because, in the long run, it is difficult to sustain that the current business model of the sharing economy is going to produce the promised win-win-win(-win) outcomes and consequently offer a true competitive advantage to its different stakeholders (see 2022: 416). First, commercial platforms are not currently creating any real profit for their investors and owners. On the contrary, their business model—that is, “growth before profits”—seems to consist only of reinvesting all their earnings in disrupting competitors with the aim of a future dividend distribution that has yet to be achieved. Uber is again an emblematic example. In the meantime, venture capitalists are instead losing and not gaining money (Isaac, 2019). Secondly, if we intend the directly involved stakeholders as consumers, it is logical to imagine that, if sharing platforms finally do achieve their aspired monopolistic position, this will also lead to a rise in prices and a reduction of benefits for consumers themselves (Khan, 2017). Moreover, some scholars have even stressed how twenty-first-century consumers are becoming “prosumers” (Ritzer, 2010), invisible workers who, while consuming, produce information and data that will be used by unaccountable platforms to influence their choices and create lock-in effects without paying them for those data (Marciano et al., 2020; Martin, 2015; Zuboff, 2015). If, instead, we intend the directly involved stakeholders as service providers, that is, gig workers, we have already assessed how commercial platforms are reintroducing hierarchical organizational forms typical of traditional capitalist enterprises that often deprive their working conditions (Frenken & Fuenfschilling, 2021; Srnicek, 2017). Finally, they also seem to produce negative externalities for third parties in society by accelerating the transition to a labor market characterized by precarious jobs and making the whole economy less sustainable, innovative, and inclusive in the long run while disenfranchising people from the control of essential infrastructures of their daily lives (Crouch, 2019; Davis, 2022; Johnson & Acemoglu, 2023; Khan, 2017; Lindman et al., 2023; West, 2019; Zuboff, 2022).<sup>13</sup>

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<sup>13</sup> To continue with the example of the ride-hailing sector, the municipality of NYC is at the forefront when it comes to its regulation and aims to put a stop to all these problems (New York City Taxi and Limousine Commission, 2019). We thank Mr. David Do, Commissioner Chair of the NYC TLC, for discussing with us the regulatory approach of the current commission. In particular, the main pillars of its action consist of subjecting all drivers to the ownership of a license, fixing a drivers' pay wall, customers' protection rules, special measures for guaranteeing the presence of wheelchair-accessible vehicles, and anti-congestion regulations, and asking all platforms operating in the city for disclosure of the data regarding the management of the service because of its inherently public interest.



Oppositely, a cooperative platform such as The Drivers Cooperative takes a smaller commission than Lyft or Uber, pays its workers a guaranteed hourly wage of \$30/hr (almost twice NYC's minimum wage), aims to redistribute profits among members in the form of dividends, lets them participate in the governance of the company (even for what regards data and algorithmic management), shares relevant information with all the stakeholders, addresses traditional concerns such as predatory loan rates and surprise deactivations, and fights precariousness. Moreover, it also charges clients a lower fare, wants to have a positive social impact by enhancing service quality for people with disabilities (being a leading provider in New York City in the niche of accessible social mobility thanks to specific subcontractor agreements with paratransit brokers operating for the Metropolitan Transportation Authority), and is finally planning to share its driver-owned platform, created from scratch thanks to a partnership with Google, with federated platform co-ops from all over the world in order to scale as its corporate competitors—starting from another ride-hailing platform that will be launched in Denver in 2024 (Conger, 2021; The Drivers Cooperative, 2023).<sup>14</sup>

## CONCLUSION

This commentary was born out of recognition of the significant contribution that Hielscher et al. (2022) brought to the debate about what the most appropriate regulation for sharing markets should be. We began by agreeing on the idea of considering digital platforms as institutions that may result from a social contract and assessing their legitimacy according to the benefits that they produce for the sharing stakeholders. Nevertheless, in the article, we found some weaknesses that risk contradicting the promise of developing a constitutional and post-constitutional approach to the regulation and governance of the sharing economy within the domain of business ethics. These weaknesses seem to depend on a misunderstanding of the constitutional contractarian theory and the institutional phenomenon of the sharing economy itself. Therefore, intending to revitalize its original spirit, we suggested an alternative version of the social contract and claimed that the most appropriate organizational form for substantiating this proposal would be that of platform cooperatives instead of extractive commercial platforms.

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<sup>14</sup>We thank Mr. Ken Lewis, one of the founders of The Drivers Cooperative, for discussing with us this innovative experience.

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